

ENVIRONMENT AGENCY



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EA/A51(a)

PROPOSED WYE NAVIGATION ORDER

PUBLIC INQUIRY HEREFORD RACECOURSE

(APRIL TO JULY 1997)

**FINAL SUBMISSIONS ON BEHALF OF THE ENVIRONMENT
AGENCY**

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INTRODUCTION

1. The Agency has produced as document EA/A43 a proposed structure for its closing submissions. This document substantially adheres to that structure. The submissions are accordingly analysed in five sections as follows:

A. Why bother?

A: Introduction

A1: Problems of conflict on the rivers Wye and Lugg

A2: A multiplicity of vested interests

A3: The activities of Mr Stockinger and his associates

A4: A positive vision for the rivers

A5: The adequacy of current management arrangements

B Why us?

C Why this?

D Vires

D1: The NRA's vires to apply for the Order

D2: Section 112 of the Transport Act 1968

D3 Vires and the Harbours Act 1964

E Statement of Matters

E1: Effectiveness of current arrangements for regulating the navigation and use of the rivers

E2: The case for a new regulatory regime

E3: Appropriateness of new powers for the licensing and control of vessels and the licensing of works

E4: Adequacy of Wye Navigation Advisory Committee for consulting relevant interests

E5: Environmental, ecological or economic effect of exercise of powers

E6: Vires

2. Comments on the evidence given at the inquiry (EA/A43 paragraph 6) are not given a separate section as such comments have been made throughout sections A to D. Your questions, Sir, have been answered at EA/Q6 and Q7 and are not further addressed in this submission save where it was indicated that they would be. Accordingly:

EA/Q7/27: what final view do the Agency take of the precise status of the navigation trustees of the Wye and Lugg Navigation?

A: Please see the Agency's answer on pp. 4 and 5 of EA/Q7 and see also this submission at page A26, paragraph 62 to page A33, paragraph 80.

EA/Q7/28: what is the relevance of all the litigation by the NRA, EA, V Stockinger et al, Hereford City Council to either the Order inquiry or the byelaws inquiry?

A: Please see the Agency's answer on p. 5 of EA/Q7 and see also this submission at page A33, paragraph 81 to page A43, paragraph 99.

EA/Q7/30: Why is *Bateman* relevant to the "vires" argument? This case appears to apply to a company who wish to extend their water resources in order to carry out their main function [i.e. water supply]

A: Please see this submission at D1 paragraph 3 and EA/E16 paragraphs 2.2 and 2.3.

EA/Q7/31: Is *Hazell v Hammersmith LBC* the most important case in the EA's argument that "duties" can properly be regarded as functions? If it is, why is it so important? Could a copy of this case be provided?

A: Please see EA/Q7 p.7 and this submission response section D1 paragraphs 10-16 and 17-20. The case is as important as it is because it is recent House of Lords authority showing that a bare power can properly be regarded as a function. What is true for a power is true for a duty. The objectors' case on this aspect of their *vires* argument collapses if the duty contained in section 2(2) of the Water Resources Act 1991 falls to be regarded as a function of the NRA. The reasons are developed at length in section D1 below.

3. It goes without saying that although this document is lengthy, it does not and cannot deal with all the points raised by objectors at the Inquiry. You should therefore also refer to the Agency's Evidence Management Table (EMT - EA/A44/(a)) and its Objection Management Table (OMT - EA/A45) for the Agency's response to objectors' points not dealt with in these submissions.

A. WHY BOTHER?

Introduction

1. This section identifies a number of reasons why, the Agency submits, the Order should be made. These are: the conflicts, the multiplicity of vested interests on the rivers, the activities of Mr. Stockinger and his associates, and the Agency's positive vision for the rivers, and the inadequacy of current management arrangements to deal with these problems. The activities of Mr Stockinger and his associates have taken up a great deal of inquiry time, and it might be tempting to see those activities as the main reason for the making of the Order. In the Agency's view, this would be a mistake. Each of the reasons identified above is a good reason for the making of the Order. The relative importance of those reasons depends very much on one's perspective; as is apparent from the varying answers of the Agency's witnesses to your question about what, in their view, was the need for the Order. For Mr Taylor, Mr Stockinger was a key factor. Mr Hilder stressed the various kinds of conflict on the rivers that needed to be managed so as to minimise their impact on other users and the environment. Mr McGarvey referred to the threat of impoundment, the need to manage increasing pressure on the resource, and the Agency's wish to improve user enjoyment. Mr Fowles' answer concentrated on the range of different interests in the rivers who would not be able to be managed by consensus if pressure on the rivers increased. Mr Walker saw the gap in the Agency's powers to manage the catchment in an integrated way as the key. The Agency sees no need to attempt to rank these competing justifications. All are relevant.

A1: PROBLEMS OF CONFLICT ON THE RIVERS WYE AND LUGG

Introduction

2. It is the Agency's submission that there are problems of conflict on both the principal rivers and the upper rivers and tributaries. This part of the Agency's Closing Submissions firstly sets out the different types of conflict on the rivers, and secondly presents an overview of the evidence of conflict which has been presented to the Inquiry by the Agency and by others.

Characterising Conflict

3. Conflicts on the rivers can be divided into two groups: first, conflicts between recreational users and the environment, and, second, conflicts between different kinds of recreational user ("inter-user conflict").
4. Inter-user conflict can be further sub-divided. At one extreme there is actual physical conflict which occurs when, for example, a canoeist becomes entangled in an angler's line, or when a boater strikes a croy constructed by a fisherman. Next, there is actual conflict which does not involve any physical contact, but which results in the recreational experience being less enjoyable for participants. Professor Edmund Penning-Rowsell gives the example of a flotilla of canoes passing a solitary game fisherman. He comments:

"The angler is prevented from fishing, and fish may be disturbed from where they lie. But this does not mean that the navigators come into contact with the angler's line or tackle, or that the angler physically interferes with the canoes or rafts. There is aggravation and conflict, but it is not well measured by physical contact." (EA/P3(a), page 11)

As Paul Hilder said under cross-examination by Charles Willis, conflict includes

diminution of the recreational experience.

5. Finally there is perceived conflict, a term which describes the feeling of recreational participants that their activity is less successful as a result of the presence of other river users. The prime example of this kind of conflict is the perception of some fishermen and fishery owners that the decline in fish stocks is linked to increased recreational use of the rivers.

6. The final distinction which characterises conflict on the rivers is between past, present and future conflict. This applies both to conflict between recreation and the environment and inter-user conflict. The reference to past conflicts is a reference to the occasional incidents in the past when the rivers have been used by craft which were potentially harmful to both the environment and other river users. This included use on the rivers by hovercraft, jetskis, and assault vessels. At present difficulties are caused by obstructions to navigation in the form of croys built by anglers to aid fishing and by canoeists to simulate white water conditions. There are in addition actual and perceived conflicts amongst navigators, rafters, rowers, canoeists and anglers, and between such users and the environment (of course many of these problems are long-standing - the description of them as present conflicts is merely intended to characterise them as on-going, in contrast with the "past conflicts"). Finally, the Agency submits that there is strong evidence that the recreational use of the rivers will increase in future, and that there is therefore a risk that such conflict as exists now will increase in the future if suitable management mechanisms are not put in place.

Evidence of Conflict: Conflicts between Recreational Use and the Environment

(a) **Present conflict**

(i) **Present conflict: Agency evidence**

7. The environmental importance of the rivers has been described to the inquiry by both

Agency witnesses and others. Paul Hilder explained the various designations which apply to the rivers in his proof (EA/P2(a)) at pages 5-7, drawing particular attention to the rivers' designations as Sites of Special Scientific Interest (see EA/B44, EA/B45, EA/B46), and their possible designation as an SAC under the Habitats Directive as implemented by the Conservation (Natural Habitats & c.) Regulations 1994 (EA/B11, and see Background Paper EA/E5). He also referred to the designation of the river Wye from Mordiford to Chepstow as an Area of Outstanding Natural Beauty (EA/B47). This evidence of the environmental importance of the rivers and their landscape value is supported by that given by English Nature (OS12), the Wildlife Trusts (OS11) and Dr Ruth Williams of the Wye AONB Joint Advisory Committee (OS13).

8. At the same time, both the rivers Wye and Lugg are used by a wide variety of recreational users. The diversity of recreational use was described by Paul Hilder in detail on pages 10-13 of his proof (EA/P2(a)). Numbers of participants have been provided by the Agency in its response to your Questions (EA/Q6), and in the evidence of Professor Edmund Penning-Rowell. Craig McGarvey on pages 4-5 of his proof (EA/P3(a)) emphasised the national significance of the rivers as a recreational resource, because of the unique combination of the public right of navigation on the principal rivers and the rivers' natural, unengineered state. The evidence of other witnesses supports this assessment. The Sports Council indicated in their evidence that the rivers are of national importance for canoeing, and of regional importance for rowing (OS2, page 3). The number of fishermen and fishery owners who have commented on the Order and given evidence to the inquiry attests to the importance of the rivers to angling. Finally, the inquiry has heard from a wide variety of other recreational users, including boatmen from Symonds Yat, canoeists, rowers and rafters.
9. This combination of environmental sensitivity and intensity of use has given rise to a number of problems. Paul Hilder explained that navigation and recreation can cause physical damage to the environment, and has the potential to disturb wildlife (EA/P2(a), pages 14-17). On the first point, he referred to the conclusions of the Wye

Project Report (EA/C13, page 47) which identified various examples of such damage, and in addition he provided some additional examples of adverse impacts on habitats, for example at Huntsham bridge, where canoe-launching has caused erosion to the river bank.

10. On the second point, Mr Hilder considered the studies into the alleged disturbance of wildfowl by the raft race (EA/C53 and 54) and the NRA report on the Impact of Recreation on Wildlife (which did not confine itself to the rivers Wye and Lugg) (EA/D32). He concluded that whilst it is probable that current levels of navigation and recreation do not significantly disturb wildlife, it is impossible to be sure that this is the case. (In other words, Mr Gardiner's summary in paragraph 9 of his closing submissions of Mr Hilder's views is inaccurate.) In evidence under cross-examination by Mr Willis, Mr Hilder said that there were indications of damage, supported by a body of information. The impact of recreation on wildlife had been documented, however it was unclear whether such impacts took place on the Wye. Assessing their significance and their significance on the Wye was difficult, and this was why management was needed.
 11. The above observations apply mainly to the principal rivers. On the upper rivers and tributaries, Mr Hilder concluded that some localised physical damage is caused by the launching of canoes and by the construction of croys, whilst disturbance to wildlife occurs when canoes pass close to spawning salmon or breeding birds (P2(a), page 23).
- (ii) **Present conflict: documentary evidence**
12. There is further documentary evidence of conflict between recreation and the environment both in the Wye AONB Joint Advisory Committee Wye Valley Management Plan (EA/D2), and in the same body's Symonds Yat Management Plan (EA/D48). This latter document refers to such problems as the construction of croys by fishermen and stone barriers by canoeists, erosion caused by the unofficial launching and landing of canoes and disturbance of wildlife by canoes (pages 21-22).

rivers there is no body which can prevent or manage the recurrence of such activities. Undertakings can of course be sought from user groups, but these will generally be unenforecable, and will not cover those users who are not members. For example, Captain Dereham pointed out in evidence that although the UK Jetski association had agreed that the river was unsuitable for jetskis, only 25% of jetski owners belong to that association. He concluded that jetskiing was the sort of activity that the Order could deal with.

(c) Future conflict

(i) Future conflict: Agency evidence

19. So far I have referred to existing conflicts on the rivers and to past conflicts which the Agency submits have the potential to recur. In addition, the Agency submits that there is strong and persuasive evidence that recreational use of the rivers is likely to increase in the future, and that this will intensify and diversify existing conflicts between navigation and recreation and the environment.
20. The thesis that recreational participation will increase in the future is alluded to by Craig McGarvey (see pages 6-7 of EA/P3(a)), but finds its fullest expression in Background paper EA/E11, Trends in Participation in Water Related Management, prepared by Professor Penning-Rowcell and his colleague Sylvia Tunstall. This Paper was summarised in Professor Penning-Rowcell's evidence (EA/P5(a), pages 24-26), where he clearly stated that "participation in outdoor recreation will continue to grow in the future." Canoeing may be twice as popular in 2010, and there is a distinct possibility that participants in power-based water sports will come in increasing numbers to the river Wye.
21. Some of these results were criticised by Mr Willis in cross-examination, but they were defended by Professor Penning-Rowcell. Mr Willis suggested that it was possible that there had been a decline in the number of canoe launches since 1991. Professor Penning-Rowcell said that he thought it was possible but unlikely. In fact, canoe

launches in 1991 were probably in excess of that figure, as the survey did not cover key sites. He confirmed that he saw the figure of 33,000 increasing over time. In response to a question from you, Sir, he said that whilst it was difficult to get precise figures in relation to angling, anecdotal evidence suggested that participation in that sport was also increasing.

22. Professor Penning-Rowse went on to predict that increased recreational pressure on the resource will bring with it additional environmental damage (EA/P5(a)), pages 26-27). This could take the form of erosion caused by navigation and by launching and landing of vessels, as well as the disturbance of wildlife. There is an additional risk that increased use will lead to demand for forms of development which harm the environment and degrade the landscape quality of the area. In evidence to the Inquiry when he was cross-examined by Mr Jones, Professor Penning-Rowse said that the risk of increased pressure on the resource was the reason why the Order was essential - without it no one would be able to control that pressure.

(ii) **Future conflict: other evidence**

23. Professor Penning Rowse's fears were echoed by English Nature and CCW, who argued:

"Intensification of the existing uses, without adequate recognition of sustainable development principles, would increase the frequency, severity and extent of existing problems. Without recognition of such principles, future diversification in navigation would result in significant alterations to the rivers' ecological diversity and nature conservation interest." (OS12, pages 9-10)

Possible future impacts of navigation were set out in Appendix 3 of the English Nature and CCW Proof. Their evidence was supported by the evidence of the Wildlife Trusts to the inquiry, who referred to the possible adverse effects of an uncontrolled increase in navigation and recreation.

Evidence of Conflict: Inter User Conflict

24. As with conflicts between navigation and recreation, the Agency submits that inter-user conflicts on the rivers are a problem now on the rivers, that there have been serious incidents in the past which could recur, and that the intensification and diversification of navigation and recreation in the future are likely to give rise to new difficulties.

(a) Present conflict

(i) Present conflict: Agency evidence

25. The evidence of Paul Hilder dealt with conflicts which are now occurring on the rivers. He gave a number of examples of the problems which can occur, including navigation by canoeists preventing fishing from taking place; and the presence of fishing croys and stone groynes built by canoeists which interfere with navigation. He described a particular problem with congestion at Symonds Yat where many users may be present on the river at any one time. Finally Mr Hilder referred to the problem of canoeists launching and landing boats without permission from landowners (EA/P2(a), pages 19-20).

26. The evidence of Professor Edmund Penning-Rowsell contains a detailed survey of the available statistical evidence of conflict between anglers and canoeists on the rivers in recent times (P5(a), pages 7-22). Of particular significance are the findings set out at page 21, the numbers of rivers users who reported problems or conflicts in 1985 during the Middlesex Polytechnic Survey (see EA/C10) and in 1991 during the Wye Project. Professor Penning-Rowsell commented "...the results from the 1985 and 1991 surveys are remarkably consistent and together give a very clear picture of the state of conflict on the river." He concluded:

"...there is a significant degree of conflict between anglers and canoeists and this goes back to at least 1976...The root of the problem appears to be both inter-user

aggravation on the river, which at times is quite serious, and the feeling of some desperation by those involved in the matter (particularly the anglers and fishery owners) that nothing can be done..." (page 22).

27. Both the research undertaken in 1984/5 and that carried out in 1990-1991 dealt with actual conflict and with perceived conflict, since the surveys asked users about their impressions of problems. In addition, Professor Penning-RowSELL describes the surveys which he undertook in 1984/5 with the "key actors" in a wide range of organisations. He explains that the ghillies and fishery owners blamed the decline in their catches on increased participation by navigational users. Professor Penning-RowSELL surmised that this was because they had experienced incidents when fishing had been hindered by canoeing. In other words, because of their experience of actual conflict, fishery owners perceived canoeing to be disturbing angling in a much more generalised way. (P5(a), pages 13-14).
28. There has been no real sustained attack on the integrity of Professor Penning-RowSELL's findings at the Inquiry. Mr Willis tried to argue in cross-examination that the questionnaire survey of 242 river recreationalists undertaken in 1985 and described on page 8 of Professor Penning-RowSELL's proof was statistically useless. Professor Penning-RowSELL replied that whilst the survey size was small, it was judged to be adequate, as it was not necessary to have a large sample if the range of responses was not wide. In the separate survey undertaken, the canoe clubs (who represented thousands of canoeists) expressed more serious problems than the individual canoeists.
29. The Agency's answers to your questions (EA/Q6) also provide some information as to when and where it would be possible to see conflicts between anglers and canoeists. In this document the Agency makes the point that conflict can occur at any point and at any time of the year, but that there are locations and times of the year where and when the risk of conflict is most pronounced. This was confirmed by Professor Penning-RowSELL under cross-examination by Mr Gardiner. Professor Penning-RowSELL said that the river Wye is congested at locations like Symonds Yat, adjacent

to important features on the river or at access points. He also said that the river can become congested at key times, for example at Bank Holidays. But he also confirmed that difficulties can arise at other reaches at other times. It is for this reason that it is not possible to visit the river in the expectation that conflicts will be observed.

(ii) Present conflict: documentary evidence

30. There is other documentary evidence of present conflict. The Upper Wye Catchment Management Plan Consultation Report included Issue 17: "conflicts between recreational users of the river and between users and conservation is a widespread concern" (EA/D8, page 101). The Lower Wye Catchment Management Plan Consultation Report, meanwhile identified Issue 32: "impact of recreational users on the wildlife conservation of the river and conflict between different recreational user groups" (EA/D9, page 21). This issue is repeated as issue 35 in the Wye Catchment Management Plan Action Plan (EA/D10, page 29).

31. Reference is also made to inter-user conflict in the Wye AONB JAC Wye Valley Management Plan (EA/D2). This commented "...the increasing demands placed upon [the Wye Valley] for various forms of recreation and for increased access have given rise to environmental problems and conflicts of use." (page 23). The Wye AONB JAC also produced the Symonds Yat Management Plan in 1994 (EA/D48). On page 20, the Report refers to numerous specific examples of conflicts, including actual conflict caused by the construction of croys by anglers, and of stone barriers by canoeists, and by unauthorised launching by canoeists at Huntsham Bridge and Symonds Yat East. It also alludes to the problem of perceived conflict by pointing out that anglers believe canoeing has caused fishing catches to decline.

(iii) Present conflict: other witnesses' proofs of evidence

32. Many witnesses have given evidence of present inter-user conflict to the Inquiry. It is perhaps true to say that the written proofs do not generally adduce evidence of conflict; nor, on the whole, do they deny the existence of conflict. But the proofs do

contain some evidence. Generally both navigators and anglers do consider that there are problems of conflict on the rivers, although of course they approach the problem from different perspectives, with navigators being concerned with obstructions to navigation, and anglers arguing that uncontrolled navigation on the rivers can interfere with fishing. For example, James Simpson refers in his proof at OS8 to hazards caused by obstructions to navigation, and gives a particularly graphic example of conflict:

“I had my 20 foot boat wrecked and sunk by one such hazard because I changed course to avoid a fisherman’s line, which he made no attempt to wind in” (OS 8, paragraph 5)

The problem of obstructions to navigation also finds expression in the proof of the Welsh Amateur Rowing Association, who give examples of damage to boats caused by fishing croys in the river (see letter to Roger Evans M.P. dated 5th February 1996, included as part of OS54).

33. Major Hopkinson for the Wye Salmon Fishery Owners Association on the other hand refers to the increase in use of the rivers in recent years, and the diversification of navigational use. He concludes:

“There is clearly a need to regulate the use of such a wide range of craft to ensure that they are operated safely, do not damage the waterway and its environment and taken (*sic*) into account other users of the river (OS14, pages 1-2).

Another fisherman, Raymond Bryan of the Herefordshire and District Angling Association, sets out a list of problems which can be caused to fishing by uncontrolled navigation, including damage to fishing tackle, danger to wading anglers, disturbance of fish and interference with fishing caused by the passage of vessels down the river (OS24, page 3).

34. It is true that Hereford County Canoe Club deny the existence of conflict. On the

other hand, their proof of evidence argues that article 11 of the Order (Obstructions) "...should include a requirement for fishermen to remove their line from the water if there is any risk of it causing an obstruction or danger to any vessel or passenger" (OS9B, para. 3(e)), which implies that they have encountered problems with anglers who have failed to do this. In any event, Mr Pratley conceded under cross-examination that he had not read the longer version of Professor Penning-Rowsell's proof, and nor had he read the Agency's documents in the green folders. He also gave evidence of the problem of perceived conflict when he said that he felt that allegations of conflict were generally advanced by anglers, who blamed canoeists when they did not catch fish. He also told the Inquiry that his Club had experienced abuse from a minority of fishermen, and that canoes sometimes did get caught up in fishermen's lines.

(iv) Present conflict: Your questions

35. Before turning to the other evidence of conflict which was presented to the Inquiry in the form of oral evidence, I want to look briefly at the answers which have been provided by other witnesses to your written questions. A variety of responses has been received to question 17 ("When and where would it be possible to see conflict between anglers and canoeists?"). The Hereford & District Angling Association refers to conflicts between anglers and canoeists, especially at Symonds Yat and between rafters and anglers (EA/Q1). Mr Stockinger is even more direct in his response:

"It is possible to see conflict between anglers and canoeists whenever (1) a rod fisherman stands in the river in front of a canoeist, (2) rowing takes place within reach of angling...and (3) fishermen fish from the footings of the old Wye Bridge...several canoeists and rafters have been admitted to Hereford hospital accident and emergency ward for removal of fish hooks from their faces or abdomens." (EA/Q2, page 7).

36. Finally, the BCU give various examples of conflict. They state that they believe

conflict to be more perceived than actual, but they nevertheless introduce various accounts of confrontations between canoeists and fishermen. These are uncorroborated but if true they illustrate the fact that perceived conflict can sometimes boil over into physical violence. Carel Quaife of the BCU stated in his evidence to the inquiry that they were the only incidents of canoeists complaining about anglers which he had on his files - but he also said that many people complain informally, but will not put their complaints on the record.

(v) **Present conflict: oral evidence**

37. Many witnesses dealt with the issue of conflict in their oral evidence to the inquiry. In particular Frank Barton, James Simpson and Anthony Gardiner all gave evidence of obstructions to navigation, and despite their otherwise implacable opposition to the Order, they were all forced to concede that the power to remove obstructions in article 11 could be a useful power. Evidence of obstructions to navigation was also given by the Welsh Amateur Rowing Association.
38. Conflict between anglers and canoeists was described variously by the River Wye Preservation Trust, the Hereford & District Angling Association, R.S. Richards, Charles Woosnam and the Wye Salmon Fishery Owners Association. Charles Woosnam, for example, indicated that problems of conflict were increasing, because each year more and more canoeists wanted to use the river. Major General Hopkinson, meanwhile, said that the passage of canoes itself was not a problem, but when canoeists started using rapids, this completely "finished off" the fishing.
39. Canoeists on the other hand generally feel that problems of conflict are perceived not real, and this was borne out by the evidence of conflict given by Carel Quaife and John Westlake for the BCU and by the Hereford County Canoe Club to the inquiry. Carel Quaife said that anglers find canoeing more objectionable than it really is, in the sense that they think that it disturbs their sport more than it actually does. Again, Mr Pratley for the Canoe Club said that he felt that allegations of conflict were generally advanced by anglers, who blamed canoeists when they did not catch fish. Mr Quaife

also referred to navigation on the upper rivers and tributaries. He said that conflict is unlikely to occur on these stretches because of the access agreements, but there was no guarantee that no other canoeing will take place, and that does occasionally cause problems.

40. Many witnesses spoke of other forms of inter-user conflict. Mr Westlake of the BCU referred to the numbers of canoeists using the river, and pointed to Symonds Yat, where up to a hundred canoeists can be on the river at one time - "it is becoming dangerous because of sheer numbers, and that again shows the need for management by somebody", he said. The problem of canoeists building obstructions in the river was referred to both by Captain Dereham for the River Wye Preservation Trust, and by R.S. Richards. Conflicts between rafters and others were referred to by many witnesses, not least the Committee of Herefordshire Amateur Rafters itself. This evidence included a video which vividly depicted the confrontation between canoeists and rafters as the latter tried to remove the artificial obstructions that the canoeists had built, and then the collision between a raft and what Mrs Hales of CHAR described as Mr Gardiner's boat. Mrs Hales for CHAR stated in evidence that she had been unable to pursue the matter of the collision to a satisfactory conclusion. The following year the canoeists' obstructions had been built up again. If the Agency were the navigation authority, she felt that there would be a body she could go to ask for such problems to be resolved.

41. The Hereford & District Angling Association and the Wye Salmon Fishery Owners Association both also referred to conflicts with rafters. Mr Bryan for the Hereford & District Angling Association indicated that he did see a need for the Order because of conflict. In particular, he indicated that although he had a good relationship with Mrs Hales, she had told him that "there was a limit to how much she could control her people". He said that although there was conflict between all users, the main conflicts arose out of rafters practising, which spoiled fishing. This reflects his Association's answers to your written question, which indicated that rafts -

"by their very nature disturb the water, are noisy and interrupt the fishing...If a fish is

known to be in the vicinity of a lie, it is unlikely still to be there after a raft has passed through...boats or rafts passing through the water...constitute a potential danger when the angler is wading." (EA/Q1)

(b) Past conflict

42. I have already referred to the various incidents of past conflict on the rivers. Paul Hilder in his proof pointed out that there is an inherent conflict between the use of the river by hovercraft, jetskis and the like and other recreational uses, because of the risk of injury posed to canoeists or anglers (P2(a), page 19). Colin Shepherd M.P. in the adjournment debate in 1985 also made the point that the use of hovercraft on the rivers was potentially very harmful to other recreational users of the rivers (EA/C8, col. 1132).

(c) Future conflict

43. Again, the evidence that recreational use of the rivers will intensify and diversify in the future has already been described in detail. The potential effect of this on recreation is described by both Craig McGarvey (P3(a), page 7), and Professor Penning-Rowell (P5(a), pages 25-26). Essentially they argue that inter-user conflict is bound to increase in the future. This point was also made by R.S. Richards, who agreed that conflict on the Monnow might increase if pressure on the resource increased. It was for this reason that John Westlake of the BCU told the Inquiry that there was a need for the Order in the long term.

Conclusion

44. The Agency's submissions on conflict are essentially threefold. First, the Agency submits that there is evidence of conflict on the rivers at present, both conflict between navigation and recreation and the environment, and inter-user conflict. This has been described by Agency witnesses and by objectors and supporters. The Agency therefore rejects the contention of Charles Willis in his closing submissions

that the only example of inter-user conflict is the disturbance that canoeing causes to the sport of fishing, and that therefore the Agency is promoting the Order at the instigation of the angling lobby who wish to drive canoeists from the rivers (Closing Submissions of Hereford City Council, page 28). This is to ignore conflicts between canoeists and rafters (see e.g. the evidence of CHAR), between rafters and anglers (see e.g. the evidence of Hereford and District Angling Association), between canoeists and navigators (see e.g. the evidence of Frank Barton) and between navigators and anglers (see e.g. the evidence of James Simpson). Mr Willis also ignores the evidence of conflicts between navigation and recreation and the environment, as well as past conflicts and the potential for conflict in the future.

45. Second, the Agency submits that there have in the past been sporadic incidents of serious conflict caused by wholly inappropriate uses of the rivers, and that there is a danger that such uses will recur, unless the Agency becomes the navigation authority, and has conferred upon it sufficient powers to prevent such uses in the future. Finally, in the Agency's submission it is highly likely that the navigational and recreational uses of the rivers will increase and diversify in the future. It is therefore essential that the Agency is put in a position where such increases can be managed to prevent an equivalent increase and diversification in the level of conflicts on the rivers.
46. I shall explain in Section C below the way in which the Order will enable the Agency to address problems of conflict on the rivers.

A2. A MULTIPLICITY OF VESTED INTERESTS

47. The second aspect of the need for the Order is the existence of a multitude of different interests with different visions for the rivers. This diversity of views does not necessarily lead to the kind of conflict described above. But it does call for an effective management regime which ensures that different interests can be considered and, where possible, reconciled.

48. The existence of these varied interests is best illustrated by the public reaction to the draft Order itself. The debate surrounding three issues in particular has been chosen to illustrate vividly the opposing viewpoints of those with vested interests in the rivers: article 5 (the Agency's duty to promote navigation); article 3 (the Wye Navigation Advisory Committee) and Part V of the Order (the upper rivers and tributaries).

Article 5 : the duty to promote navigation

49. There have been 2 broad criticisms of article 5 of the Order : firstly, that there should be no duty to promote navigation on the principal rivers, merely a power to control and regulate, and secondly, that the duties to promote and maintain navigation are so qualified as to hardly amount to duties at all.

50. Those who object to the duty to promote navigation fall into two camps:

- (a) Fishery and riparian owners, such as the Wye Salmon Fishery Owners Association (OS14, para 4) and Lord Moran (OS19, pp.3-4).
- (b) Conservation groups, such as the River Wye Preservation Trust (OS10, para 7), and the Wildlife Trusts (OS11, p.13).

Their concern is, broadly, that any increase in navigation will be to the detriment of other (impliedly more important) aspects of the rivers, such as fisheries and

conservation. (See OMT point 118). This is made clear by other proposed amendments to article 5, for example:

- (a) article 5 should be expressly subject to the Agency's other functions and the Environment Act 1995 (OMT point 120);
- (b) article 5(c) (which allows the Agency to exercise the powers of Part III of the Order for such purposes relating to its other functions as it considers necessary) should expressly refer to the Agency's conservation functions (OMT point 125); and
- (c) there should be more clarity on protection of spawning areas and safeguarding of salmon catches against navigation improvements (OMT point 127).

In each of these cases a particular interest seeks to amend the Order so as to protect its position in relation to navigation, either by a general clarification (as in point (a) above) or by isolating, and according special status to, particular concerns.

- 51. By contrast, others argue that the article 5 duties are too weak and give no effective guarantees to navigators that their interests will be protected : see the evidence of South Herefordshire District Council (OS6 para. 4.3), Hereford City Council (OS27 pp. 3-5) and Mr. A. Gardiner (OS7, p.4). The amendment to article 5 put forward by the Agency in order to *strengthen* the duty to promote (EA/A25, amendment no.5) is seen by Hereford City Council as weakening that duty, and article 5(c) is seen as revealing the Agency's intention to use the powers of the Order to further its fisheries and conservation functions rather than in the interests of navigation (objection letter of Hereford City Council (OBJ 375), page 4 para. 2).
- 52. Those who would wish to see the duties of article 5 strengthened, however, do not represent all navigators : they are mainly those who wish to see the rivers "restored" to their state at some unspecified time in the past and/ or made navigable by larger vessels. The British Canoe Union do not object to article 5 of the Order and have

never done so; nor do the majority of the individual canoeists and canoe clubs who object to the Order. Canoeists are the largest group of navigators who currently use the rivers.

Article 3 : the Wye Navigation Advisory Committee

53. The views that have been expressed on the Wye Advisory Committee (as it was called in the Order as applied for) and the Wye Navigation Advisory Committee (as it is now proposed to be called) also reflect the wide variety of interests on the rivers.
54. Some objectors argue that there is no need for an Advisory Committee at all, as the existing statutory advisory committees are adequate : see the evidence of Lord Moran (OS19 pp.4-5, OS20A pp.5-6), and OMT point 60. This objection tends to be made by landowning and fishery interests who see the Regional Fisheries Advisory Committee (which is dominated by fishery interests, although recreation is now also represented) as an adequate means of consultation.
55. Others argue that the powers of the Committee are too weak and should be strengthened, and ask for certain matters to be subject to mandatory consultation with, or a right of veto by, the Committee. The range of subjects reflects the range of interests on the rivers:
 - (a) all those matters on which the Committee is currently required to be consulted should be subject to a right of veto (S. Herefordshire D.C., OS6).
 - (b) there should be mandatory / very full consultation before byelaws are made (see OMT points 88 and 89).
 - (c) consultation should be mandatory on any matter affecting property rights (OMT point 91).
 - (d) charges should be subject to the agreement of the Advisory Committee (OMT

point 292)

56. Arguments about the composition of the Committee are as numerous as the number of interests on the rivers, and include the following:

- (a) The Committee should be composed solely of navigators (Mr. Gardiner, OS7 p.4).
- (b) There should be more navigation representatives on the Committee (National Association of Boat Owners, OS43).
- (c) The Committee has too many navigation members, and too few fishery and riparian representatives (Lord Moran, OS19 pp.4-5).
- (d) Local canoe groups should be represented, as the British Canoe Union will not adequately represent the interests of local canoeists (Hereford County Canoe Club, OS9A, para. 3(a)).
- (e) An 'ad hoc' Committee made up of fishery and riparian interests is sufficient (objection letter of Mr. Alfred Pope (OBJ 26)).
- (f) The Committee should not seek to represent all institutional interests, but should represent recognised and specific proprietary interests (objection letter of R.S. Richards (OBJ 226)).
- (g) the Committee should have a majority of local authority representatives (S. Herefordshire D.C., OS6 paras. 2.2, 5.1).

In all these cases we see a vested interest group attempting to exclude other groups from, or minimise their influence upon, the Committee.

Part V : the upper rivers and tributaries

57. The debate surrounding the upper rivers and tributaries is the most obvious example of vested interests attempting to defend their rights. Landowners and fishery owners insist that there is no public right of navigation on the upper rivers and tributaries and ask for the old Acts to be repealed in their entirety. They claim that article 26, which improves the Agency's power to regulate navigation on the upper rivers and tributaries, implies that a public right of navigation on those rivers exists, will encourage navigation, and is an interference with private rights. The widening of the range of functions for which byelaws under paragraph 1 of Schedule 25 to the Water Resources Act 1991 applies is seen as down-grading the importance of fishery interests relevant to those of navigation. (Evidence of Lord Moran, OS20, R.S. Richards, OS1, OMT points 303, 304, 309, 315). Mr. Richards went so far as to say in cross-examination that the byelaw-making power should be extended to enable the better protection of the condition of the upper rivers, but not to manage their recreational use. The upper rivers and tributaries were too sensitive to allow a balancing act between different interests, and the only sensible course was to allow them to be managed by fishery and riparian owners. On the other hand, canoeists criticise Part V of the Order for failing to confirm that a right of navigation exists on the upper rivers and tributaries (OMT point 305, 326) or (more moderately) insist that the Order should identify and set out in full every provision of the old Acts which may confer a right of navigation over the upper rivers and tributaries (OMT point 341).
58. There has also been a debate about which stretches of river should be classified as upper rivers and tributaries. Quite apart from the arguments about the definition of inland waterways, it has been argued that the Lugg between Leominster and Presteigne should be part of the upper rivers and tributaries and not the principal rivers (see OMT point 40, and the proof of evidence of the Salmon and Trout Association (OS21, para. 5-6)). To include that stretch of river in the principal rivers would "inevitably be detrimental to the high amenity value of that part of the river, which lies in its fishing and in all those interests (principally involving flora and fauna) which prompted the making of the river into a Site of Scientific Interest" (objection

letter of Messrs. Harrison Clark on behalf of the Midland Flyfishers (OBJ53). Again fishing and conservation are seen as interests to be protected against the incursions of navigation.

Implications

59. I set out the Agency's response to these and other issues in section C below. Here we simply make the point that the wide range of competing interests in, and visions for, the rivers which the debate over these controversial provisions of the Order exposes, point to the need for management of the rivers and all their uses. Much of the debate during the inquiry has centred on conflicts between fishing and navigation, as though that were the only conflict of interests, a conflict so irreconcilable that any individual or body must be either pro-navigation and anti-fishing, or anti-navigation and pro-fishing. The picture is not in truth as simple as that. The non-navigators comprise anglers, fishery owners, landowners, conservationists, even rambles, all with different interests and priorities and different views on different sections of the rivers. The navigators include on the one hand the dozens of canoeists who objected to the Agency having a power to construct locks and weirs in the Order as applied for because it would harm the environment and have an adverse effect on their sport (see OMT point 133), and on the other hand those (such as Mr. Kenchington and the so-called "navigation trustees") who favour impoundment of the rivers because it would promote *their* favoured form of navigation and (perhaps) have beneficial ecological effects. These competing uses and demands cannot be adequately balanced against one another, and the interests of *all* users taken into account, for so long as one major use of the rivers, navigation, is unmanaged.

A3: THE ACTIVITIES OF MR STOCKINGER AND HIS ASSOCIATES

Introduction

60. A further reason why the Order needs to be made is the on-going activities of Mr Stockinger and his associates. In its opening statement to the inquiry (EA/A28 p.6), the Agency described the relevance of Mr. Stockinger as follows: "The activities and aspirations of Mr. Stockinger and others anxious to change the nature of the rivers by promoting an impounded navigation come into the category of pressures to be resisted, but they also illustrate vividly the danger of what some people, now and in the future, may consider to be a legitimate vision for the use of the rivers". The brief history of Mr Stockinger's involvement in the Wye up to the Court of Appeal's refusal to grant him leave to appeal against the judgment of Laddie J is set out in Background Paper EA/E1, paras. 12 - 18. Here we concentrate on events since that date and the evidence given by Mr Stockinger and his associates at the inquiry (although prior events are referred to where relevant). These events and activities, we submit, reinforce the view that Mr. Stockinger's aims are to be resisted, and that his vision for the rivers is an illegitimate one.
61. The main development since the Court of Appeal's decision is the claim by Mr Stockinger and others to have been appointed navigation trustees. Mr Stockinger has been ambivalent as to the relevance of this claim, at times asserting that the trustees' main argument is one of *vires* and the status of the trustees is irrelevant, and yet at the same time apparently relying on their alleged status as the basis for an application for costs (see the letter from Mr. Stockinger to Anthony Weare of the Agency, 10th April 1997 (EA/A36 App 2-15)). The Agency's position is that the Order should be made whether or not those purporting to be navigation trustees are who they claim to be. On the one hand, the uncertainty caused by their continuing activities is in itself a reason for making the Order. On the other hand, if they are in fact trustees or otherwise have some claim to represent the 1809 Act Company, they are wholly unsuited to be the navigation authority for the rivers. There is a need to prevent them having control over the rivers, and the case for the Order is to that extent strengthened.

However, the question of the trustees' status is addressed below for the assistance of the inquiry.

The Legal Position of the "Navigation Trustees"

62. The declarations granted by Master Moncaster (EA/B41) and confirmed by Laddie J (EA/B42) established that Mr. Stockinger had no right to speak for the Company of Proprietors. However, a declaration relates to the state of affairs at a particular point in time. That state of affairs may change. Mr. Stockinger argues that the declarations granted by Master Moncaster have been superseded by subsequent events (Trustees closing submissions, "revised" version, paras. 19 and 30), namely:
- (a) The appointment of further navigation trustees late in 1996 by existing navigation trustees.
 - (b) The Order of Judge Cooke in the Central London County Court.
 - (c) The Order of the Birmingham County Court in case number BM7 77001 relating to 40 shares in the Company of Proprietors (see EA/A49).
 - (d) The navigation trustees obtaining other court Orders in their favour.
63. We address each of these points. The Agency's information-gathering is not yet complete, and these submissions are a provisional, rather than a final view. When the Agency has all relevant information, it will need to take a view on whether to take action by, for example, instituting legal proceedings against those claiming to be trustees. Whether or not it decides to institute proceedings in the future will not affect the Agency's submission that, whatever the status of the trustees, the Order should be made. (The Agency may write to the TWA Processing Unit on this.)
- (a) **The purported appointment of further navigation trustees late in 1996**
64. Mr Stockinger and the other purported navigation trustees have produced no evidence that they have in fact been appointed navigation trustees. Mr Barton, Mr Gardiner, Mr Simpson and Mr Stockinger all declined to produce the document so appointing them.

While one document of appointment has been submitted to the inquiry by the Wildlife Trusts (On the matter of the alleged confirmation of trustees, OS 40) the trustees have been evasive about the status of that document, and Mr Stockinger has referred to other documents of appointment which are not before the inquiry. However, in paragraph 30 of his closing submissions (revised version), Mr. Stockinger appears to place reliance on the document submitted by the Wildlife Trusts, and what follows assumes that that is a relevant appointment.

65. The Agency's views on the legal status of the navigation trustees appointed under the 1727 Act following the passage of the 1809 Act are set out in detail in its background paper EA/E22. On 8th July (i.e. two days ago) Dyson Bell Martin received a response to E22 from Mr. Stockinger, misleadingly dated 19th June. There is nothing in this paper which causes the Agency to dissent from the argument set out in E22.
66. Much of Mr. Stockinger's paper, for example paragraph 7 which deals with the sale of sandstone blocks, is simply irrelevant. The meat of his argument is in paragraphs 10 to 14, which argue that the trustees were incorporated in the Company as non-shareholding members, and had one vote each by virtue of their membership. The latter proposition is said to occur 'under the general law', and no supporting references are given. These propositions are simply inconsistent with the provisions of the 1809 Act. Once the 1809 Act was passed, all the statutory powers of the trustees vested in the Company. The running of the Company was given to the Committee, the shareholders alone elected the Committee, and the shareholders alone took the profits. The trustees as such had no role at all. (See Background Paper EA/E22 paras. 3.4-3.6). To argue that the trustees were entitled to vote simply ignores the provision in section XXXI that voting was to be by shares. The sole significance of the trustees' inclusion in the list of those incorporated (section I of the 1809 Act) was to enable them to subscribe for shares. The list of subscribers to the 1809 Act Company (EA/B49) shows that at least one, the Bishop of Hereford, did so.
67. Further, the Agency has now examined local government legislation relevant to the status of the ex officio trustees, and considers that the current Mayors of Hereford,

Monmouth and Leominster are probably not ex officio trustees. This point is discussed in more detail below.

68. It follows that the first event relied on by Mr. Stockinger as superseding the declarations of Master Moncaster is of no effect.

(b) The Order of Judge Cooke in the Central London County Court

69. An Order declaring that the "Bailiff of Leominster" in the 1727 Act should be construed as the Mayor of the town of Leominster for the time being was made by Judge Cooke on 5th December 1996 (EA/A49, pp. 32-33). Mr Stockinger, when cross-examined by me, alternated between claiming that the Order confirmed the status of the trustees, and refusing to say how it should be interpreted, as that was a matter for the Treasury Solicitor to decide. The Agency does not accept that the Order recognises the status of the trustees as:

- (a) The heading of the action, which refers to "Trustees of the Rivers Wye and Lugg Navigation" is one given by the applicants themselves and not by the court. This point applies to all the actions brought in the name of the trustees.
- (b) Mr Stockinger claimed in cross-examination that in the course of deciding whether or not he had jurisdiction, Judge Cooke had assessed the claims of the navigation trustees to be trustees. Although the judge considered his jurisdiction to make the Order under s. 23 of the County Courts Act 1984 (see EA/A49 pp. 18-20), he did not address the question of whether those claiming to be trustees were validly appointed. That issue was not decided by the court. The Order granted deals purely with the construction of the 1727 Act, and decides nothing about the status of the trustees or the impact of the 1809 Act on the trusteeship.
- (c) The context of the application as presented by Mr. Stockinger was highly misleading:

- (i) His submissions refer to the 1809 Act but state its effect to be that "the trustees were incorporated into a corporation as they were at the time" (EA/A49 p.17). This is an inaccurate summary of the Act, as it suggests that the 1809 Act incorporated the trustees alone and as it does not mention that the Corporation was to have shares for which any of the Act's promoters could subscribe. It does not appear that the 1809 Act was put before the court.

- (ii) No reference was made to the judgment of Laddie J. While Mr. Stockinger's affidavit (para. 17) (EA/A49 p.7) refers to Master Moncaster's Order, it states its effect to be that "the Statutory Corporation appears to have no effective means of registering the transfer of shares among its shareholders", which is wholly inaccurate. Although the affidavit states (at para.17) that a copy of the Order would be placed before the Court, there is nothing in the transcript to suggest that this in fact happened. If the judge had been fully informed of the decision of Laddie J he would have been bound to query whether Mr. Stockinger had any standing to make the application, whether it would be appropriate to make any declaration without hearing adverse argument, and whether any declaration would be of practical utility given that the trustees' powers were vested in the 1809 Act Company by s. II of the 1809 Act (see EA/E22, para. 2.7).

70. Quite apart from these factors, the Agency does not believe that the Order is correct on its face, as not all relevant legislation was before the judge. Judge Cooke based his decision that the Bailiff of Leominster should be construed as meaning the Mayor of Leominster on section 6 of the Municipal Corporations Act 1835. Section 73 of that Act, which provided that where members of an old municipal corporation were ex officio trustees with other persons, their replacement should be chosen by the new council, was not considered. Sections 6 and 73 of the 1835 Act were replaced by sections 15(6) and 135 of the Municipal Corporations Act 1882. Section 15(6) of that

Act was replaced by s.18(6) of the Local Government Act 1933. The 1933 Act has been replaced by the Local Government Act 1972, and under sections 245 and 246 of that Act mayors now have a ceremonial role only. There is no provision equivalent to section 6 of the 1835 Act. It is therefore probable that the Mayor of Leominster can have held no trusteeship by virtue of his office since the 1972 Act came into force. The same reasoning applies equally to the Mayors of Hereford and Monmouth. If it is correct, none of the mayors can now be a trustee.

(c) The Birmingham County Court Order relating to 40 abandoned shares

71. This Order states that 40 shares in the Company of Proprietors have been surrendered and are available for re-issue by the Company (EA/A49 pp. 104-105). The 40 shares concerned are identified neither in the evidence sworn in support of the application, nor in the Order itself. (It is conceivable that they were identified in exhibits to the affidavits, but the exhibits have not been made available to the Agency).
72. The transcript of the judgment given by Judge Boggis has appended to it a note from the judge stating that he was not made aware of the judgment of Jacob J (which is intended to be a reference to Laddie J) ruling against Mr. Stockinger's entitlement to speak for the Company (EA/A49 pp. 5-6). The Agency's view is that the Order would not have been made had Judge Boggis been aware of that decision at the time.
73. In any event, the Order is of no relevance to the claim of Mr. Stockinger and others to be navigation trustees. It merely says that the 1809 Act Company is entitled to reissue 40 shares. It does not decide whether the purported trustees have any right to act for the Company for that or for any other purpose.

(d) Other Court Orders

74. An Order made by Judge Boggis on 14th April 1997 (EA/A49 pp. 75-76) declared
- (i) that the trustees, sitting as the management committee of the 1809 Act Company, had properly appointed a share registrar under the 1809 Act,

- (ii) that the registrar had properly re-registered four shares in the name of Hereford City Council, and
- (iii) the registrar had properly re-registered one each of those shares in the names of Mr. Stockinger and three of his companies.

75. The Agency does not accept that the court Order is correct insofar as it refers to the trustees "sitting as the management committee" of the 1809 Act Company. Even if, contrary to the views expressed in EA/E22, the trusteeship survived the 1809 Act and there are properly appointed trustees, those trustees do not themselves constitute the management committee. Section 36 of the 1809 Act provided that the committee was to be chosen at a general meeting of the Company, and section 31 provided that those entitled to vote at such meetings were the shareholders and the shareholders alone (see EA/E22, paras. 3.4-3.6).

76. The basis of the declarations granted by the judge was presumably the assertion, in paragraph 4 of Mr. Stockinger's affidavit in support of the application, that there was a chain of share transfers from Sir Geoffrey Cornwall, Bart., to Mr. Stockinger and the three companies (EA/A49, p. 2). The details of these transfers are apparently set out in an exhibit to the affidavit, which has not been made available to the Agency. Mr. Stockinger previously instituted proceedings in relation to the Cornwall shares in the Clerkenwell County Court in 1995, which were consolidated with the NRA's proceedings against Mr. Stockinger in the High Court. The claim made by Mr. Stockinger then was that Sir Geoffrey Cornwall was the successor to Sir George Cornwall, one of the original shareholders in the 1809 Act Company, and that Sir Geoffrey had passed the shares to Hereford City Council which in turn transferred them to Mr. Stockinger and his three companies. Laddie J did not accept that the shares had passed to Mr. Stockinger and the companies (EA/B42, p.18-19). There is nothing in Mr. Stockinger's affidavit to suggest there has been any relevant event relating to those shares since the judgment of Laddie J. There is no reference in Mr. Stockinger's affidavit to the judgment of Laddie J. Judge Boggis would not have made the Order he did had he been aware of it. In any event, Laddie J. was of the opinion that "Even if Mr. Stockinger had managed traced [sic] title to four shares, and

even if all the other defects in his attempt to transfer them to himself and the other defendants had been overcome, he could not form a Committee [i.e. the Committee which was responsible for carrying on the business affairs of the 1809 Act Company]. Even if he did, he would have insufficient numbers to allow the Committee to carry on any business." (EA/B42 p.19).

77. There are two further court Orders which the trustees have obtained. One relates to the scope of the power to erect mooring posts conferred on the 1809 Act Company by section 50 of the 1809 Act. The wording of the Order is that certain acts are within the powers of "the trustees of the Rivers Wye and Lugg Navigation, as the Company of Proprietors". This presupposes, but does not decide, that there is a continuing trusteeship and an identity of the trustees and the Company. The Agency does not accept either of these assumptions, for the reasons given in EA/E22. Another Order relates to the Collision Regulations. It assumes, but does not decide, that the purported trustees are who they claim to be.
78. Proceedings were also instituted relating to the byelaw-making power of the 1809 Act Company and local authorities under the Public Health Acts Amendment Act 1907. These were discontinued.
79. The conclusion of this lengthy discussion is that none of the court Orders known to the Agency confirms the legal status of those purporting to be navigation trustees. They have been made on the basis of partial and even misleading information, and do not address the key question of the impact of the 1809 Act on the trusteeship created by the 1727 Act. The Agency's view remains that the trusteeship did not survive the 1809 Act, that it has not been possible to appoint new trustees since the passing of the 1809 Act, and that even if this is wrong trustees would have no status in the 1809 Act Company unless they were also shareholders (see EA/E22 para. 5.1).

80. However, for the purpose of the next section, the Agency assumes, against itself, that Mr. Stockinger and others are indeed navigation trustees, and submits that this does not mean that the Order should not be made.

If the purported trustees are who they say they are, they are unfit to be the navigation authority. The Order should be made.

81. There are 6 grounds for this submission:

(a) the old Acts are an inadequate tool for managing navigation;

(b) the trustees have no funding;

(c) the trustees have insufficient expertise;

(d) the trustees are unfit to occupy any position of responsibility;

(e) the trustees are unaccountable;

(f) the trustees' vision for the rivers is inappropriate.

(a) The Old Acts are an inadequate tool for managing navigation

82. The Agency's views on the adequacy of the old Acts are set out in Background Papers EA/E1 and EA/E15, and will not be repeated here. The Agency submits that the trustees have failed to refute these arguments, and have themselves recognised the inadequacies of the old Acts and the need for modern legislation.

83. Of those giving evidence, only Mr Stockinger showed any familiarity with the old Acts. Mr Gardiner when questioned about their adequacy could only say that Mr Stockinger had advised him that they were adequate. Mr Stockinger claimed during cross-examination that EA/E15 para. 2.4, setting out a list of valuable powers which

are not available to the Company, was inaccurate. He asserted that the old Acts contained provision for the removal of obstructions and repair of embankments, and said that he would put in a paper identifying those provisions. He has not done so. In support of the adequacy of the byelaw-making power conferred on the 1809 Act Company by s.39 of the 1809 Act, old 1809 Act Company byelaws were referred to which were displayed on a display board but not entered as inquiry documents. These byelaws related solely to the use of the towpath, supporting the Agency's argument that the s.39 power may relate only to the towpath and not extend to controlling navigation (EA/E1, paras. 3.7, 4.3 and 6.5).

84. Most telling are the various draft instruments prepared in the name of the Company of Proprietors:

- (i) Rivers Wye and Lugg Navigation Bill (EA/C44)
- (ii) The Company of Proprietors etc. (Share Vesting) Order (EA/X9 p.5)
- (iii) Draft Transport and Works Act Orders (EA/C33-34.)
- (iv) Catchment Management Board Order (EA/C41).

The first two documents recognise that legislative intervention may be necessary before the Company of Proprietors can be effectively revived; the third is a recognition that further legislation may be needed before plans for the restoration of locks and weirs can proceed. The draft Catchment Management Board Order sets out a raft of provisions not dissimilar to those contained in the (Agency's) Order, such as the setting up of an Advisory Committee, and provision for the removal of obstructions and the licensing of works (see Background Paper EA/E1 paras. 6.1 - 6.5 for further details). Mr Stockinger claimed under cross-examination that the Order was merely a consultation draft, and some of its provisions were not in fact within the scope of section 39 of the 1809 Act. The Agency does not quarrel with the latter proposition: see EA/E1 para. 6.5. The Order is evidence, however, that even those seeking to revive the 1809 Act Company recognise the inadequacy of the powers contained in the old Acts, and the need for a more modern management regime for the rivers.

(b) The trustees have no funding

85. The 1809 Act placed a limit of £6,000 and, if that should prove insufficient, a further £3,000 on the capital which could be raised by the Company (see EA/B1, sections XXX and XXXII). The trustees claim that they will be able to raise sufficient funds by other means e.g. by grants from the Millenium Commission or local authority finance. There is no reason to suppose that this will be successful, and I invite the Inspector to find this as a fact. An application to the Millenium Commission in the name of the Company of Proprietors was turned down: see EA/C 35, and although Hereford City Council supports those attempting to revive the Company (see the Resolution of the Council's Policy and Finance Committee, 16th October 1995, EA/X4 p.43) the other local authorities represented at the inquiry wish to dissociate themselves from the attempt (see Mr Wilcox's supplementary proof of evidence (OS6B), para. 6). Mr Gardiner stated in the course of cross-examination by Mr Laurence that as far as he knew, no funding whatsoever was available, and Mr Simpson admitted during cross-examination that while he was sure money could be found, that was just a hope. The responsibility of managing navigation on these important rivers cannot be left to a group of individuals with no source of funding.

(c) The trustees have insufficient expertise

86. Those who have provided evidence to the inquiry and who claim to be trustees are Mr Stockinger (a lawyer), Mr Gardiner (a pleasure cruise operator), Mr Barton (an ex-soldier who now runs a car repair business), Mr Simpson (a retired telecommunications engineer), Mr Smith (a blacksmith) and Mr Davies (a publican). This motley assemblage of individuals does not immediately strike one as having the necessary expertise to manage navigation on the rivers. Mr Gardiner agreed during cross-examination that he did not personally have the qualifications to do all the things a navigation authority does, but said that the trustees would employ people with the relevant expertise. The trustees have no funds to do this. Mr Gardiner also submitted an affidavit to the inquiry claiming that he had been appointed as Navigation Bailiff for the Trustees of the Navigation (OS33 para. 47). He was unable to give a

coherent account of when he had been appointed, or by whom, or what the relationship was between the appointment "for the Trustees", and the appointment by the Company of Proprietors referred to in paragraph 47 of the affidavit sworn by him during the litigation between the NRA and Mr Stockinger (EA/X5). Mr Barton did not have a copy of the document appointing him as a trustee to hand, and appeared only to have seen it the previous September. The trustees subsequently adopted their policy of refusing to answer questions about "internal" matters. Mr Smith gave evidence of his involvement in various restoration projects, but it is difficult to see that having restored a church for use as a bat sanctuary is a qualification for the management of navigation. The only "evidence" which has been provided which directly addresses the question of the trustees' ability to operate as a navigation authority is the letter from Mr Stockinger to Michael Lee of 14th April (EA/A36 Appendix 2 p. 15A-C) referring to Mr Stockinger's involvement in the consolidation of the Merchant Shipping legislation. Mr Stockinger subsequently asked for this letter to be withdrawn, and refused to answer questions about his involvement with the Treasury Solicitors. This is hardly convincing evidence of expertise. That letter also claims that "Mr Bushby will likely find that each of the statutory trustees of the Wye and Lugg navigation has professional experience relevant to the effective running of the inland navigation." No evidence to support that statement has, in the Agency's submission, been provided. In my submission, you should find as a fact that the so-called trustees have no such experience.

(d) The trustees are unfit to be the navigation authority

87. The trustees do not only lack the requisite expertise to manage navigation on the rivers. Their behaviour renders them wholly unfit for any position of responsibility. This is vividly illustrated by the complete disregard they have shown for the inquiry and its procedure. By way of example:

(a) Mr Stockinger failed to produce a proof of evidence for himself or any of his witnesses, despite repeated requests to do so from both the Agency and the Programme Officer. One witness, Captain Hailwood, had not been asked to

produce any written evidence, had not been shown a copy of the Order, did not know the Wye area and would not comment on whether or not the Order should be made.

- (b) Relevant information has been deliberately concealed from the inquiry. Mr Gardiner said during cross-examination that the status of the 1809 Act Company would become clearer by the end of the inquiry, but refused to provide details. Both Mr Simpson and Mr Stockinger subsequently admitted that there were court proceedings relevant to the inquiry, but refused to provide details. When information was finally provided by Mr Parkhill on 11th June 1997 (EA/A39 p. 20) it was partial, and the Agency has been put to some considerable expense in tracing relevant proceedings (see EA/A49, page 3 for details). The Agency was provided with a new court order as recently as 2nd July (Order of H.H. Judge Boggis accompanying written submissions of the byelaws inquiry).
- (c) Misleading documentation has been presented to the inquiry. The affidavit of Mr Gardiner, for example, refers to actions taken by the Company of Proprietors at a time when, as a result of the judgment of Laddie J, they could not possibly have been taken by the Company (e.g. OS33 para.55). Mr Stockinger's index of documents refers repeatedly to letters written by the Company of Proprietors, which as a result of the judgment of Laddie J, could not possibly have been written by that Company. A document has been produced entitled "affidavit" which is in fact merely a signed statement: see OS30B, "affidavit" in Objection by Desmond Davies, which is signed at 1 St. Martyn St., the Saracen's Head Inn. Mr. Stockinger has produced a revised version of his closing submissions, received by the Agency on 7th July, dated 19th June, which is the date on which his oral submissions were made. On 8th July the Agency received a paper from Mr. Stockinger responding to its Background Paper EA/E22 on the navigation trustees which was also dated 19th June, misleadingly suggesting that the paper had been submitted at the same time as Mr. Stockinger's closing submissions almost two weeks earlier.

(d) The trustees continued to produce evidence in affidavit form after it had been made clear that this was unnecessary. Mr. Stockinger had the impudence to suggest that the fact that their evidence was in affidavit form added something to its veracity (Mr. Stockinger's revised closing statement, paragraph 23) and that anything less was likely to discredit the inquiry's information-gathering process (revised closing statement, paragraph 24).

(e) The trustees have advised one another during cross-examination. Mr Gardiner, who originally claimed that his affidavit related to the state of affairs before the judgment of Laddie J, returned from lunch to say that he had taken legal advice, that the trustees were incorporated into the 1809 Act Company, and that he therefore stood by his affidavit as an accurate statement of the position at the date it was sworn. Mr Stockinger subsequently claimed during cross-examination that he had not given legal advice, but had only told Mr Gardiner to stand by his affidavit. Mr Parkhill prompted Mr Stockinger during the course of questioning by the Inspector, and told Mr Simpson during the course of his cross-examination not to answer questions about court proceedings.

88. It is evident that those claiming to be trustees rely considerably on Mr Stockinger for advice and assistance. He had a hand in preparing the affidavits of Mr Gardiner and Mr Simpson, as those gentlemen admitted during cross-examination; he is the person who deals with the difficult matters. Other documents produced by objectors have an uncanny resemblance to documents produced by him. His history does not inspire confidence in his ability properly to discharge that task. He has been reprimanded by the Law Society for holding himself out as a solicitor at a time when he did not have a practising certificate (see EA/X13). He has claimed to be a consultant to the Department of Transport, whereas in fact he has never been paid or employed by them. He has brought proceedings in the county courts in the name of the navigation trustees without informing the Environment Agency, despite a clear ruling by Laddie J that the NRA (as it then was) had an interest in attempts to revive the Company of

Proprietors (EA/B42, judgment of Mr Justice Laddie, p.17), and he failed to disclose to the Birmingham County Court details of the litigation between Mr Stockinger and the NRA, which was relevant to the question before the judge (see EA/A37 p.55, mistakenly referring to Jacob J). As lawyers, both Mr Stockinger and Mr Willis ought to have known that if they were engaged in friendly litigation, which would have been of interest to the Agency, it was utterly unacceptable not to have given the Agency notice of that litigation.

(e) The trustees are unaccountable

89. Extravagant claims have been made for the accountability of the trustees. Mr Stockinger asserts, in his final submission (revised version "dated" 19th June) that the shareholders of the Company of Proprietors "are", and always have been, local individuals and landowners, local businessmen, and local government office holders, and that this shareholding structure ensures that the actions of that Company are locally motivated and scrutinised (paras. 180 and 181). He has referred in his oral evidence to the trustees' desire for local authorities to become involved in the 1809 Act Company, a desire evidenced by the letter from Mr. Davies inviting Leominster Town Council to buy shares in that Company (EA/A39 p.26).

90. The trustees are not in fact accountable at all to anyone but themselves. They have refused to provide the inquiry with details of their appointment or to answer questions about the internal workings of the trust (see above). Mrs Hales of the Committee for Herefordshire Amateur Rafters gave evidence that she had never been consulted by the trustees about their plans for the river. And local authority involvement to date does not suggest that such involvement is likely to lead to accountability. Hereford City Council support the attempts to revive the Company of Proprietors (see the resolution of the Policy and Finance Committee of 11th July 1995 (EA/X6 p.41) and the letters to the Secretary of State for the Environment and the High Court (EA/C42)), but there is no trace of this in the proof of evidence of Mr. Willis. The secrecy in which the Rivers Group meets has been dealt with below. Mr. Stockinger has referred questions on the trusteeship to Mr. Willis, who has refused to answer

them on the basis that the trusteeship is a matter for the Mayor personally, and not the Council. (This is most apparent from the answers Mr. Willis gave to Mr Lawrence's questions on June 19th, the day on which Mr. Willis delivered his closing speech). When asked whether he was the Mayor of Hereford's Chief Officer, Mr Willis replied that while the Mayor might ask him for advice, no-one except the trustees had referred to him as the Chief Officer (answer given in cross-examination, 19th June). Yet on 4th December 1996 Mr Willis swore an affidavit, for use in the proceedings before Judge Cooke, that he was the Mayor's Chief Officer and had been authorised to make the affidavit on behalf of the Mayor (EA/A49, p.11). Against this background, the assertion that actions of the Company of Proprietors will be locally scrutinised are simply farcical.

(f) The trustees' vision for the river is inappropriate

91. The plans of those seeking to revive the 1809 Act Company have proved elusive. The documentary evidence is that the aim is to "restore" the navigation by building a number of locks and weirs in the rivers at unspecified locations: see EA/C29 (outline application for grant of European structural funds), EA/C33 and C34 (draft Transport and Works Act Orders) and EA/C39 (draft preliminary offering circular). The details of these plans have never been clear, and were not made any clearer during the inquiry. Mr Barton wanted the river restored to its condition in 1790. Mr Gardiner was unable to decide between 1826/7, the 1850s and the early 20th Century as the relevant dates, and could not say which of the documents he had provided as evidence of the previous state of the rivers were relevant to which of those dates. Mr Stockinger asserted that there had been 22 locks and weirs on the rivers but could not say when, and suggested that their sites could be deduced by comparing the chart on the trustees' display board (which has not been submitted as an inquiry document) with an extract from the Hereford Times in 1906 (which has not been produced). No clear distinction has been drawn between locks which were actually constructed, and those which were merely proposed.
92. The Agency's witnesses have explained the harm that large scale works such as the

construction of locks and weirs would cause to the rivers' existing uses and the habitats and species they support (see in particular Paul Hilder (EA/P2(a), pages 21-22), Craig McGarvey (EA/P3(a), pages 7-8) and Professor Edmund Penning-Rowsell (EA/P5(a), pages 27-29). The impact of such a scheme on the river is analysed in some detail in Background Paper EA/E20. It has been alleged or implied that this document is of little value because it does not satisfy the criteria for an environmental impact assessment, and does not respond to specific proposals. However, the document does not on its face claim to be an environmental impact assessment, and there *are* no specific proposals to be examined. No evidence (as opposed to assertion) has been produced to counter the argument the paper puts forward: namely,

“the scheme would profoundly and irreversibly change the nature of the rivers, and substantially damage the ecology of the catchment. It would change the patterns of flow and quality of water within the rivers, harming the interests of most current users of the river.” (EA/E20, p.50 para. 8.)

93. Moreover, many other witnesses to the inquiry indicated that they were opposed to this alternative vision, even though some, like the Hereford County Canoe Club, were otherwise objectors to the Agency's application. (Although Mr Pratley for the Canoe Club did concede that the Club would support anybody who was able to prevent Mr Stockinger's vision from being realised).
94. The evidence given by the trustees at the inquiry seemed at times to be attempting to distance the trustees' plans from the construction of locks and weirs, perhaps (although this is speculation) in recognition of the strength of feeling against such a scheme. They claimed that in the light of modern engineering techniques, it might be possible to make the river navigable with less than 22 locks and weirs. The application for structural funding (EA/C29) and the draft TWA Orders were merely consultation documents (evidence of Mr Stockinger during cross-examination); the priority was the restoration of wharves and slipways, and consultation on locks and weirs would proceed from there (evidence of Mr Simpson and Mr Stockinger during cross-examination; see also the letter from Frank Barton of 17th June 1997 EA/A39

p.33).

95. This has an interesting effect on the trustees' case. For as long as there is a difference between the Agency and the trustees on the question of whether locks and weirs are desirable, there is a substantial difference of vision for the rivers. You will have to decide which vision is the right one. But if the trustees' plans are in fact more modest, and do not extend beyond improvements to, and construction of, access points etc., the difference in vision disappears and the issue is whether navigation should be managed by a properly-funded public body under carefully-drafted modern legislation, or by a group of self-appointed individuals attempting to operate archaic legislation with no funding at all. The former regime is clearly to be preferred.
96. These matters have been set out at some length because the Agency considers that *if* the purported navigation trustees in fact have some legal status, the case for the repeal of the old Acts and the making of the Order is not weakened but strengthened. The trustees should not be entrusted with the task of managing the rivers.

If the "navigation trustees" are not who they say they are, the Order should be made in any event.

97. If the Agency is right in its view that the document of appointment and court Orders before the inquiry do not establish that the purported navigation trustees have the legal status they claim to have, this does not mean that the trustees do not represent a threat. Their continuing antics are themselves a good reason why the Order should be made. Mr Stockinger has shown himself a determined and resourceful litigant, and if the Order is not made there is no reason to suppose that he and those who support him will desist from their attempts to revive the Company. His evidence to the inquiry was that he appealed to the Court of Appeal "to buy time", in the face of a clear decision from Laddie J that his attempts to revive the Company had been "absurd and misconceived" (EA/B42, p.12). At the Court of Appeal hearing he made detailed submissions on the merits of his case, which at the inquiry he claimed were irrelevant. He has (to the Agency's knowledge) instituted proceedings in the Central London

County Court, and five sets of proceedings in the Birmingham County Court. Local authorities have recently been invited to subscribe for shares in the Company of Proprietors on the strength of one of those Orders (see EA/A39 p.26). There may well be other court proceedings of which the Agency is unaware.

98. Most of the purported trustees' antics have so far been conducted on paper. Mr. Gardiner claims in his affidavit to have executed certain functions as Navigation Bailiff (OS 33 para. 62) but in cross-examination said that he had not in fact executed all those functions, and that some of what he had done he would have done as a boatman in any event. Mr. Simpson also stated in cross-examination that most of what he claimed to have done as a trustee he would have done in his personal capacity in any event. However, there is always a risk that the campaign currently being conducted on paper may in the future be conducted on the rivers themselves. One of the recent court orders, for example, relates to the erection of mooring-posts in the Bishop's Meadow. These rivers, which are an important environmental and recreational resource, should not be at risk of becoming a battleground in this way.
99. Even if Mr. Stockinger and the other trustees abandon their attempts to revive the Company, for as long as the old Acts remain unrepealed, there is a risk that others may seek to do so in the future (Robert Owen's evidence when you questioned him). The current position creates an unacceptable degree of uncertainty for all those involved in managing the rivers which can only be put to an end by repealing the old Acts and removing for good the possibility of the company being revived.

A4: A POSITIVE VISION FOR THE RIVERS

Introduction

100. A further argument for the making of the Order is that the Order will enable the Agency to achieve its positive vision for the rivers, which is the enhancement of the recreational experience of all river users.
101. The Government Guidance on Sustainable Development issued under section 4 of the Environment Act 1995 contains the following statement: "The aim of government policy on navigation is to maximise the potential of the waterways, so far as this is consistent with other objectives of sustainable development, whilst taking account of the needs of all interest groups, and ensuring good value for money for the taxpayer." (EA/D20, page 25). The Agency shares this vision for navigation and recreation on the rivers, and this is reflected both in the Agency's national policy on navigation and the evidence given to this Inquiry by the Agency's witnesses on their vision for navigation and recreation on the rivers Wye and Lugg.

National policy

102. The principal Agency witness on national policy for navigation and recreation was Craig McGarvey, the Agency's Head of Navigation and Recreation, who is responsible for these functions throughout England and Wales. At page 13 of his Proof (EA/P3(a)), he introduces the Agency's policy documents on navigation and recreation, which can be found at EA/D22 and D23 respectively.
103. The Agency's Draft Navigation Strategy is intended to apply to those navigations for which the Agency has specific navigation responsibilities. Thus if the Order is made, and the Agency becomes the navigation authority for the principal rivers Wye and Lugg, the strategy will apply to those rivers. This Strategy indicates: "our principal aim is to maintain and improve the Agency's Navigations on behalf of the nation and to make them accessible for recreational and commercial use." (EA/D22, page 8).

Craig McGarvey wished to emphasise that “commercial use” meant the existing types of business that rely on the river - passenger boats, canoe hire, outdoor pursuit centres, etc. (EA/P3(a), page 13). In other words, the Agency does not and could not propose large-scale commercialisation of the rivers if the Order is made. The theme of promotion of navigation whilst showing sensitivity to existing uses and priority is reflected in the statement on page 4 of the Strategy:

“The Agency aims to maximise the potential of its Navigations, so far as this is consistent with other objectives of sustainable development, whilst taking account of the needs of all interest groups, and ensuring value for money.”

I shall return to this below in the context of the Agency’s duty under article 5 of the proposed Order.

104. The Agency’s Draft Recreation Strategy is intended to set out the principles which will guide the Agency in fulfilling its general statutory conservation and recreation duties set out in sections 6 and 7 of the Environment Act 1995. In a sense this Strategy will guide the Agency’s approach to recreation on the rivers whether or not the Order is made. But the Agency submits that if the Order is made it will enhance its performance of its general recreation function and hence the implementation of the Strategy.
105. The Strategy indicates that the Agency’s principal aim in relation to recreation is to protect, improve and promote the water environment for recreational use. This means protecting existing uses and creating new opportunities (page 7). As with the Navigation Strategy, the general theme is that recreation needs to be encouraged so far as that is consistent with existing uses and priorities. Thus the Strategy indicates that the Agency intends (for example) to “contribute to the health, well-being and quality of life of those taking part in leisure activities without destroying the natural resources upon which leisure depends” and to “support the development of leisure in ways which contribute to, rather than detract from, the quality of our environment” (page 5). This integrated approach is, in the Agency’s submission, the most sustainable way to

manage rivers in England and Wales.

Vision for the rivers: the principal rivers

106. It was Professor Edmund Penning-Rowsell who said under cross-examination by Lord Moran:

“The rivers are a valuable resource, as they can be used for recreation of many kinds. They should be available for use where damage is not excessive. We should be seeking to maximise enjoyment.”

If the Order is made, the Agency will be charged with a series of general duties to promote navigation on the principal rivers pursuant to article 5 of the Order. Originally article 5 as applied for required the Agency to comply with these duties so far as may be consistent with its functions under any other enactment. The Agency gave further consideration to the drafting of the article, and the consolidated draft at EA/A30 deletes this requirement, and includes a new article 2A. This requires the Agency in exercising its functions under the Order to have regard to its functions under any other enactment and to endeavour to achieve what it considers to be an appropriate balance between those functions and the functions under the Order.

107. This approach is consistent with the themes of the Draft Strategies described above. They emphasise that the Agency should always bear in mind the impacts which various river activities have upon each other and upon the environment. The Order would therefore require the Agency in deciding how to promote navigation and recreation to have regard to its other statutory functions, in relation to (say) conservation, fisheries, pollution, water resources, flood defence and land drainage. Thus the Agency will always be required to balance the benefits of action to promote navigation and recreation against any disbenefits to its other statutory responsibilities.
108. A number of Agency witnesses has given evidence on what is meant in this context by the “promotion of navigation”. All recognised that the exercise of the duty must take

into account the rivers' importance for conservation and the importance of existing uses, be they fishing, canoeing, rafting, rowing or pleasure boating. Paul Hilder made the point that promotion of navigation need not necessarily conflict with other non-navigational uses. It does not necessarily involve large scale works or substantial changes to the character of rivers, but could include such matters as the provision of access points or information. This will benefit all users (P2(a), page 35).

109. Craig McGarvey pointed out that the rivers are a natural environment best suited to quiet enjoyment, and that this is the kind of activity that the Agency will seek to promote. Promotion would include the encouragement of best practice through codes of behaviour. Mr McGarvey agreed with Mr Hilder that the provision of canoe launch sites, interpretation boards and calendars of events would be included (P3(a), page 29). Finally, Ian Walker pointed out that navigation could be promoted without any works being carried out - for example by making information more readily available. Any works which the Agency carries out as a result of the Order will undoubtedly be small scale - for example better and less environmentally damaging boat and canoe-launching sites (P6(a), pages 23-24).

Vision for the rivers: the upper rivers and tributaries

110. This Inquiry has heard evidence from a number of witnesses concerning the upper rivers and tributaries. The Agency has made it clear that it recognises the special status of these stretches, where rights of navigation are disputed, but where navigation nevertheless takes place, together with angling. (See the evidence of Paul Hilder, P3(a), pages 23-24 and the evidence of Ian Walker, P6(a), pages 19-20). As Robert Owen outlines, this explains the different approach taken by the Order to management of the upper rivers (see P7(a), pages 24-25), so that the substantive provisions which apply are articles 3 (Wye Navigation Advisory Committee), 4 (Wye Navigation Plan), 26 (byelaws) and 32 (repeal of enactments).
111. The special status of the upper rivers and tributaries means that the Agency's vision for these rivers differs from that for the principal rivers. The Draft Navigation

Strategy described above will not apply because this only applies to those rivers for which the Agency has specific navigation responsibilities, and so it would not apply to the upper rivers and tributaries even if the Order was made. The Draft Recreation Strategy will nevertheless be relevant, as the duty in section 6 of the Environment Act 1995 extends to these stretches. The article 5 duty, however, will not apply to the upper rivers and tributaries.

112. A positive vision for the upper rivers and tributaries was outlined in evidence by Paul Hilder and Ian Walker. Mr Hilder said that the Agency wished to “[manage] recreational use of the upper rivers and tributaries in a way which strikes an appropriate balance between users and ensures sustainable development is achieved” (P3(a), page 24). He stated that the byelaws in paragraph 1 of Schedule 25 as extended and modified by article 26 of the Order will “enable [the Agency] to balance the demands of recreational users against the requirement to protect the environment when the need arises...These byelaws will also be available to the Agency to enable it to promote quiet enjoyment of the upper rivers and tributaries.” (page 45). Ian Walker indicated that in his view “[t]he sole reason for any byelaws on those stretches will be to ensure that the practice and development of boating on them is carried forward in a sustainable manner.” (EA/P6(a), page 20).

Management of future increases in navigation and recreation

113. I have already described the evidence for the proposition that in the future the recreational use of the rivers will increase and diversify. This provides a key argument for the Order, which is that such an increase will increase both conflict between navigation and recreation and the environment, and inter-user conflict, and that therefore it is essential that a modern management framework is put in place now. The positive aspect to this argument, which I now want to develop, is that the likely growth and diversification in recreational demand provides an opportunity for the Agency to manage the principal rivers so that their recreational potential is realised without their other uses and priorities being compromised.

114. Paul Hilder summed up the position very neatly:

“The provisions of the Wye Navigation Order have been drafted to put in place a regime that will address current problems and accommodate sustainable changes in use but protect against unsustainable or sudden or unconsidered changes.”
(EA/P2(a), page 22).

115. This was echoed by Craig McGarvey, who said that future demands on the rivers could in all probability be accommodated. The Order will allow the Agency to reduce conflicts but also to plan and provide for any future recreational demands in a manner which protects and ideally enhances the environmental resource, which, Mr McGarvey pointed out, is so pivotal to the recreational experience. The aim is increase the quality of recreational experiences on the Wye and its tributaries (P3(a), page 7).

116. These sentiments were reflected in some of the Agency witnesses' oral evidence to the Inquiry. For example, Craig McGarvey said:

“I believe in the future recreational demand will increase; this should not be stopped but rather we should accept it and work with it....we need to plan for increased participation. The Agency wants to take the lead role as a champion of navigation, to improve facilities for the use and enjoyment of the rivers.”

117. Of course the idea of managing the increase and diversification of recreational demand means that any increases in existing uses or any new uses would only be tolerated to the extent that they did not conflict with existing uses or with the environment - the Agency would not be well-disposed to a sudden increase in demand for the use of jetskis on the rivers, for example. This caveat is particularly appropriate to the upper rivers and tributaries, where the Agency's awareness of the environmental sensitivity of the rivers and the disputed right of navigation will require it to be especially careful to ensure that any extra navigational and recreational use really is in the best interests of the rivers.

A5: THE ADEQUACY OF CURRENT MANAGEMENT ARRANGEMENTS

118. The Statement of Matters expressly raises the question of whether current management arrangements for regulating navigation and use on the rivers Wye and Lugg and their tributaries are adequate. There is a variety of what may loosely be called "current management arrangements", none of which is particularly effective. The Agency's view is that these are not an adequate means of tackling the problems identified above.

Local authority byelaws

119. The byelaw-making powers of local authorities are discussed in Background Paper EA/E3 and the addendum thereto. Some byelaws have in the past been made by local authorities under section 249 of the Local Government Act 1933 and section 172 of the Public Health Act 1875. These are listed in paragraph 3.3 of EA/E3 and can be found at EA/B68-71, B73-74. These byelaws are extremely general in scope and apart from the byelaws made by Hereford City Council in 1950 they only really prevent negligent or reckless navigation - in other words they prescribe minimum standards. The 1950 byelaws made by Hereford City Council only apply to pleasure boats and vessels let for hire. They are also not enforced: Mr Gardiner (the main exponent of the argument that local authority byelaws are an adequate means of regulation) knew of only two prosecutions under them, both dating from the 1960s (see OS7, document 6A, and Mr. Gardiner's evidence during cross-examination). This does not amount to an adequate system of regulation.
120. Relevant local authority byelaw-making powers are currently contained in section 185 of the Local Government, Planning and Land Act 1980, which confers a power on certain local authorities to make byelaws in relation to pleasure boats (the successor to the 1875 provision), and section 235 of the Local Government Act 1972, which confers a general power on local authorities to make byelaws for the good rule and government of their area - the successor to the 1933 Act provision (EA/E3, paragraphs

3.1-3.2). For reasons which are set out in detail in the addendum to EA/E3, the Agency does not believe that these powers could today be exercised by the local authorities. This means that the existing byelaws could not be re-made. To argue that local authority byelaws are an adequate means of regulating navigation and use on the rivers would therefore involve arguing that the existing *byelaws* provide an adequate means of regulation now (which for the reasons given above is not the case), and will not need to be amended or added to, whatever the future brings (which would be highly implausible in any event).

121. Local authorities also have power to license pleasure boats under section 94 of the Public Health Acts Amendment Act 1907. The limitations on these powers are discussed in more detail below. Here I simply note that they apply to a very limited class of vessels.
122. The only local authority to have a more specific byelaw-making power in relation to navigation on the Wye is Hereford City Council, under s.20 of the Hereford City Council Act 1985. This byelaw-making power applies only to the Wye in Hereford, and itself envisages that additional byelaws might be made by what was then the water authority (section 20(7)). It has never been exercised. The Agency on the other hand considers that it is necessary to vest powers to manage navigation on the whole of the principal rivers in a single body; for that reason it proposes to repeal section 20.
123. Background Paper EA/E18, the Regulatory Appraisal prepared by the Agency in compliance with the previous government's deregulation initiative, sets out some of the disadvantages of an attempt to regulate navigation and use on the rivers through local authority byelaws. It would run the risk of there being different management regimes in force on different stretches of the rivers. Local authorities do not have the Agency's wide range of water-related functions, and would not be able to manage the catchment in an integrated way. The costs of achieving co-ordination between the different local authorities, the Agency and other interested parties could be high (EA/E18 Para.18).

The Collision Regulations

124. Mr Gardiner argues, at OS7 paragraphs 10-12, that the Collision Regulations apply to the river Wye and are an adequate means of regulation. Mr Stockinger makes a similar point in paragraphs 121-127 of his revised closing submissions, "dated" 19th June but received by the Agency on 7th July. The Agency does not accept that the Collision Regulations apply to the Wye, despite the Court Order obtained by Mr. Stockinger (EA/A49 pp.34-35) : see EA/E14. Even if they do apply, they clearly do not provide a comprehensive, or even adequate management regime. They deal only with one aspect of navigation management, namely traffic regulation, and themselves envisage that special rules may be made for inland waterways by an appropriate authority which would include the Agency, if the Order was made (see rule 1(b), EA/B62 page 14).

Management by consensus

125. More recently attempts have been made to manage the rivers by consensus. The details are given in Background Paper EA/E7, written by Mr Len Taylor, to which you are respectfully referred. The main features of this voluntary approach are the creation of the Wye Management Advisory Group (Wye MAG), a group composed mainly of statutory bodies, and of the Wye Forum, a group of river users which reports to Wye MAG (see the evidence of Len Taylor, EA/P1(a), paragraphs 4.7-4.9, 4.14-4.17). It also involved the Agency in the publication of information and active support for access agreements on the upper rivers (see the evidence of Paul Hilder EA/P2(a) page 31).
126. The Agency's witnesses have given evidence as to why management by consensus cannot work.
- Mr Hilder said that in effect there is currently no direct management of the navigational and recreational use of the rivers. Voluntary regulation depends on the goodwill of those involved. There is no guarantee that new users will wish to

co-operate, and a voluntary regime not underpinned by statutory powers would find it difficult to address sudden or dramatic developments. (EA/P2(a) paragraphs 13.12-13.14). I alluded to this view above in the context of my argument that there is nothing to prevent past conflicts involving, say, Jetskis or hovercraft from being repeated.

- Mr McGarvey referred to the need for an appropriate management framework to be put in place before increasing recreational demands on the rivers become unsustainable (EA/P3(a) paras. 5.12-5.13). This view was supported by Mr. Fowles, who in answering the Inspector's question as to the need for the Order emphasised the difficulties of achieving consensus between competing interest groups as pressures on the rivers grow. Mr Westlake, giving evidence for the British Canoe Union, also regarded growing pressure on the rivers as the reason why, in the long term, management by consensus could not work.
- Professor Penning-Rowell, basing his argument on an article by Hardin (EA/C57), discussed the theoretical reasons why voluntary regulation would not work. He characterised the Wye as an open access common property resource, where the "commoners" (existing users) cannot prohibit other users from exploiting the resource. It is not in the interest of any individual canoeist, or rafter, or angler to diminish their use of the rivers, even though degradation of the resource may be the result. An open access common property resource without management is unsustainable, as there is no incentive for individual users to submit to self-regulation when no-one else has that obligation. (EA/P5(a), paras. 8.1-8.7). The Agency submits that this argument, which has not been directly addressed by objectors, is unanswerable.

The evidence of objectors

127. Most objectors who dispute the need for the Order do not seriously argue that local authority byelaws, the Collision Regulations and voluntary agreement are adequate to deal with the problems on the river. Mr Gardiner (OS7, para 12) adds a fourth reason

why the current position is adequate – the powers held by the 1809 Act Company. The Agency's views on the 1809 Act Company and those who claim to speak for it have been set out at length elsewhere. Here we merely note that Mr Gardiner sees a navigation authority as part of an appropriate management regime for the rivers. He accepted this point in cross-examination, admitting that there was a need for a navigation authority but alleging that the Agency would be an "anti-navigation authority". The other purported trustees clearly believe that there should be a navigation authority for the rivers, but contend that it should be the 1809 Act Company (Mr Stockinger's closing submissions, revised version, para.178). And Mr Willis, faced during cross-examination with the resolution of Hereford City Council's Policy and Finance committee of 9th September 1996 resolving to consider the possibility of applying for a Transport and Works Act Order, (EA/X6 p.49) accepted that there was a need to manage navigation. The real dispute between the parties at the inquiry is not *whether* something needs to be done, but *what* should be done, and *who* is the most appropriate body to do it.

The upper rivers and tributaries

128. On the upper rivers, the current approach to managing by consensus takes the rather more specific form of access agreements between landowners and canoeists. The main agreement is at EA/C55. The reasons why access agreements cannot provide an adequate means of regulation are dealt with in the evidence of Mr. Hilder (EA/P2(a) paras. 10.10-10.12). Past agreements have collapsed, and the current agreement may do so in the future. In any event, it covers only part of the Upper Wye, and one of the most intensively used stretches of the river, from Glasbury to Hay-on-Wye, is not covered. Mr. Hilder concludes "further regulation is needed for managing recreational use of the upper rivers and tributaries in a way which strikes an appropriate balance between uses and ensures sustainable development is achieved." (EA/P2(a) para. 10.12)

B: WHY US?

Introduction

1. So far I have been concerned to set out those arguments which in the Agency's submission establish that there should be a modern navigation authority for the rivers Wye and Lugg. In this section, I want to review the various arguments which, the Agency submits, establish that it is the only suitable body to manage navigation and recreation on the rivers Wye and Lugg. I propose to do this in two ways: first, by setting out the positive arguments for this proposition, and second by dealing with the various objections which have been advanced before the Inquiry to show that the Agency is not a fit and proper body to be the navigation authority. In doing so, I aim to show that all of these latter arguments are without foundation.

Arguments that the Agency is a suitable body to be the navigation authority for the rivers Wye and Lugg

2. There is a number of arguments which have been advanced by Agency witnesses and others to support the contention that the Agency is a suitable body to be the navigation authority for the rivers Wye and Lugg. First, it is submitted that the general statutory duties which apply to the Agency render it suitable to be the navigation authority for the rivers. Second, the Agency submits that only the Agency can deliver integrated catchment management on the rivers Wye and Lugg. Third, the Agency argues that it has developed expertise both as a navigation authority elsewhere, and in exercising its general recreation function. Fourth, it is submitted that the Agency is qualified as a public body to be the navigation authority for the rivers. Finally, the Agency submits that there is no other suitable candidate to become navigation authority for the rivers.

The Agency's existing statutory duties

3. There are four general duties (or sets of duties) which govern the activities of the Agency and which make it particularly appropriate to be the navigation authority for the rivers. These are the Agency's sustainable development duty, the conservation and recreation duties and the cost benefit duty.
4. The first duty is the Agency's principal aim conferred by section 4(1) and (3) of the Environment Act 1995 (EA/B12) in 'discharging its functions so to protect or enhance the environment as to make the contribution which the ministers consider it should make to achieving the aim of sustainable development. Craig McGarvey described the usual definition of sustainable development - development which meets the needs of the present without compromising the ability of future generations to meet their own needs. He also described the guidance which the government has issued under section 4 (EA/P3(a), pages 9-10). These matters are also covered by Robert Owen in his proof (EA/P7(a), pages 29-30), and in Background Papers EA/E9 (pages 6-8), and EA/E21. Those Papers express the view (shared by Mr McGarvey) that the Order itself represents a contribution to sustainable development.
5. There is a further point to be made, however, which is that the sustainable development duty will apply to the Agency's functions under the Order (article 2(3)), so that as navigation authority the Agency will be required always to scrutinise its actions and ensure they are contributing to sustainable development. This meets the requirement posed by Professor Penning-RowSELL that the navigation authority for the rivers "should be an organisation whose mission is to protect the environment within the framework of sustainable development" (EA/P5(a), page 36).
6. The second set of duties are the general conservation duties set out in sections 6 and 7 of the 1995 Act, and they too are described in Background Paper EA/E9, pages 9-12. They are also described by Robert Owen on pages 30-31 of his proof

(EA/P7(a)). Sections 6 and 7 essentially provide that the conservation and enhancement of natural beauty and amenity and the conservation of flora and fauna are duties of the Agency (the difference being that section 6(1) makes this a general stand-alone duty of the Agency, whereas section 7(1)(a) operates to govern the Agency in the exercise of its other functions). Again the argument is twofold - the Order will enable the Agency better to fulfil its conservation duty in section 6(1), but at the same time the duties of section 7 will apply to the exercise by the Agency of the powers of the Order. This is important, because of the rivers' importance to conservation, evidenced by their SSSI designations, and the landscape quality of the river Wye, reflected in its AONB designation. As Professor Penning-Rowsell put it:

"In my view the main imperative when tackling the current problems on the Wye should be the protection of the environment that is unique to the Wye and managing the recreation that is based on that resource. Therefore the organisation charged with managing this activity should have environmental protection as its prime focus, rather than, say, economic development. If environmental protection is to the fore, then sustainable development (as defined above) can be the focus of its activities." (EA/P5(a), page 36).

7. The third set of duties which, the Agency submits, qualifies it to be the navigation authority for the rivers are the recreation duties contained in sections 6 and 7 of the 1995 Act. Again, section 6(1) is a stand-alone duty which requires the Agency to promote the use of inland and coastal waters for recreational purposes, whereas for example section 7(2), which requires the Agency to have regard to the desirability of preserving freedom of access to certain areas, applies to the exercise by the Agency of its other functions. These duties were described by Craig McGarvey (EA/P3(a), page 10) and Robert Owen (EA/P7(a), pages 30-31) and in Background Paper EA/E9, pages 9-11. The same point again applies - that the Order is being promoted to fulfil the section 6(1) duty, but also these duties of section 7 will apply to the exercise by the Agency of the powers under the Order. Again these duties are especially appropriate to the Wye, because as described by

Paul Hilder (EA/P2(a), pages 10-13) and Craig McGarvey (EA/P3(a), pages 4-5) the Wye is an important resource for a number of different recreational users, including fisherman, rowers, canoeists, rafters, pleasure boaters and walkers. The statutory duties provide a guarantee to such users that the powers of the Order will be exercised so that all of their interests are taken into account.

8. Finally, the cost benefit duty in section 39 of the 1995 Act (described by Craig McGarvey on page 12 of EA/P39(a) and Background Paper EA/E9 at page 9) will require the Agency to take into account the likely costs and benefits of the exercise or non-exercise of the powers of the Order.

Integrated catchment management

9. As Craig McGarvey emphasised in his proof (EA/P3(a), page 12), the concept of integrated catchment management has government approval. The Government Guidance on Sustainable Development (EA/D20) requires the Agency to take a holistic approach to the protection and enhancement of the environment (page 3). The Environment Agency Management Statement (EA/D21) states that the Agency "should adopt across all its functions, an integrated approach to environmental protection and enhancement" (page 2).
10. The concept of integrated catchment management was described by Craig McGarvey, who said that it meant:

"...considering all problems, issues, uses and demands made on a catchment to identify any synergies or conflicts with other functions and duties of the Agency, and to identify actions to preserve or improve the catchment."
(EA/P3(a), page 12).
11. Roy Fowles, meanwhile, explained the link between the concept of integrated catchment management and that of sustainable development. He said that there is always the potential for the various uses of a catchment to conflict, and therefore it

is important to view each use in the context of its effects on other uses. Sometimes uses need to be managed in order to minimise such conflicts. If this does not happen:

“there is the possibility that there will be less scope for current uses to be maintained in the future. In other words, the absence of integrated catchment management is unsustainable, because it can result in future generations being unable to meet their own needs.”(EA/P4(a), page 6).

12. Both Craig McGarvey (EA/P3(a), page 27) and Roy Fowles (EA/P4(a), pages 7-12) describe in detail the mechanism by which the Agency achieves integrated catchment management, namely through the preparation of Catchment Management Plans and now Local Environment Agency Plans (LEAPs) which investigate various river uses, and the interactions between them, and propose actions by the Agency to resolve any problems which are identified.
13. It should be clear by now that the rivers Wye and Lugg are prime examples of rivers where different uses interact with each other. You have heard from a variety of different recreational users, and heard about the way in which navigation for example can interfere with conservation or with angling (or vice versa, in the case of fishing croys which obstruct navigation). A number of witnesses also made the connection between navigation and water resources, pointing out that navigation on the rivers depends on a certain river level being maintained, which in turn can be affected by climatic conditions, but also by abstractions - see for example the proofs of Charles Kenchington (OS34 (pages 2-3, 5), OS34A (page 1). Mr Kenchington's point was that the promotion of the Order is premature because the long term implications of abstraction/climate change have not been fully considered. In fact, as Len Taylor said in re-examination, if climate change occurs, the Agency is committed to considering the problem holistically. The Order will not prevent that, as it can only improve the ability of the Agency to consider all uses of the rivers.

14. Professor Penning-Rowell recognised the importance of holistic management of the rivers in his evidence, concluding:

“The authority responsible for tackling the problems discussed in this proof should have powers extending over the whole catchment so that the adverse effects of pressure on the resource can be tackled wherever they occur and not passed on downstream to an area managed by another organisation...water-based recreation on the Wye should be tackled by an authority looking at and responsible for water regulation for the whole catchment...”. (EA/P5(a), page 36).

15. The only authority which can manage the rivers in an integrated way is the Agency, because only the Agency already has a number of functions in relation to conservation, fisheries, water resources, flood defence and land drainage, and pollution control.

16. I would just like to pause to deal with one argument that has been advanced before this Inquiry. Mr Stockinger tried to argue before you that the mindset of the Agency would be that of an integrated catchment manager, rather than of a navigation authority. (See also, for example, Mr Stockinger’s written questions to Roy Fowles in EA/A36, question 4, which distinguishes a dedicated navigation authority from an integrated catchment manager). The response is that the Agency will be the navigation authority for the rivers if the Order is made (see Background Paper EA/E10, page 1-2). It will manage navigation on the rivers in conjunction with its other functions for the rivers, and vice versa - that is what integrated catchment management means, and, the Agency submits, this is the best way to manage navigation on the rivers.

17. The fact that there are around the country many navigation authorities other than the Agency (e.g. the British Waterways Board) does not, in the Agency’s submission, have any impact on the argument that the principles of integrated catchment management point towards the Agency having conferred on it the

additional powers and duties which, by this Order it seeks.

The Agency's navigation function expertise

18. The Agency is already the navigation authority for a number of other rivers, which it manages under local legislation containing many powers which are similar to the powers of the Order. These include the non-tidal Thames, the Upper Medway and a number of rivers in the Anglian Region. Background Paper EA/E8, and Appendix 2 to Craig McGarvey's proof (EA/P3(a)), provide more details on this, and Background Paper EA/E10 explains how the provisions of the Order are based on existing navigation legislation.
19. The point that I wish to re-emphasise is that the Agency has extensive experience of exercising just the sorts of powers which it is seeking for the rivers Wye and Lugg on the other waterways which it manages. In the Agency's submission, this too makes it a proper body to manage navigation and recreation on the rivers Wye and Lugg. Craig McGarvey gave evidence of this, focusing on the exercise by the Agency of its existing byelaw-making powers (EA/P3(a), pages 18-20), licensing and charging provisions (EA/P3(a), pages 20-22), and provisions for the production of navigation plans (EA/P3(a), pages 22-23). He also produced Table 1, in which he gave examples of those powers and byelaws most commonly used on the Agency's other navigations, and explained the way in which those powers and byelaws could be used to benefit navigation. This was a general theme, and Mr McGarvey was keen to emphasise that the Agency does not manage its other rivers in a draconian manner, or in a manner which is restrictive of navigation. The Agency generally seeks to manage by consensus and the prosecution for contravention of byelaws (for example) is generally a means of last resort (page 19) - indeed the Agency will not generally promote byelaws unless there is a need to do so to deal with a particular problem (page 20).
20. The powers of the Agency are generally used to benefit navigation, and even provisions such as licensing which would appear to be restrictive of navigation are

in fact beneficial - income from licence charges, for example, is used for services which benefit navigators (pages 19, 21). Mr McGarvey explained in detail how the Agency operates its licensing schemes on its other rivers (page 21). He also outlined the Agency's plans to introduce a single, harmonised licensing scheme for all of the inland waterways controlled by the Agency (pages 21-22). He indicated that if the Agency decided to introduce a licensing scheme for the rivers, it would either utilise a scheme currently operated by another region, or, if the harmonised scheme had been introduced, this could be utilised (page 22).

21. Mr McGarvey further explained the proposals for harmonisation under cross-examination by Mr Jones, when he said that the harmonisation will in all probability be of the schemes themselves, not of the charges levied under those schemes. Charges will relate to the river in question and will be used to benefit navigation on that river. They will vary between rivers, depending on the services provided. The scheme will allow vessels to navigate on all of the rivers for which the Agency is navigation authority, perhaps subject to the payment of top-up charges.
22. Finally Mr McGarvey explained that any scheme introduced by the Agency would include a block licence for members of the BCU, along the lines of the schemes operated in the Anglian and Southern Regions (page 22). This is just one example of the way in which river users could benefit if the rivers were managed by the Agency, because the Agency could make use of experience gained in managing other rivers, and of arrangements which are already in place.
23. I referred above to the concept of integrated catchment management, and explained that where the Agency is the navigation authority, it is able to manage navigation so that it is integrated with its other functions. Craig McGarvey explained how this works in practice on page 14 of his proof, summarising the position as follows:

“On all of these rivers managing the navigation is intimately related with

water level management for flood defence, water resources, water quality and to a lesser extent fisheries and conservation purposes.”

24. The Agency wishes to use the experience gained on its other rivers to manage the uses of the rivers Wye and Lugg in a fully integrated way, but it is currently prevented from doing so by the lack of powers to manage navigation.

The Agency's recreation function expertise

25. As well as possessing specific (i.e. local) statutory functions in relation to the rivers described above, the Agency also has a general duty to promote recreation on all rivers in England and Wales (s.6 of the 1995 Act). Again the Agency submits that the expertise gained in the exercise of this function makes it an appropriate body to be the navigation authority for the principal rivers. Craig McGarvey gave various examples:

- the Agency's expertise in site management (EA/P3 (a), pages 24-25).
- the publication of promotional and advisory literature on watersports (page 25) - which in the Agency's submission evidences its knowledge and understanding of sports like canoeing.
- the Agency's experience of, and credibility in bringing together, different land-owning and canoeing interests, e.g. in the National Angling and Canoeing Liaison Group (page 25-26).
- the experience of facilitating access agreements on the Upper Wye and the river Usk (page 26).
- the Agency's technical expertise (page 26).

26. Mr McGarvey summed up the position by saying “our specialisms will I believe be extremely valuable to the river Wye and its tributaries” (page 26). All of this expertise will be available to the Agency in its management of the rivers, and therefore it is misleading for Mr Willis to say, as he does in Hereford City Council's Closing Submissions: “The experience of the Welsh Region in

operating navigations is very limited compared with the experience of the Environment Agency as a whole." (page 35).

The Agency as a public body

27. It was Professor Penning-Rowse who made the point that, in addition to its ability to deliver integrated catchment management and sustainable development, it was the Agency's status as a public body that qualified it to be the navigation authority for the rivers Wye and Lugg. He put it thus:

"..this is a common property resource, with open access, and the Wye constitutes a free navigation. This type of public property resource should not be managed by a private organisation for private profit, since this will lead, among other effects, to certain groups being disadvantaged more than is desirable and possibly denied their legal rights...." (EA/P5(a), page 36).

No other suitable candidate

28. If the Secretaries of State accept, as the Agency submit they should, that there should be a new navigation authority for the rivers with modern powers, the next question must be: who should be the navigation authority? It is plain that the Agency is the only candidate, the others being unwilling or unable to take on the job. Of course, the Agency accepts that by itself, this argument is not especially attractive; but taken together with the positive arguments outlined above, it makes the proposition that the Agency should have the necessary powers conferred upon it unassailable.
29. Some objectors have suggested that a consortium of local authorities would be an appropriate body to be the navigation authority for the rivers. It is clear that Hereford City Council did try to orchestrate an application by the local authorities for the river for a Transport and Works Order to become the navigation authority.

Document EA/X6 contains an extract from the Hereford City Council Policy and Finance Committee minutes of 9th September 1996, which contains a resolution to this effect. But when this was put to Charles Willis in cross examination, he said that there was not sufficient enthusiasm for any action on the part of other Councils, largely because of lack of funds. By the end of 1996 this was not a practical proposition, he said. Nor could Hereford City Council "go it alone" and become the navigation authority for the whole of the Wye. He did suggest that the position might be different once the unitary authority for Herefordshire comes into existence, but of course at this stage this is purely hypothetical.

30. The only other candidates for navigation authority are Mr Stockinger and his followers. I have dealt in detail elsewhere with the claims of these people. It suffices here merely to note the arguments against them, which are two-fold. First, they have not succeeded in reviving the 1809 Act Company - this is clear from the litigation undertaken by the NRA against Mr Stockinger and others outlined in Background Paper EA/E1, pages 15-18 - and nor are they "navigation trustees", see Background Paper EA/E22. They are unable to rely on the old Acts to confer navigation functions on them, and so they are not the navigation authority. Second, even if the Agency is wrong and they are the navigation authority for the rivers, they are wholly inappropriate to continue to be so. They lack modern functions, expertise and funding, and their conduct before (and blatant disrespect of) this Inquiry demonstrates their unfitness. The old Acts should be repealed, whether or not they are the navigation authority, either to ensure that they cease to be the navigation authority, or to ensure that they are prevented from arguing at some future date that they are the navigation authority. You will recall Mr Owen's evidence to you as to the continued possibility of reviving the 1809 Act Company.

Arguments that the Agency is not a suitable body to be the navigation authority for the rivers Wye and Lugg

31. You have heard a number of arguments to the effect that the Agency is not a

suitable body to be the navigation authority for the rivers Wye and Lugg. In this section I aim to refer to them all for the purpose of refuting them. First, some objectors argued that the Agency is an unaccountable body. Second, it was alleged that the Agency is biased against navigation, or, on the other hand against fishermen and fishery owners. Third, some objectors have claimed that the Department of the Environment Review of Navigation Functions concluded that the Agency was not a suitable navigation authority. Fourth, a number of objectors contended that the Agency's record in managing the Wye is suspect. Finally, I shall be referring to what might be called the allegations of "sleaze" which both Mr Barton and Mr Stockinger thought fit to make against the Agency in the course of the Inquiry.

Allegations that the Agency is unaccountable

32. The allegation that the Agency is unaccountable was made principally by Mr Wilcox for South Herefordshire District Council and others, and also by Mr Willis for Hereford City Council. In their closing submissions, South Herefordshire District Council argued that the Agency should be contrasted with local authorities, which are accountable because they are controlled by people who can be chosen by, and removed by, the public. It was submitted that, by contrast, all the Agency is required to do is to consult, although it was conceded that an example of indirect accountability had been given (see pages 3-4 of the closing submission). Mr Willis' accusations of unaccountability were principally made in the course of his cross examination of Agency witnesses.
33. In the Agency's submission, the Councils' arguments are based on a number of false premises. First, the Councils assume that only public bodies that are directly elected are properly accountable to the public which they serve. The second false premise is that the only way in which the Agency can be called to account is through consultation. The final false premise is that there is a difference between accountability and consultation.

34. The Councils are wrong to assert that "...the Environment Agency had given no thought to the issue of accountability" before the Inquiry began (page 4). There is much evidence on this issue in the proofs which were prepared in advance of the Inquiry. In particular, I refer you to Len Taylor's proof (EA/P1(a)), which contains at Appendix A an explanation of the regional committee structure of the Agency, and at pages 27-31 an explanation of the thinking behind the drafting of article 4, which provides for the Wye Navigation Plan.; the proof of Craig McGarvey, which explains that the Agency is an open and consultative organisation (EA/P3(a), page 23); and the proof of Ian Walker which again refers to the Wye Navigation Advisory Committee (EA/P6(a), pages 17-18, 22-23). This was supplemented by evidence to the Inquiry, where, for example Len Taylor said under cross-examination by Timothy Jones that the Agency was accountable to Parliament and to its various committees. Agency officers are available to the public and the Agency has many contacts with local groups, he said. Roy Fowles, again under cross-examination by Timothy Jones, said that he was accountable to the public and to customers, and was responsive to politicians.

35. Robert Owen said under cross-examination by Mr Willis that a body is accountable if it can be called to account and required to explain and justify its activities. He also said that accountability does not necessarily require that the body in question should be turned out of office if it does something wrong - that is one aspect of accountability, but there are others, he said. He gave some examples in his proof (EA/P7(a), pages 28-29), and introduced Background Paper EA/E10, which at pages 4-5 explains in detail how the Agency is accountable. These can be summarised as follows:

- individual members of the Agency are accountable to Ministers.
- the Agency is accountable to Parliament (Roy Fowles explained in re-examination the chain of command by which decisions taken by him could be overruled, ultimately by Parliament).
- the Agency can be called to account by the courts.
- the Agency is required to publish information about its activities.

- the Agency is required to consult with various statutory committees.
 - the Order will require the Agency to set up Wye Advisory Committee.
36. There are other mechanisms. For example, the Order will by article 4 require the Agency to prepare a Wye Navigation Plan, and as part of that process to consult with the Wye Navigation Advisory Committee and other interested parties. If byelaws are made under Article 14, the process of their confirmation will represent an important aspect of accountability. Furthermore, Mr Owen made the point under cross-examination by Mr Willis that the Agency is subject to supervision by the Parliamentary Commissioner for Administration, the Ombudsman. Mr Owen also referred under cross-examination to the power of the Secretary of State for the Environment, Transport and the Regions and the Minister of Agriculture, Fisheries and Food to give directions to the Agency under section 40 of the Environment Act 1995. Finally, the above list is concerned with formal consultation mechanisms; as I have already indicated, both Mr Taylor and Mr Fowles gave evidence of more informal channels of communication between the Agency and river users and other interested parties.
37. Therefore, in addition to the duty to consult its various advisory committees (which will be supplemented by the Wye Navigation Advisory Committee if the Order is made) the Agency is accountable to Ministers, to Parliament, to the courts and to the ombudsman. Members of the public *can* make a difference to the decisions of the Agency. They might choose to complain to the Agency directly. If they did not receive a satisfactory response, they could write to their M.P. and ask for the matter to be taken up with the Secretary of State, or for it to be referred to the Ombudsman. They could even (and do) bring an action in the courts.
38. The Agency also submits that it is wrong to distinguish between accountability and consultation with committees. Consultation is an important part of accountability because in consulting the Agency will be required to justify its policies and plans and to listen to representations made by those committees. Furthermore, the Agency does not simply ignore representations made to it.

Speaking of the proposed Wye Navigation Advisory Committee under cross-examination by Mr Jones, Mr Fowles said "I would be in a poor position if I disregarded advice from the Committee". He also expressed the view that it would be strange for the Agency to disregard the advice of the committees set up to help it in the exercise of its functions.

39. In fact, if the Agency ignores representations made to it, the mechanisms I have described are available to members of the public, and in particular the Agency will be exposed to judicial review of its decisions by the courts if those decisions fail to take account of relevant considerations. Robert Owen also pointed out in re-examination that a committee which is aggrieved by a decision of the Agency can use some of the other available mechanisms - it could seek to persuade the relevant manager to change his mind, and if not it could apply to the Minister or the Secretary of State, who could give a direction under section 40 of the 1995 Act. Committees are also a means by which individual members of the public can make their views known to the Agency - as Robert Owen said in re-examination, if the Order is made, and an individual wishes to raise a concern with the Agency, he can contact a Committee representative and ask for it to be raised.
40. The Agency would make two final points under this head. First, Mr Owen pointed out under cross-examination by both Mr Willis and Mr Jones that the Environment Act 1995 (which generally had cross-party support) contains those safeguards which Parliament considers necessary to ensure that the Agency is accountable. It can be inferred from this that Parliament considers that the Agency is sufficiently accountable.
41. The second point is that it is very ironic that Mr Willis has accused the Agency of being unaccountable in the light of the secrecy that surrounds the activities of "the River Group". I just want to pause to remind the Inquiry of the sequence of events.
42. The request for minutes of the "special River Wye Working Group" was made by

a letter from the Herefordshire Nature Trust to Mr Willis dated 18th April 1997 (EA/X6, page 53). The letter indicated that Miss Lickorish of the Trust has been denied access to these minutes, and also (incidentally) to the letter by which the Mayor of Hereford has allegedly appointed "the navigation trustees". By letter of 29th April 1997 (EA/X6, page 54), Mr Willis replied that the notes of the rivers group were exempt. Under cross examination Mr Willis undertook to provide such extracts from those notes which were not exempt if the request was renewed, and also undertook to provide the Agency with the Council minute setting up the River Group. The request was accordingly renewed by letter of 23rd May 1997 from the Trust (EA/A39-1) In his reply dated 29th May 1997 Mr Willis provided 3 short extracts of notes, as well a Council minute authorising the River Group to approve the Council's objection to the Order (EA/A39-2-6). This letter was copied to Dyson Bell Martin.

43. On 2nd June 1997, Dyson Bell Martin wrote to Mr Willis asking for confirmation that these were the only notes of the River Group that were not exempt, and for copies of the Council minute setting up the River Group (A39-10-11). After a reminder dated 16th June 1997 was sent by Dyson Bell Martin (A39-28), Mr Willis replied by letter of 18th June 1997 enclosing that minute, but did not refer to the notes of the River Group (A39-37-38).
44. The final chapter in this rather mysterious story concerns the answers provided by Mr Willis to the Inspector's written questions (EA/Q5). In reply to a question about when the River Group was set up, he attached the relevant Council minute and answered the question on the purpose of its creation by reference to that document and to the minute authorising the Group to approve the Council's objection to the Order. He confirmed that the River Group was still in existence, but in response to questions about its powers and terms of reference and its reported activities and recommendations, he merely referred again to its approval of the Council's objections. He did also indicate that the Group had been concerned in litigation concerning the ownership of the river bed. He admitted himself that he appeared to be "coy".

45. The Agency's submission is that Mr Willis has in fact been cagey in the extreme about the activities of the River Group (and, incidentally, about his involvement in the recent litigation by the so-called "navigation trustees" and others). Limited details concerning the creation and purposes of the Group were eventually provided by him after repeated requests by Dyson Bell Martin. Access to the minutes of the Group's meetings were originally denied to the Herefordshire Nature Trust, and subsequently a few very brief extracts were provided. In the Agency's submission it is not open to Mr Willis to accuse the Agency of unaccountability when his own Council's actions in relation to the rivers have been carried out through a mysterious and highly secretive cabal.

Allegations that the Agency is biased

46. In the course of this Inquiry, the Agency has variously been accused of being biased against navigators and in favour of anglers and fishery owners (by Mr Gardiner, Mr Barton, Mr Willis, Mr Worsley and by the Welsh Amateur Rowing Association), of being biased against anglers and fishery owners and in favour of canoeists (by Lord Moran, amongst others), of being biased in favour of conservationists (by Mr Hunter, amongst others).
47. Plainly the Agency denies these allegations. It does so firstly because its various statutory duties as described above require it to be even-handed, and to promote fisheries and recreation and conservation. Article 2A of the Order (EA/A30) will reinforce this by requiring the Agency to balance its functions under the Order with its other functions. Secondly, as many Agency witnesses have indicated, this Order is being promoted so that all of the different interests who make use of the rivers may benefit. Both Paul Hilder (EA/P2(a), pages 34 to 47) and Roy Fowles (EA/P4(a), pages 13-15) in their review of the provisions of the Order point out provisions which could be used to advance the interests and concerns of, variously, conservationists, navigators and fishermen and fishery owners.

48. Thirdly, these allegations have been denied by the very groups that the Agency is supposed to favour. For example, Major General Hopkinson told the Inquiry that the fishery lobby had no "special key to the Agency's door" - in fact "we spend most of our time fighting the Agency", he said. And, despite Lord Moran's assertions, it is hard to believe that (for example) the Hereford County Canoe Club would consider that the Agency had shown special favouritism towards its members. However, the most compelling reason for rejecting the argument that the Agency is biased is, in the Agency's submission, the fact that none of the allegations of bias is backed up by any kind of evidence at all. At base, they simply reflect the fact that many objectors have a different view about the way the rivers should be managed. This in itself points to the need for the Order!
49. This becomes clear if we look more closely at the objectors' reasons for saying the Agency was biased. First, there are those objectors who say that the Agency has ignored or condoned obstructions to navigation in the river - for example Mr Gardiner (OS7, page 5) and the Welsh Amateur Rowing Association (OS54)). It should first of all be noted that both Mr Barton and Mr Gardiner undertook in the course of cross examination to provide details of the location of these obstructions. Dyson Bell Martin wrote to Mr Gardiner (A39-7-8) and to Mr Barton (A39-9) on 30th May 1997 to request this information. Mr Barton replied on 3rd June 1997 (also in EA/A39-12) that he was in the course of preparing a map. This has not been forthcoming, and nor has a response from Mr Gardiner. The Welsh Amateur Rowing Association were slightly more specific about obstructions in the river, but their allegation that the NRA had said that they had the power to remove these obstructions but failed to do so was not substantiated by Mr Hartland under cross-examination.
50. As I shall explain later on when I come to discuss some of the provisions of the Order, the Agency's position is that it does not always have the power to remove obstructions to navigation. One of the arguments for the Order is that it will contain in article 11 a power to remove obstructions which the Agency intends to exercise to the benefit of navigation on the rivers (see the evidence of Paul Hilder,

EA/P2(a), pages 37-38 and of Roy Fowles, EA/P4(a), pages 13-15).

51. Other objectors, notably Mr Grazebrook and Mr Worsley (OS44, page 5), have expressed the view that the Agency is somehow incapable of being a dedicated navigation authority because of the various statutory duties which apply to the Agency. Mr Grazebrook complained that the Agency will be concerned to protect conservation as well as to promote navigation (see OS15, page 5). The Agency makes no apology for this. It would be quite wrong for the Agency to promote navigation at all costs on rivers such as the principal rivers Wye and Lugg which are so environmentally sensitive and which have other important uses. As I have argued above, it is precisely because the Agency has duties in relation to such matters as conservation, and responsibility for managing other uses of the rivers, that it contends that it is an appropriate navigation authority for the rivers.
52. Some objectors claimed that the activities of the Agency prior to the application for the Order show bias on the part of the Agency. Thus Lord Moran says in his proof (OS19, pages 2-3) that the NRA's involvement in the Wye Challenge Report evidences its bias in favour of canoeing and against angling. The Report can be found in EA/C13. As Lord Moran concedes, a number of bodies other than the Agency was involved in its production. All that the Agency would wish to say at this stage is that in the Agency's submission the document is scrupulously fair to all interests.
53. Some objectors sought to argue that the Order itself evidences bias on the part of the Agency. This was the position of Lord Moran, who said in his proof (OS19, page 3) that the duty to promote navigation in article 5, and the saving of certain passages from repeal in article 32, both illustrate the Agency's bias towards canoeists. In the Agency's submission, Lord Moran's argument ignores many of the provisions of the Order which would benefit anglers and fishery owners. In addition, the article 5 duty is really only a local version of the recreation duty contained in section 6(1) of the Environment Act 1995. As I shall explain below it is intended to allow the Agency to promote the quiet enjoyment of the rivers.

The article 32 savings, meanwhile, are a reflection of the Agency's neutral stance concerning rights of navigation on the upper rivers and tributaries - see (for example) the evidence of Robert Owen (EA/P7(a), pages 24-25, 36-38). Robert Owen said in answer to cross-examination by Lord Moran that article 32 had been included to be fair to all. He said that the Agency had, for example, included article 27 to accommodate anglers and fishery owners. He added that article 32 was needed because it would be wrong to repeal provisions which might confer public rights. Those who sought their repeal (such as Lord Moran) betrayed their own vested interests in so doing.

54. In oral evidence to the Inquiry, Mr Willis said that he based his accusation of bias on such matters as the composition of the Wye Navigation Advisory Committee, which he claimed was dominated by fisheries interests. He also expresses this view on page 35 of Hereford City Council's Closing Submissions. In fact, as both Len Taylor (EA/P1(a), pages 27-31) and Ian Walker (EA/P6(a), pages 17-18, 22-23) explained in evidence, the membership of the committee has been designed to fully reflect navigation and recreation interests. I shall deal with the issue of composition of the Committee in more detail later on.
55. Mr Willis' more general accusation was that the Agency was not being even-handed in promoting an Order which was restrictive of navigation whilst doing nothing to control fishing (see, for example the Closing Submissions of Hereford City Council at page 36). Mr Taylor's response to this at the Inquiry was to argue that such provisions were already in place. Mr Hilder explained that the Order would regulate the impact of fishing as it affected navigation, for example through the power which required works in the river to be licensed. He also said that angling was already regulated by, for example, the Salmon and Freshwater Fisheries Act 1975. Mr McGarvey added that if the Order was made, paragraph 3 of Schedule 25 to the Water Resources Act 1991 could be used to make byelaws to manage angling. Mr Owen confirmed this in his evidence (P7(d)).
56. Wilder allegations were made by witnesses such as Mr Gardiner (OS7, page 4),

Mr Simpson (OS8, para. 1.7) and Mr Stockinger (OS47, para. 43) who claimed that the Agency was intending to "stifle" navigation on the rivers Wye and Lugg. In fact, as I shall go on to argue in a moment, the Order contains a host of provisions to allow the Agency to manage navigation on the rivers to the benefit of all users, both navigational and non-navigational.

57. In essence allegations such as these mask the real dispute between the Agency and the objectors. When objectors claim that the Agency is biased, what they really mean is that the Agency does not share their vision for the future of the rivers Wye and Lugg - because the Agency's vision for the future is of a balance between the rivers' different uses and priorities. Indeed, it is ironic that the Agency should be accused of bias by (some) navigation interests and (some) anglers and fishery owners. You may agree with the view of Len Taylor (expressed under cross-examination by Mr Willis), that this shows that the Agency has got things about right!

Allegation that the Government has concluded that the Agency is not a suitable body to manage navigation on the rivers.

58. Mr Barton (OS29, page 8), Mr Worsley (OS44, para. 12), Mr Stockinger (OS47, various paragraphs) and Mr Grazebrook (OS15, pages 5-6) all alleged that the Department of the Environment review of navigation functions has cast doubt on the Agency's fitness to become the navigation authority for the rivers, although no evidence was given to support this. This was, of course, a matter that was comprehensively dealt with in Craig McGarvey's evidence (EA/P3(a)) at pages 14-18. I need only repeat his conclusions:

"...nothing in the review or in the Government's comments give the Agency cause to think that any of our objectives in promoting the order are under threat, are unobtainable or inappropriate" (page 18).

Allegation that the Agency's record in managing the rivers is suspect

59. Mr Stockinger and his followers have attempted to cast doubt on the way in which the Agency has managed its other functions on the rivers Wye and Lugg to date. Allegations can be found in the evidence of Mr Barton (OS29, page 8), Mr Davies (OS30, OS30B, paras. 23-27), Mr Worsley (OS44, para. 14) and Mr Kidley (OS45, para. 15). The Agency's answer is that its record of management of the rivers Wye and Lugg is well-documented through the Catchment Management Plan Annual Review, published in February 1997 (EA/D30). Roy Fowles highlighted some of the successes reported in the Review in his evidence (EA/P4(a), pages 17-18), and concluded that "...the Agency has had successes across a range of functions, and developed valuable partnerships with other bodies..." (page 18). I would also remind the Inquiry that Mr Barton said that he would try to elaborate on his contention that "the NRA and the Agency have let standards drop where they have tried to compromise". His failure to do so suggests that he is unable to do so.

Allegations of "sleaze" made against the Agency

60. Mr Barton and Mr Stockinger have been responsible for most of the allegations of "sleaze" made against the Agency, which they no doubt consider help to establish that the Agency is not a fit body to become the navigation authority for the rivers. In fact they do nothing of the sort, as they are entirely without foundation.
61. These allegations have been made in the proofs of Mr Stockinger or Mr Barton, but also have been referred to in their oral evidence, or in letters to the Agency or the Inquiry. One allegation that has been persistently made is that contained in paragraph 28 of Mr Barton's proof (OS29): "...many objections to the Environment Agency's plans have been either bought off or frightened off..". This is also suggested by Mr Stockinger's letter to the Agency dated 21st May 1997 (EA/A36, App 2-39-39) to which Dyson Bell Martin replied on 30th May 1997 (EA/A36). In evidence before the Inquiry Mr Barton made a series of vague

and unsubstantiated claims to back up his argument, and the Inspector felt able to say that he could not attach any weight to these assertions without evidence. Mr Barton also made reference to a "nasty letter-writing campaign" by the Agency "to belittle the efforts of the Trustees and Shareholders of the Navigation." Again, Mr Barton was unable to provide any evidence to support this when questioned at the Inquiry. Of course, there is no truth whatsoever in these wild accusations, and the Agency's response to them has been to refute those which are detailed and ignore those which are not.

62. Another allegation made by Mr Barton was that the Agency and its advisers misled the Inquiry by pretending that it knew nothing of court orders obtained by the so-called "navigation trustees". By letter of 16th June 1997 (EA/A39-30), Mr Barton claimed that the Agency had in fact been told about these orders by certain officers in Hereford and Worcester County Council. Luckily the Agency was able to demonstrate swiftly that this claim was also without foundation - see the letter from Mr Yates of the Council to Dyson Bell Martin dated 19th June 1997 (EA/A39-39) which confirms that the Council did not inform the Agency or its representatives of any proceedings involving the so-called "Navigation Trustees". Nevertheless these allegations are repeated by implication in a letter personally addressed to myself and dated 19th June 1997 (EA/A39-42) which asks at what date the Agency or its advisers first knew of court orders relating to the "Navigation Trustees", and to consider my reply most carefully. Dyson Bell Martin replied to this letter by a letter of the same date (EA/A39-44).
63. Finally, and just before the adjournment of the Inquiry, Mr Barton sent a letter dated 19th June 1997 (EA/A39-43) to the Inspector which claimed that the Agency "...had been engaging in a campaign of threatening behaviour...". He admitted that he had little proof of this, but he believed that the Agency had successfully "gagged" the editor of the Hereford Times and other newspaper editors with "threats of legal proceedings". He went on to imply that the NRA had admitted it had provided allegedly false information which appeared in a report in *The Independent* newspaper. Again Dyson Bell Martin replied on that same day

(EA/A45-45). They did not feel it necessary to respond in detail to the ridiculous allegations of press gagging, and I do not feel it to be necessary to do so now, except to say that they *are* plainly ridiculous. They were also able to show that Mr Barton's second claim was inaccurate - in fact Bircham & Co. had written to Mr Stockinger in April 1996 to deny responsibility for the parts of the article which were allegedly inaccurate (that letter can be found at EA/A39-47).

64. Of course these pitifully desperate claims do not prove that the Agency is unfit to manage navigation on the rivers Wye and Lugg - rather they show that even if Mr Barton, Mr Stockinger and their friends were the "navigation trustees", or able to become the "navigation trustees", they would be totally unfit to be the navigation authority for the rivers. We hope that you will feel likewise.

C: WHY THIS?

Introduction

1. In opening the Agency's case at the beginning of this inquiry, I identified the Agency's objectives in promoting this Order as:-
 - (a) to help conserve the environment of the rivers;
 - (b) to reduce and if possible eliminate conflict between river users, and between some users and the environment; and
 - (c) to improve the quality of existing recreational use of the rivers and accommodate increased demand in a sustainable way.

(See EA/A28, p.3)

2. This section falls into two parts. Firstly, it shows how the Order will enable the Agency to achieve the objectives mentioned above (for convenience, these objectives are broken down in a slightly different way to that above, but the substantive points addressed are unchanged). Secondly, it deals with the main objections to the detail of the Order raised at the inquiry.

How the Order achieves the Agency's objectives

- (a) **To reduce and if possible eliminate conflict between river users.**
3. The Order contains a number of provisions which will help to achieve this objective. As I indicated above, it has become clear during the course of the inquiry that one of the main causes of tension between navigators and fishermen is the presence of numerous fishing croys in the river. Article 11 of the Order will give the Agency power to remove, or require the removal of, obstructions to navigation and Mr.

Barton, Mr. Gardiner and Mr. Simpson among others agreed that this provision would (if used) be beneficial. Article 20, which prohibits the construction, alteration, renewal or extension of any works in the river without a licence granted by the Agency under article 19, will ensure that it will not in future be possible to construct or modify croys without due regard being paid to the interests of navigation. The resolution of this problem will, the Agency submits, lead to a considerable reduction in the antagonism felt by navigators towards fishery owners (and anglers).

4. Other provisions in the Order which will lead to the reduction of conflict between users include the byelaw-making powers in articles 14 and 26, which will enable rules of behaviour to be established and encourage navigators to behave responsibly, and article 17, which allows directions to be given to the master of a vessel. The Wye Navigation Advisory Committee, which provides a forum for those engaging in, and affected by, navigation to discuss relevant issues will, the Agency believes, lead to greater understanding between the different interests in the long term.

There is a convenient summary of the way in which the Agency may use the powers of the Order to address inter-user conflict in Mr Fowles' proof of evidence (EA/P4(a), Table 1):

- (b) **To help conserve the environment of the rivers; to reduce and if possible eliminate the conflict between some river users and the environment.**

5. Provisions in the Order which assist in the fulfilment of this aim include:-

- (a) Article 8, paragraph (1)(b) of which provides that it shall be an offence to navigate or use the principal rivers in a manner liable to injure their bed or banks.
- (b) Article 14, which allows byelaws to be made, inter alia, for prohibiting the navigation or use of the principal rivers by vessels which exceed specified dimensions (which may be used to exclude inappropriate vessels from

environmentally sensitive areas : EA/P2(a) para. 14.11.2) (article 14(2)(c)) and for preventing the control of pollution (14(2)(f)).

(c) Article 16 (1)(c), which provides for the temporary closure of any part of the principal rivers to conserve their natural beauty, flora, fauna, and geological or physiographical features of special interest.

(d) The removal, for the upper rivers and tributaries, of the functional restriction on the purposes for which byelaws may be made under paragraph 1 of Schedule 25 to the Water Resources Act 1991 (article 26(2)), will enable byelaws to be made for the purposes of the Agency's duty generally to promote the conservation of inland waters and land associated with such waters (s. 6(1)(a) of the Environment Act).

6. More generally, article 5(c) of the Order provides that the Agency may exercise the powers of Part III of the Order for such purposes relating to any of its other functions (including conservation) as it thinks necessary. And article 2(3) puts it beyond doubt that the Agency's duty in Section 7(1)(a) of the Environment Act to exercise any power conferred on it so as to further the conservation and enhancement of natural beauty, and the conservation of flora, fauna and geological and physiographical features of special interest, applies to the Agency's exercise of its powers under the Order.

(c) **To improve the quality of existing recreational use**

7. The powers conferred on the Agency to remove obstructions to navigation (article 11) and regulate works (articles 19 and 20) will undoubtedly improve the quality of existing navigation. So too will the provisions for the removal of sunk, stranded and abandoned vessels (article 10) and the repair of structures and embankments (article 12). Article 16 will provide for the better management of events by allowing the temporary prohibition, restriction or regulation of navigation on the principal rivers to facilitate the holding of races and regattas. Mr. McGarvey, at paragraph 9 and Table 1

of his proof of evidence (EA/P3(a)), sets out some of the benefits of byelaws to recreational users.

8. Article 5 of the Order imposes a duty on the Agency to exercise the powers of Part III of the Order to manage the principal rivers for the purposes (inter alia) of promoting, to such extent as it considers desirable, their navigation and use. Article 6(2) of the Order gives the Agency power to construct works for the purposes of preserving, managing and improving the principal rivers for their navigation and use. The Agency's witnesses have given evidence that these powers are likely to be used to provide information, construct access points and canoe launching facilities, and generally to provide improved facilities for navigators: see EA/P3(a) para. 7.6, EA/P2(a) para. 14.2.3, 14.3.1, EA/P6(a) para. 7.4.1.

Mr Fowles' evidence, EA/P4(a) Table 2, sets out in more detail the ways in which the Agency may use the powers of the Order to improve the quality of existing recreational use.

(d) To accommodate increased demand in a sustainable way

9. The Order makes provision for a registration scheme to be introduced on the rivers, which would provide much-needed information about user numbers and enable the Agency to monitor growth in demand (article 14(2)(k); article 26(3)). Article 4 of the Order provides for the preparation of a Wye Navigation Plan, in consultation with the Wye Navigation Advisory Committee, which will provide an agreed framework within which the powers of the Order may be exercised. Article 2A of the Order, which requires the Agency to have regard to its other functions when exercising its functions under the Order, and to endeavour to strike a reasonable balance between them, means that the interests of the catchment as whole will be considered. Article 2(3) makes it clear that the Agency's duty, in discharging its functions, to contribute towards sustainable development (s. 4 of the Environment Act 1995), will apply to its functions under the Order.

10. For these reasons the Agency believes that the Order is the right Order to achieve its objectives and will be of lasting benefit to all those who use the rivers.

Objections to the detail of the Order

11. A great number of detailed objections has been raised to the principles and drafting of the Order. A comprehensive picture may be obtained from the Objection Management Table (EA/A45) and the Evidence Management Table (EA/A44(a)). This section concentrates on the main objections raised at the inquiry, in the order in which they appear in the Order.

Article 2

12. Hereford City Council contend that the definition of "banks" in article 2(1) is ambiguous. The Agency's evidence is that the definition is sufficiently precise to provide a means of determining the lateral limits of jurisdiction, by reference to land drainage and water level records (EA/P6(a) para 7.2.1.) The Hereford City Council Act 1985 (EA/B5), s. 20, confers powers to make byelaws by reference to the river and its banks (s.20(2)) but does not define banks at all. The Agency considers its definition to be a worthwhile improvement.

Article 3

13. Objections to the proposed Wye Navigation Advisory Committee fall into four main groups:
 - (a) There is no need for a Committee at all. Existing Committees are adequate.
 - (b) The method of selecting Committee members is inappropriate.
 - (c) The Committee should be differently composed.
 - (d) The Committee should have more powers.

14. (a) The Committee is necessary because the existing Agency committees do not have sufficient breadth of expertise in navigation. A specialist (and catchment-based) Committee comprising navigators and others with relevant interests is needed to advise on the exercise of the Agency's powers under the Order. The principal exponent of the "no need" argument, Lord Moran, is a landowner and fishery owner who clearly sees navigation as a threat and has a vested interest in ensuring that navigation is discussed only by the Regional Fisheries Advisory Committee, which (although it has some recreation representation) is dominated by fishery interests.
15. (b) It has been argued by Mr. Willis for Hereford City Council and Mr. Jones for the other councils that the membership of the Committee will be manipulated by the Agency so that it consists only of those who agree with the Agency's views. This argument is based on article 3(3), which allows the Agency to refuse to appoint a nominee who has insufficient knowledge and experience, and 3(4), allowing the Agency to make appointments to the Committee itself if the groups represented fail to make any nomination within a reasonable time, or cease to have an identifiable existence. The picture painted was of nominee after nominee being turned down by the Agency until a suitably compliant Committee member was found. This is unrealistic. The provisions in question are default powers, and it is the Agency's evidence that they will rarely be used because it is unlikely that unqualified persons will be nominated or that a nomination will not be made (evidence of Len Taylor during cross-examination by Mr. Jones). Should those contingencies occur, however, they will be a valuable means of ensuring that the Committee remains a useful source of advice, and the Agency submits that they should be retained on that basis.
16. (c) The attack on the composition of the Committee was led by the local authorities, who ask to be given a majority on the Committee on the grounds that they are the democratically elected representatives of local people and are publicly accountable. They claim that the Agency's concept of an advisory committee where numbers do not matter is unrealistic as decisions will invariably be taken by a majority. The Norfolk and Suffolk Broads Act 1988 (EA/B30) is relied on as a

precedent for a local authority majority.

17. None of these arguments is convincing. It is true that local authorities are democratically elected and represent a large number of local people. Mr Jones, in cross-examination, made much play of the fact that local authorities represent far more people than, say, the British Canoe Union. But most of those local people have little or no interest in navigation on the rivers, which is the subject matter of the Order, and will be the subject with which the Committee will have to deal. Organisations such as the British Canoe Union have a direct interest, and relevant expertise. And to the extent that those represented by the local authorities do have an interest in the rivers, those interests, as is evident from the evidence before the inquiry, are likely to be diverse. Mr Wilcox could give no coherent account of how local authority representatives of the Committee would decide which interests to represent, except to say that they would look at "the wider context".
18. The claim that the Committee must inevitably have resort to voting is mere assertion, and is contradicted by the evidence of other witnesses at the inquiry. Mr. Westlake, giving evidence for the BCU, said that the Agency listened to what its Committees had to say and took away what it regarded as good advice. He did not feel that his voice was ignored on the RFAC Committee, even though he was outnumbered by fishery interests. Captain Dereham, of the River Wye Preservation Trust which, although not a statutory body, has a range of interests among its members, gave evidence that the members of that Trust were aware of each other's differences of view, knew that they had to live with one another, and were prepared to reach an accommodation. To give local authority members a majority would necessitate either squeezing out other interests which the Agency considers have a useful role to play or increasing the size of the Committee to an unacceptable level.
19. Thirdly, the reliance on the Norfolk and Suffolk Broads Act is misplaced. Section 1 of the Act, which was put to Mr. Walker by Mr. Jones, does indeed have a majority of local authority members, but it is the section which constitutes the navigation authority itself, not an Advisory Committee. There is an advisory committee for the

Broads, set up under section 9 of the Act. It has no local authority members, and members are appointed by the Authority rather than appointed or nominated by those represented.

20. Finally, the consequence of revising the membership of the Committee as the local authorities suggest (see proof of evidence of Mr Wilcox, OS6 appendix) would not be simply an increase in local authority membership : it would mean the exclusion of other relevant interests. Only 1 nominee is proposed, for example, to represent the interests of those who navigate and use the rivers. This would not provide sufficient diversity of views to enable the Committee to give proper advice.
21. Another theme of the local authorities' argument was that the Forest of Dean District Council should have a seat on the Committee. Article 3 as drafted reflects the impending local government reorganisation by giving representation on the Committee to the three new unitary authorities and the one remaining county council in the area. The Agency considers that the interests of the Forest of Dean are adequately recognised by the ability of Gloucestershire County Council to nominate a Committee member (article 3(2)(o)).
22. The local authorities also argued that the Committee's chairman should be elected by the local authority members. The Agency sees no justification for this. The logical alternative to appointment of the Chairman by the Agency (which is the Agency's preferred view for the reason given in Mr. Walker's evidence (EA/P6(a) para. 7.3.1) is appointment of the Chairman by the whole Committee, and not by a specially privileged group.
23. Other requests made at the inquiry relating to the composition of the Committee are that there are too few navigators (although no indication has been given of who the additional navigators should be), that local canoeing interests should be represented, and that the Ramblers should have a seat. The Agency's response to each of these points is simply that the Committee's membership as currently proposed provides the necessary expertise and represents the right range of interests. It should be noted that

one of the main proponents of the "too few navigators" view, Hereford City Council, have themselves undertaken to consult a specified group of organisations before exercising their power to make byelaws under s.20 of the Hereford City Council Act 1985. The list of those to be consulted is at EA/X6 p.6C. Depending on how charitable a view is taken of which of the interests there specified represents navigation, there is either a majority, or a substantial minority, of non-navigators.

24. (d) The claim by South Herefordshire District Council and the other local authorities represented by Mr Jones that the Committee should have a right of veto is unsustainable. The Agency as navigation authority will have the financial burden of managing navigation on the rivers, and will be subject to common law duties to ensure the safety of those navigating and using them. It would be wholly inappropriate for a Committee which will make no financial contribution, and have no such responsibilities, to have a power of veto which would allow it to dictate to the navigation authority and which might prevent the Agency from fulfilling its common law and statutory duties. The Agency is aware of no precedents for such powers. If the local authorities want the final say in the management of navigation, they should promote an Order constituting themselves as the navigation authority for the rivers. That possibility was mooted by Hereford City Council (see the minutes of the Council's Policy and Finance Committee 9th September 1996, EA/X6 p.49), but Mr Wilcox stated in cross-examination that the other local authorities had little enthusiasm for the idea. The Advisory Committee should not be seen as an opportunity for them to acquire power without responsibility.
25. That said, the Agency recognises, that the local authorities have an important interest in the management of the rivers, and that co-operation between the local authorities and the Agency would be beneficial. A provision for direct consultation with the local authorities by the Agency was proposed to the local authorities by letter dated 24th March 1997, having been first suggested in January (EA/X14 p. 72) and again, following revisions to take account of proceedings at the inquiry, on 2nd May. On both occasions the proposal was rejected out of hand (see EA/X 14 p. 74 and EA/X 14 p. 77). The Agency is now formally proposing such a provision to the inquiry : see

the final filled-up draft (Order EA/A47), article 25B. I commend this to you as a more appropriate recognition of the local authorities' role than a majority on, or increased powers for, the Committee.

Article 5

26. The nature of the debate on article 5 is outlined in section A2 above. At the inquiry the opposing camps were led by Mr. Willis and Mr. Grazebrook on the one hand, and Lord Moran on the other.
27. The Agency's basic position is that set out in its opening statement (EA/A28 p8), namely that article 5 is an acceptable middle course between those who oppose, and those who wish to give priority to, the promotion of navigation. The duty to promote navigation is cast in the same terms as the duty to promote recreation on inland waters and land associated with such waters in section 6(1)(c) of the Environment Act 1995. Article 5 is the local application of an existing duty to the activity with which the Order is concerned - navigation. To object that the duty to promote will be to the detriment of conservation and fisheries is to ignore the Agency's duties as laid down by Parliament. The Order reflects the balance between the Agency's functions set out in the Environment Act, and the amendment to article 2A proposed by Lord Moran to make this clear (OS20A, p.2) is unnecessary. Significantly, English Nature, who have a clear interest in conservation matters, do not object to the duty to promote.
28. Nor does the Agency believe that there is a need for article 5 to be strengthened. Section 11(1) of the Anglian Water Authority Act 1977 (EA/B13), cited by Mr Grazebrook as an example of a clear duty to promote navigation, is not in fact very different from article 5 of the Order. It is a duty only to take "such steps *as are reasonably practicable* to ensure that a recreational waterway is put to the best use for the purposes of recreation ... *having regard to its other lawful uses.*" This addresses the difficulty of balancing navigation and other uses of the river in much the same way as does article 5, combined with article 2A, of the Order.

29. Duties to promote navigation are in any event the exception rather than the norm : it is inaccurate to assert, as Mr. Grazebrook did when giving evidence, that for all other inland navigations the navigation authority has a duty to promote. In all the local inland navigation legislation before this inquiry there is only one other possible example besides the Anglian Water Authority Act : s.2 of the Norfolk and Suffolk Broads Act 1988 (EA/B30), where there is a duty to promote the enjoyment of the Broads by the public and to protect the interests of navigation, rather than a duty to promote navigation as such. The Order therefore goes beyond most inland navigation legislation.
30. Underlying both lines of objection to article 5 seems to be the assumption that the article cannot allow the Agency any discretion, because the discretion may not be exercised in the way the objector would prefer. If you reject the allegations which have been made that the Agency is biased, and accept our contention that the Agency is capable of balancing the different interests on the rivers in a responsible and even-handed way, there can be no reason to be afraid of the Agency having a measure of discretion and the wording of article 5 should remain unchanged.

Article 6

31. The local authorities represented by Mr. Jones object to article 6, which confers certain powers on the Agency to carry out works for navigation purposes on the principal rivers. This is because works carried out under article 6 would benefit from permitted development rights, which would mean that they could be carried out without the need to obtain express,planning permission.
32. The nature and extent of the Agency's permitted development rights, in so far as they are relevant to the Order, are described in an addendum to Background Paper EA/E2. The concerns of the local authorities are unjustified, as:
- (a) it is arguable that the Agency currently enjoys some permitted development rights for navigation works (EA/E2 addendum para. 2.5).

- (b) Department of Environment Circular 9/95 (General Development Order Consolidation 1995) provides for consultation with the local planning authority on the proposed exercise by a statutory undertaker of its permitted development rights (EA/E2 addendum para. 3.1). If the proposed new article 25B of the Order is accepted, this will provide an additional route for consultation with the local planning authorities.
 - (c) Permitted development rights do not apply to certain kinds of development (EA/E2 addendum para. 4.1), and if the rivers become a Special Area of Conservation any development by the Agency will need to be approved by the local planning authority notwithstanding the GDO.
 - (d) Article 4(1) of the General Permitted Development Order allows local authorities to make a direction in certain circumstances withdrawing permitted development rights.
33. In any event, permitted development rights have been endorsed by Parliament. It is not a valid objection to the Order to say that if the Order is made, and the Agency becomes the navigation authority for the rivers with the powers appropriate to its role, the Agency will have rights of a kind which Parliament has decided are appropriate to its role.

Article 7

34. It has been suggested that the effect of article 7 of the Order is to remove the existing public right of navigation: see the proof of evidence of Mr. Gardiner for the Symonds Yat Boatman's Organisation (OS7, p.4). This is simply inaccurate: the Order confers a right to navigate and use the principal rivers which is co-extensive with the right repealed.

Article 10

35. Mr. Willis argued that this article was draconian and would deter potential navigators from coming to the Wye. It is unclear whether this amounted to a request that the article be deleted from the Order, or was simply relied on as evidence of the Agency's anti-navigation bias. No evidence was produced in support of the claim. This article is well-precedented (see, for example, the Norfolk and Suffolk Broads Act 1988 (EA/B30), Schedule 5 para. 12; the Anglian Water Authority Act 1977 (EA/B12) section 21, and the Thames Conservancy Act 1950 (EA/B21), section 16).

Article 12

36. It was put to Mr. Hilder by Mr. Jones for the councils that the Agency had not considered the relationship between this article and the requirement to obtain planning permission. They had not, which was not surprising, as the point had not been raised before. Provisions similar to article 12 are common in inland waterways legislation; see, for example, the Norfolk and Suffolk Broads Act 1988 (EA/B30), Schedule 5 paragraph 11, section 106 of the Thames Conservancy Act 1932 (EA/B20). A similar provision already applies on the tidal Wye : see the Gloucester Harbour Revision Order 1994, (EA/B38) article 9. There is no evidence that the relationship between these provisions and the planning regime has caused any difficulty, and no reason to suppose that article 12 will cause problems on the non-tidal river Wye.

Article 13

37. In view of the local authorities' reasonable argument that the time limit for appeals under article 13 is too short, the Agency propose to amend article 13(2) to allow 21 days for an appeal to be brought (see final filled-up Order EA/A47(a)). The appeals provisions in articles 10A and 11A of the Order have been amended in the same way.

Article 14

38. It has been argued by Mr. Grazebrook that the byelaw-making provisions in article 14 of the Order are unacceptable, as they purport to empower the Agency to restrict public rights and are therefore repugnant to the law of the land (OS15, pp. 7-8). The main planks of this argument, as it was elaborated in cross-examination, were:
- (i) Byelaws may regulate, but not restrict, public rights. They must not be repugnant to the general law of the land.
 - (ii) Paragraph 2 of Sch. 25 to the Water Resources Act 1991 applies to waters where there is a public right of navigation. It respects the regulation/restriction distinction, and is the model on which the Agency's byelaw-making power should be based. Paragraph 1 applies to waters which are not publicly navigable. It need not, and does not, respect the regulation/restriction distinction.
39. Both arguments are misconceived. It is true that byelaws must be intra vires their enabling power and not repugnant to the law of the land. But the Order is concerned not with byelaws, but with the power to make byelaws. The Transport and Works Act clearly envisages that an order made under section 3 of the Act may confer byelaw-making powers (see paragraph 13 of Schedule 1 to the Act (EA/B9)) and draws no distinction between byelaws which regulate and those which restrict. (This is not surprising, as the distinction is hardly clear cut and Mr. Grazebrook was unable to provide a convincing explanation of it in cross-examination). Article 14 is therefore perfectly lawful.
40. Mr. Grazebrook's argument based on paragraphs 1 and 2 of Schedule 25 is unsustainable. Firstly, paragraph 2 itself confers power to prohibit navigation by vessels which are not registered (see sub-paragraph 2(4)(b)) and so does not confine itself to regulation as Mr Grazebrook appears to understand that term. Secondly, paragraph 1 of Sch. 25 contains a general power to prohibit boating on inland waters

(sub-paragraph 1(1)(a)), and applies to all inland waters, which includes (but is not limited to) waters over which there is a public right of navigation (see the diagram in EA/A41). Paragraph 1 already gives the Agency a power to prohibit navigation. Article 14 does not, therefore, go beyond the powers of regulation available to the Agency under current legislation: it merely provides a more detailed list of the types of byelaws which may be made. It is entirely commonplace for local inland navigation legislation to contain detailed byelaw-making powers.

41. There has been little attention to the detail of article 14 at the inquiry. The OMT (EA/A45) gives the Agency's response to the detailed points raised in objection letters and statements of case: the only issue addressed here, because it is required to be addressed by point 3 of the Statement of Matters, is vessel registration.

42. The Agency has provided evidence of the benefits of a registration scheme: see the references to proofs of evidence in point 226 of the OMT. South Herefordshire District Council claim that the introduction of a registration scheme under article 14(2)(k), combined with the power to make registration charges under article 14(4)(a), would be unnecessarily bureaucratic and an unacceptable financial burden (OS6, para. 3.2). It is not entirely clear whether this is an objection to registration per se, or is based on an argument that the existing South Herefordshire Boat Proprietors Licensing Scheme (EA/B67) introduced under s.94 of the Public Health Acts Amendment Act 1907 (EA/B64) is adequate. To the extent that it is based on the adequacy of the South Herefordshire scheme, the Agency's response is that:
 - (i) the scheme applies to a very limited class of vessels (see EA/ P7(c)) and its existence is no reason to delete the power to require registration of other vessels;

 - (ii) if there is likely to be any unacceptable overlap between the South Herefordshire scheme and any registration byelaws which the Agency may propose, it would be open to the local authorities to argue for an exemption from registration for vessels registered under that scheme. Exemptions from

registration may be granted under article 14(4)(c). It would be inappropriate to pre-empt that decision by excluding from article 14 the power to require registration of all vessels, or by excluding vessels registered under the South Herefordshire scheme from the Agency's byelaw-making power before the details of any scheme which may be proposed by the Agency are known.

43. To the extent that the objection to registration is a more general one, there are sufficient safeguards built into the byelaw making process. Byelaws introducing a registration scheme may not, as is asserted by Mr. Wilcox at OS6 para. 3.2, be introduced after a consultation exercise only. They will be subject to confirmation by the Secretary of State (see article 14(10) which puts this point beyond doubt) who may decide to hold a public inquiry. This provides ample opportunity for objections to registration and registration charges to be voiced and fully considered. No evidence has been produced that the introduction of registration will impose an unwarranted financial burden. A further point is that Parliament (by enacting Schedule 25 to the Water Resources Act 1991) has endorsed the general principle of registration schemes.

Article 15

44. It has been argued that article 15 unnecessarily duplicates both the South Herefordshire Boat Proprietors Licensing Scheme (OS6, para. 3.1) and the Merchant Shipping (Survey and Certification) Regulations 1995 (EA/B66). The general effect of these schemes is set out in an addition to Mr. Owen's proof, EA/ P7(c). Both the scheme and the Regulations apply to a very limited class of vessel, and do not allow for on-the-spot inspections of those vessels to which they do apply. Article 15 will apply to all classes of vessels, and will enable on-the-spot inspections to be made in the interests of safety. The British Waterways Board has an equivalent power on its navigations: see the British Waterways Act 1983 (EA/B33), section 7. The article should be retained unamended.

Articles 19 and 20

45. Three main arguments have been directed at articles 19 and 20: that they will be used to license obstructions to navigation to the benefit of fishermen and the detriment of navigation (Hereford City Council, OS27 para. 6), that article 19 should be restricted to allow the Agency to license only those obstructions which can be authorised by an order under the Transport and Works Act, section 4, (Hereford City Council, OS27 para. 2.6), and that they usurp the powers of local authorities and interfere with the planning process (S. Herefordshire D. C., OS6 paras. 4.1 - 4.2).
46. The first criticism is unfounded. It makes an illogical assumption that because the Agency has not prevented the construction of fishing croys in the past, it will condone and authorise their construction in the future. One of the reasons for the present number of obstructions in the river is that there is currently no mechanism for ensuring that fishing croys do not encroach on the public right of navigation. The Agency has the power to regulate the modification and construction of croys under its land drainage powers (see section 109 of the Water Resources Act), but this does not enable consent to be refused on grounds of interference with the public right of navigation. The Order solves this problem by providing, in article 20(1), that no works may be carried out without a licence granted by the Agency under article 19. This will ensure that the interests of navigation are considered.
47. In any event under article 5 of the Order, it is the duty of the Agency to exercise the powers of Part III to manage the principal rivers for the purposes of (inter alia) protecting the interests of those navigating and using them. It would simply not be open to the Agency to use article 19 to license obstructions which were detrimental to the interests of those navigating and using the principal rivers. Underlying the objection is the conviction that the Agency is biased against navigation and in favour of fishermen, which is rejected for the reasons given in section B above.
48. The second criticism is simply irrelevant. Section 4 of the Transport and Works Act relates to the scope of section 3(1)(b) orders. This Order is proposed under section

3(1)(a). See further the EMT on this point.

49. The third criticism is misguided. Articles 19 and 20 will not take away the local authorities' power to grant or refuse applications for planning permission. They are simply an additional control to ensure that the interests of navigators are considered and protected. This may mean that a development for which planning permission has been granted by the local authority may be refused a licence by the Agency. If the development is not in the interests of navigation, it is right that this should be the case (but, in any event, there is a right of appeal to the Secretary of State under article 19). The local authorities are not the appropriate bodies to safeguard the interests of navigation and the abundance of croys on the rivers demonstrates that existing planning powers have been woefully lacking in this regard. Article 19 also provides a benefit to navigation which planning permission can never do, by enabling the Agency to grant statutory authorisation to obstructions to navigation (article 19(1)). This means that structures such as launching facilities which are beneficial to navigators but are technically obstructions to navigation and therefore public nuisances, would benefit from the defence of statutory authority in any action for public nuisance.

Article 26

50. Mr. Grazebrook put forward arguments in relation to article 26 very similar to those he put forward in relation to article 14. He admitted during the course of cross-examination, however, to not having been aware that article 26 simply amended an existing byelaw-making power which already permitted the prohibition of navigation. That paragraph (1) of Schedule 25 does already extend to prohibition makes it impossible to sustain his argument that article 26 goes beyond what is appropriate to byelaws.
51. The main opposition to article 26 came from the fishery and landowning interests, whose concerns are essentially:

- (i) that the existing byelaw-making power, combined with private access agreements, is an adequate means of regulation;
- (ii) that removal of the functional restriction in paragraph 1 of Schedule 25 downgrades the importance of fisheries, and article 26 will encourage navigation on the upper rivers. This is said to be inconsistent with the Agency's neutral position on rights of navigation, and to be likely to harm conservation and fishery interests.

52. The Agency's response to these (and similar) points has been set out at length elsewhere and will not be repeated here: see the answers and references given to OMT points 303-309. The evidence of those objectors who made these points at the public inquiry added little to the argument. Neither Lord Moran nor the Wye Salmon Fishery Owners' Association could see any reason for the functional restriction on the ability to make byelaws to manage navigation in paragraph 1 of Schedule 25. Mr. Richards' view was that the functional restriction should be partially removed to allow byelaws to be made for purposes which related to preserving the condition of the rivers as such, but not recreation. The Agency should not have the full range of duties in relation to the upper rivers, as it was ill-equipped to balance the competing interests there. This argument ignores the fact that the Agency already has a duty (in s.6(1)(c) of the Environment Act 1995) to promote recreation on inland waters, which includes the upper rivers. It has already been entrusted with the task of balancing its recreation function against its other functions on the upper rivers and tributaries. Article 26 of the Order merely improves the Agency's ability to manage the navigation which does in fact take place, and thereby fulfil that task.

53. As for the argument that article 26 will encourage navigation, the Agency does not understand how an increase in the ability to regulate an activity is likely to encourage it. The only explanation of this apparent paradox was proffered by Lord Moran, who said that his main concern was with the way article 26 would be perceived and represented in the press. If you believe that article 26 is a valuable provision the fact that it might be mis-reported is no reason to exclude it from the Order.

54. The Agency submits that article 26 of the Order should remain unchanged.

Article 32

55. Generalised allegations about repeal of historic rights apart, the evidence on article 32 at the inquiry concentrated on the savings for the upper rivers and tributaries. Mr. Richards, Lord Moran, and Mr Woosnam all submitted that the old Acts should be repealed in their entirety, as it was highly unlikely that they conferred rights of navigation on the upper rivers and tributaries. The Agency does not believe that the question of whether there is a public right of navigation on the upper rivers and tributaries is one on which it, or you, or the Secretaries of State, can or should take a view. The argument can only be decided by the courts and the Order should not pre-judge or prejudice that legal debate. Some mechanism is needed to ensure that the Order does not have an adverse impact on any rights of navigation which may exist.
56. Both Mr. Woosnam and the Wye Salmon Fishery Owners' Association argued that if there was to be a saving in relation to the upper rivers and tributaries, it should take the form of a generalised saving for such rights of navigation as may exist similar to the saving for rights of way in article 32(3), rather than a saving of isolated passages of the Order. Mr. Woosnam argued that to preserve selected passages compromised the Agency's position of neutrality, as the preserved passages (which suggest that there is a right of navigation) would not fall to be interpreted in the wider context of the Act (which suggests, he believes, that there is not). That argument is wrong: where part of an Act has been repealed it may, although not of operative force, still be taken into consideration in construing the rest : see 44(1) Halsbury's Laws, para. 1311. However, the Agency is proposing an amendment to article 32 of the Order to make it clear that the repealed parts of the old Acts may be taken into account in interpreting the passages saved (see EA/A47(a) article 32(5)). On the more general question of whether there should be a general saving rather than the preservation of isolated passages, the Agency does not itself have strong views. However, it is aware that the current approach is strongly supported by canoeists and the British Canoe

Union (see EA/A45(d) OMT point 341), who have not had a chance to comment on the alternative approach because it was suggested only after the BCU had given their evidence to the inquiry. For that reason, you may think that the current approach should on balance be retained.

Appendix to C¹

(References are to the final filled-up draft Order A47(a))

1. Delete the whole of article 32, and insert the following:-

“32. The enactments specified in Schedule 2 to this Order are hereby repealed to the extent therein specified, save insofar as -

(a) they confer any public right of navigation over the upper rivers and tributaries, or any part thereof;

(b) any public right of way over land is conferred by or acquired under those enactments.”.

2. In Schedule 2 (3rd column) leave out the words “, but not” to “the tributaries” in both places where they occur.

3. Delete the whole of the last paragraph (commencing “Part VI of the Order...”) of the Explanatory Note (page 47).

¹ See paragraph 56 of C, page C20. Towards the end of that paragraph, the Agency said that it did not have strong views on whether, *as an alternative to preserving the two selected passages in the old Acts*, there should be a general saving. The amendments set out in this appendix have been produced for the assistance of the Secretaries of State should they feel that a general saving would be preferable.

D1: THE VIRES OF THE NRA TO APPLY FOR THE ORDER

1. It became clear during the Inquiry that the principal ground upon which objectors sought to raise the issue of *vires* was this. The NRA, it was said, lacked *vires* to apply for the Order; therefore the EA lacked *vires* to continue the promotion of the Order. Nobody sought to argue that if the NRA had *vires* to apply for the Order, the EA lacked *vires* to continue the promotion of the Order. The EA has explained why, in its submission, it did have *vires* to continue the promotion of the Order at para. 4.2 *et seq.* of EA/E16. In this closing submission the EA concentrates on the principal submission raised by objectors viz. that the NRA lacked *vires* to apply for the Order. The EA accepts that if the NRA lacked *vires* to apply for the Order, the EA could not "cure" such lack of *vires* by taking over promotion of the Order. The EA accordingly accepts and submits that the *vires* issue may be reduced to asking whether the NRA had *vires* to apply for the Order.¹ If it did, then the EA had *vires* to continue the promotion of the Order; if it did not, then the EA did not have *vires* in its own right to continue such promotion.

2. **Relevance of vires as an issue.** If the Secretaries of State are satisfied that the Order should be made (whether as currently drafted or in some modified form), that will be because they have been satisfied, on the evidence, that the EA has made out the need for the Order (the need issue) and has successfully demonstrated that the powers and duties of the Order should be conferred and imposed on *it* (the identity issue). The EA says that the evidence strongly supports it on both these issues. If the EA's evidence on these issues is accepted, it will mean that *on the merits* the Secretaries of State are satisfied that the Order should be made. Even assuming that the merits of the case do satisfy the Secretaries of State that the Order should be made, however, some objectors (Mr Grazebrook, Hereford City Council and Mr Stockinger in particular) say that the Secretaries of State *may not* make the Order because the EA's predecessor, the NRA, lacked *vires* to apply for it. The EA's answer to that is this. Had the NRA not been

¹ The EA contends separately that the Secretaries of State could make the Order even if the NRA lacked *vires* to apply for it. That contention is further examined below; see paragraph 23 *et seq.*

abolished, so that it had fallen to the NRA to promote the Order at the inquiry, the NRA's case on the need and identity issues would have been the same as the EA's. If, as is being postulated, the Secretaries of State accept the EA's evidence on those issues it can likewise be postulated that, had the NRA continued in existence, they would necessarily have accepted the NRA's case on those issues. The Inspector is therefore in effect being asked by objectors to refuse to make the Order on the ground that the NRA lacked *vires* to apply for the Order even on the basis that the NRA would (had it not been abolished) successfully have established the need and identity issues.

3. Fortunately, the EA submits, there is no need to approach the matter in this legalistic way. For if it is postulated (as it must be, if the EA is successful on the need and identity issues) that those issues would, had the NRA continued in existence, have been resolved in the NRA's favour, that *shows* that the NRA was justified in applying for the order. That is the common law principle as established by the *Bateman* case. See EA/E16 paragraphs 2.2, 2.3. The underlying rationale of *that* case was need, viz. the need for the waterworks company to extend its powers and duties to permit it properly to fulfil its functions of supplying water to the inhabitants of Ashton under Lyne. In the present case, the need (as you are respectfully invited to find) was similarly for the NRA to extend its powers and duties to permit it properly to fulfil its duty generally to promote recreation, as well as its other functions in connection with water resources, water pollution, flood defence, land drainage and fisheries. If the Transport & Works Act 1992 had not been passed, the NRA would have had to apply to Parliament (by promoting a Bill) to confer on it the powers and duties of the Order and would, on the authority of *Bateman's* case, have had power to promote such a Bill. That being so, under s.20 of the Transport & Works Act 1992, the NRA had power to apply for the Order.

4. It is however not merely on *Bateman's* case that reliance is placed. The NRA also, and importantly, had available to it section 4(1)(a) of the 1991 Act. Under that provision, the NRA

"shall have power to do anything which in its opinion is *calculated to facilitate*,

*or is conducive or incidental to,*² the carrying out of the Authority's functions."

Section 4(1)(a) would have authorised the NRA to promote a Parliamentary Bill to become the navigation authority for the Wye, had the NRA initiated such procedure before the TWA became law. As it was, the TWA was enacted in 1992. Thereafter, it was no longer necessary, or possible, to seek Parliamentary powers. Relying on section 4(1)(a) of the 1991 Act, the NRA in March 1996 applied for the Order instead.

5. The NRA's "opinion" for the purposes of section 4(1)(a) was that in applying for the Order it was doing something which was indeed conducive to the carrying out of its functions. The objectors have not suggested that this was not the case. They contend however (expressly or impliedly) that the NRA's section 4(1)(a) opinion was not one it could reasonably have held. They invite the Secretaries of State to refuse to make the Order not on the ground that the relevant opinion was not held by the NRA, but on the ground that as a matter of law the opinion *could not validly or lawfully be held*. They say in effect that the NRA could not in law have held the necessary section 4(1)(a) opinion because the application for the Order and/or the Order itself could not possibly have been conducive to the carrying out of the NRA's functions. There are logically three strands to the objectors' argument. *First*, the objectors acknowledge, as they must, that the NRA's functions included the "mainstream" functions mentioned in section 2(1) of the 1991 Act (paragraph (a) - water resources; paragraph (b) water pollution; paragraph (c) - flood defence and land drainage; paragraph (d) - fisheries), but they deny (expressly or impliedly) that the Order could have been conducive to the carrying out of any of those functions. *Second*, they say that the duty generally to promote recreation under section 2(2) of the 1991 Act, was not a function of the NRA and so, although the Order would or might³ have been conducive to that duty being carried out, that fact

² In the remainder of this submission I shall use the shorthand expression "conductive to" to refer to all the words which have been italicised above.

³ In paragraph 6 of a supplement to his proof of evidence dated 9/5/1997 Mr Grazebrook argued that the Order needed to be "in general terms ... promotional of navigation" in order for it to be conducive to the promotion of navigation [viz. to the carrying out of the section 2(2) duty to promote recreation]. Mr Grazebrook's argument was that the duty to promote navigation contained in the Order (article 5(a)(ii) EA/A30 p.10), needed to be

could not have justified the NRA in applying for the Order. *Third*, they say that the NRA could therefore not lawfully or validly have held the relevant section 4(1)(a) opinion that the Order would be conducive to the carrying out of its functions.

6. These contentions fail for the following reasons. *First*, the evidence clearly established that the Order would be conducive to the carrying out of the NRA's mainstream functions. *Second*, and in any event, the duty imposed by section 2(2) did, as a matter of law, fall to be regarded as a function of the NRA; and if that is correct, the Order with its duty to promote navigation would plainly be conducive to that duty/function being carried out. *Third*, and in any event, the NRA's section 4(1)(a) opinion was that the Order would be conducive to the carrying out both of its mainstream functions and of its section 2(2) duty/function and that was an opinion it was entitled to hold.

7. All these points - and others - have already been made in EA/E16. In particular, it is there explained how the Order would have been conducive to the carrying out of the NRA's functions under section 2(1) (paragraph 3.13) and its duty under section 2(2) (paragraph 3.10) and why the section 2(2) duty itself takes effect as a function (paragraphs 3.3-3.7). In this closing submission, it might be worthwhile simply to summarise the main points in support of each of these points.

8. **The NRA's mainstream functions and the Order.** There are 5 separate sources for the view that the Order would be conducive to the carrying out of the NRA's mainstream functions and/or that this was the opinion of the NRA:
 - (a) **The 1995 action.** The affidavit of Mr Weare (EA/C37) in the *Stockinger* High Court action was sworn at a time (August 1995) when the NRA had not yet finally resolved to apply for the Order. It was uncontradicted by evidence on the other side. It was accepted by the Judge (EA/B42). And it is wholly consistent with the matters mentioned in the following sub-paragraphs of this paragraph. A relevant passage from the judgment of Laddie J. at pp.2, 3 reads as follows:

unqualified.

"Development of navigation to allow greater use by pleasure craft (that is, motor-powered boats that require a greater depth of water and a greater width of channel than the minimal requirements of canoes and rafts) is likely to have significant implications not only for other recreational users of the river, but also for the fish and other fauna, water quality, water abstraction, and other uses. This will be particular (sic) so if locks and weirs were [to] be built to assist navigation. Even if fully effective fish passes were constructed, the changes in flow patterns and water depths would affect the rate of upstream passage of fish, and the locations where they could be caught by anglers. This would have consequential implications for fishery values, which are largely determined by the number of salmon caught each year. Any alteration to flow regimes and channel cross-sections at flow gauging stations at Belmont, Redbrook and Ross-on-Wye would have significant implications for the arrangements whereby water is released from upstream reservoirs to support major water supply abstractions. Similarly, if significant stretches of deep, slower moving water, held back by weirs, were to replace the extensive shallows, rapids and riffles that presently exist, the capacity of the river naturally to self purify and re-oxygenate would be affected. This would have implications for the overall water quality of the river, and its ability to receive discharges from sewage treatment works and other sources."

- (b) **The 1996 Government Review.** The views expressed by the Government itself in its June 1996 Review of Navigation Functions (see EA/D15) included these passages:

"9. The Government also recognises that navigation is often closely linked to other river management functions. The way in which water resource and flood defence functions are managed can affect the water environment in a number of ways, including its potential for navigation

• **Mr McGarvey (EA/P3(a))** explained how, in the Anglian Region, the various functions of the Agency dovetailed with its navigation function (see for example paragraphs 7.2, 7.3); and in re-examination (following his cross-examination by Mr Simpson) on the afternoon of Day 4 (Tuesday 29/4/1997), Mr McGarvey explained how Mr Stockinger's proposals for the reconstruction of locks and weirs had potentially damaging implications for water quality, water resources, quality of fisheries, conservation and flood defence. He said that the powers of the Order would be to facilitate discharge of the Agency's mainstream functions, by ensuring that these damaging effects were not felt. He confirmed that these same considerations applied also to the NRA.

• **Mr Fowles (EA/P4(a))** explained how this would work on the Wye in the context of the Wye CMP Action Plan published in December 1995 - see paragraph 7.1, 7.2. The examples of Agency successes "across a range of functions" (paragraph 7.2) were of course preceded by work in the same areas carried out by the NRA. The evidence of Mr Fowles strongly supports the conclusion that the NRA applied for the Order because it thought that doing so would be conducive to the carrying out, in an integrated way, of all its functions.

• **Mr Walker (EA/P6(a))** drew attention in paragraph 5.11 of his proof to the Agency's existing "wide operational responsibilities in management and control of the river catchment in terms of fisheries, land drainage, flood defence, pollution control and water resources" and went on to observe, in paragraph 5.12 "only in one significant area within the Wye catchment does the Agency not have management powers - that of navigation. This is the present gap that needs to be closed in order to bring about proper and complete conservancy management for these rivers". These considerations would have been applicable also to the NRA when it was deciding whether to apply for the Order.

(e) **EA/E20.** The future risks to the rivers which Mr Hilder drew attention to in paragraph 13.10 of his evidence and to which he said the NRA had had regard in

deciding to promote the Order, were described in detail in paper EA/E20 (on which Mr Hilder was put forward as the Agency's witness to answer questions in cross-examination. See the Agency's Opening Statement EA/A28 paragraph 21). That paper (which was challenged by no objector) sets out in vivid detail (effectively confirming the evidence given in August 1995 by Mr Weare and accepted by Laddie J. referred to above) the potential impact of navigation by large motorised craft on the rivers and concludes at paragraphs 8, 9:

"8. The scheme [for developing the Wye to accommodate large motorised craft] would profoundly and irreversibly change the nature of the rivers and substantially damage the ecology of the catchment. It would change the patterns of flow and quality of water within the rivers harming the interests of most current users of the rivers.

9. The new environment brought about would adversely affect each species of migratory fish which contributes to the conservation status of the rivers."

9. The Agency submits that those five separate matters together demonstrate conclusively that the NRA could properly be of the "opinion" (for the purposes of section 4(1)(a) of the 1991 Act) that the Order would be conducive etc. to the carrying out of *inter alia* its mainstream functions. You are therefore specifically invited to *find as a fact*, in the light of all the evidence before the Inquiry, that when the NRA applied for the Order:

Finding (1) The NRA was of the "opinion" (under section 4(1)(a) of the 1991 Act) in applying for the Order, that the Order would be conducive⁴ to the carrying out of its functions under section 2(1)(a) - (d) of the 1991 Act (no objector has suggested that this opinion was not held, but as the NRA's *vires* has been challenged, a formal finding in the terms mentioned is requested); and that

⁴ In the sense explained in footnote 2 above.

Finding (2) independently of the NRA's opinion on that subject, the Order would in fact have been conducive⁴ to the carrying out of those functions.

10. **Section 2(2) and section 4(1)(a).** If those findings of fact are made, the objectors' *vires* challenge collapses, even without reference to the NRA's argument on section 2(2) of the 1991 Act. That latter argument involves asking you to make these further findings of fact viz. that

Finding (3) the NRA was of the "opinion" (under section 4(1)(a) of the 1991 Act) in applying for the Order, that the Order would be conducive⁴ to the carrying out of its duty under section 2(2) generally to promote conservation and recreation;

Finding (4) independently of the NRA's opinion on that subject, the Order would in fact have been conducive⁴ to the carrying out of that duty.

Note (1): No objector (except perhaps Mr Grazebrook) has suggested that either finding of fact 3 or 4 should *not* be made, but as the NRA's *vires* has been challenged, formal findings in the terms mentioned are requested in addition to the findings in relation to its other functions under section 2(1).

Note (2): Each of the four suggested findings was supported by the evidence of Mr Owen in re-examination.

11. The matters mentioned in sub-paragraphs (a) to (e) of paragraph 8 above bear principally on the link between the Order and the NRA's functions under paragraphs (a)-(d) of section 2(1) of the 1991 Act. They also bear on the link between the application for the Order and the NRA's duty to promote recreation and conservation under section 2(2) of the 1991 Act. The matters mentioned in paragraphs (a) to (e) of paragraph 8 above are therefore relied on, to the extent that they are applicable, to establish that the promotion of the Order was, and was in the NRA's opinion, also conducive to the

carrying out by the NRA of its section 2(2) duty. In addition, the Agency relies generally on the evidence of all its witnesses which shows overwhelmingly that the Order would have assisted the NRA to carry out that duty. The Order, if made, would then give local expression to the national duty set forth in section 2(2) of the 1991 Act (now in section 6(1) of the 1995 Act). In the words of paragraph 3.10 of EA/E16:

"3.10. The Order would have helped the NRA to fulfil its duties under section 2(2), because it would have helped the NRA to manage the river Wye and Lugg in the interests of all recreational users, including pleasure-boaters, canoeists, rowers, anglers and walkers, in a balanced and integrated way. It would also have helped the NRA to prevent such activities from conflicting with the very important conservation needs of the rivers. The repeals effected by the Order would similarly have been conducive to the fulfilment by the NRA of its section 2(2) duties, because there was a serious risk that if a revived 1809 Act Company of Proprietors assumed control of the rivers, it could with uncertain constraints dredge the rivers and construct works on them to the detriment of both recreation and conservation interests. Furthermore, the NRA believed these matters to be the case."

Findings of fact 3 and 4 above are intended to encapsulate the points made in that extract.

12. As mentioned in paragraph 3 and footnote 2 above, it is believed that, with the exception of Mr Grazebrook, neither finding would be controversial. Objectors instead argue that section 2(2) of the 1991 Act did not confer a function. For the arguments in support of the Agency's contention that it did, see paragraphs 3.5-3.8 of EA/E16, the contents of which the Agency respectfully repeats.
13. Two things should be added. *First*, as is set forth in paragraph 3.5 of EA/E16 and endnote 7:

16. The conclusion that section 8(4) of the Water Act 1989, re-enacted as section 2(2) of the 1991 Act, conferred a function on the NRA generally to promote recreation (and conservation) is also consistent with common sense. If the Order had been applied for a fortnight later than it was, i.e. in April 1996, the applicant would have had to be the Agency. It is deeply unattractive for the objectors to say (as their argument on this aspect commits them to doing) that the NRA could not properly regard its application for the Order as being conducive to carrying out its recreation function (because section 2(2) did not confer a function) whereas the Agency a fortnight later *could* properly have regarded an identical application made by it as being conducive to carrying out its precisely similar function set forth in section 6(1) of the 1995 Act.
17. **Arguments of objectors, not so far noticed.** The Agency cannot and does not deal separately with all the objectors' arguments on *vires* in this closing submission. The objectors' principal contentions on *vires* have in any event been dealt with in the body of this document. Nevertheless, there are the following points which ought to be briefly touched on.
18. **Mr Grazebrook.**
- (a) Mr Grazebrook argues (supplement to proof 9/5/1997, paragraph 5) that the Order does not "assign" anything (section 2(1)(f)): "it confers powers, duties and status". Mr Grazebrook's distinction between "assigns" and "confers" is arid and is rejected, but he is in any event missing the point. The question is not whether the *Order* assigns anything; the question is whether it is proper to speak of *section 2(2)* of the 1991 Act as being an "enactment" whereby a function was "assigned" to the NRA for the purpose of section 2(1)(f).
- (b) Mr Grazebrook also suggests - see footnote 3 above - that the provisions of the Order would not in fact promote navigation. The answer to him, apart from what is set forth in paragraph 3.10 of EA/E16 quoted in paragraph 11 above, is that the national duty to promote recreation is itself qualified by the phrase - "to such extent as it considers desirable": it is therefore entirely appropriate that the

local expression of that duty - in article 5(a)(ii) of the Order - should be similarly qualified. You are therefore invited to conclude this reasoning supports findings Nos. 3 and 4, viz. that the (NRA's opinion was that the) Order would be conducive to the NRA's carrying out its general recreational duty.

- (c) *Credit Suisse v. Allerdale* [1996] 4 All ER 129 cited by Mr Grazebrook in his summary at p.2 is not

"authority for the proposition that an incidental power such as that appearing in s.4(1)(a) of the 1991 Act and s.37(1)(c) of the 1995 Act cannot be used to seek further functions (as opposed to powers)."

On the contrary, that case confirmed that a power such as that in section 4(1)(a) of the 1991 Act had to be construed by identifying the relevant statutory functions and then examining "the context in which the implied powers are to be exercised". See per Neill LJ at p.148g and j. Mr Grazebrook pointed to nothing in the 1991 Act to support the proposition that section 4(1)(a) could not be used to enable the NRA by order under the TWA 1992 to apply for powers and duties which would operate to confer on it a statutory navigation function for the rivers. The use of section 111 of the Local Government Act 1972 to promote an illicit swap transaction out of conformity with the borrowing powers specifically provided for by Schedule 13 of the 1972 Act is in a wholly different category.

- (d) *Statement of Matters*. As part of the Statement of Matters, no.6, Mr Grazebrook suggested the addition of the following sentence:

"Can the Agency's purposes be achieved by ministerial Order?"

The Agency understands Mr Grazebrook to advance three reasons why the EA's purposes cannot be so achieved. *First*, because there is no *vires* to apply for an Order (or for a Parliamentary Bill). That has been dealt with above. *Second*, because an order under the TWA is not an enactment for the purposes of section

2(1)(f) of the 1991 Act. This is simply incorrect in the Agency's submission; and even if it were correct, nothing in section 2(1) precluded the NRA acquiring a new function otherwise than as provided for by section 2(1)(f). *Third*, because the 1991 Act lays down a comprehensive code (summary of proof, p.2):

"The scheme of the WRA was therefore to confirm the status as navigation authority for the few waterways in question, to provide a means whereby the functions of an existing navigation authority might be transferred to the Agency (Schedule 2) and, for public navigations having no active navigation authority, to provide a scheme for imposing navigation control (through the application of byelaws under s.210 and Schedule 25) supplemented by power to levy navigation tolls (s.143)."

Accordingly, so the argument is understood to run, only Parliament could interfere with the scheme so laid down. The Agency does not accept that there is any such scheme as Mr Grazebrook suggests. The existence of provisions for transfer under Schedule 2 of functions and for the making of byelaws in certain cases under section 210 of and paragraph 1 and 2 of Schedule 25 to the 1991 Act, could not preclude a body acquiring the powers and duties of a navigation authority otherwise than by transfer order under Schedule 2. Even if there was some such scheme of the 1991 Act as Mr Grazebrook asserts, and only Parliament could upset it, that is what Parliament did when it subsequently enacted the TWA. After 1992, the NRA had no choice but to apply for an Order under the TWA: had it sought to promote a private Bill, it could not, having regard to the availability of the new procedures under the TWA, successfully have proved (as it would have had to do) that the purposes of the Act could not be effected without the authority of Parliament. Cf. EA/X1 paragraph 7. The correct answer to Mr Grazebrook's suggested additional question "Can the Agency's purposes be achieved by ministerial Order?" is therefore "Yes; and only by such an order".

19. Mr Willis

- (a) Mr Willis helpfully summarises his argument on *vires* at pp.24, 25 of his closing submission. From that summary, it is clear that everything turns on paragraph (d):

"Neither recreation nor conservation nor navigation on the Rivers Wye or Lugg were functions of the National Rivers Authority and therefore section 4 does not bestow the general power to make an application for an Act of Parliament in respect of these matters."

The EA answers this both by showing that promotion of recreation and conservation was a function of the NRA (paragraph 14 above) and that the application for the Order was plainly conducive to that function (paragraphs 11 and 17(i) above). Separately, the Agency shows that the application for the Order was conducive etc. to the carrying out of the NRA's *other* functions as well, viz. those under paragraphs (a)-(d) of section 2(1) of the 1991 Act (paragraph 8 above).

- (b) *Could the NRA's section 2(2) duty be a function having regard to section 16?* Mr Willis argues not - see pp.20, 21 of his Closing Submission. But the answer to Mr Willis is that a duty expressed by reference to "proposals relating to any functions of the Authority" (section 16) is different in kind from a separate, free-standing duty such as was contained in section 2(2). It is not without significance that section 2(2) appears where it does (in the section containing "The Authority's functions") and away from section 16. A free-standing duty to do something can clearly take effect as a function; a duty expressed by reference to a function, equally clearly, cannot itself be a function.
- (c) Mr Willis argues also that the Order falls outside the TWA because it does not relate to the operation of an inland waterway (Closing Submission pp.36, 37).

The term "operation" is however a wide one, used in section 3(1)(a) in contradistinction, and as an alternative, to "construction". The section "clearly envisaged that the Act can be used not only for the construction of new waterways (e.g. canals), but also to acquire powers over existing waterways in connection with their operation. The powers of the Order fall within this description, as they are concerned with the management of the existing uses of the rivers, and therefore with the "operation" of the rivers". EA/E12, paragraph 3.5. The phrase "operation of an inland waterway" must be capable of applying to all kinds of inland waterway (i.e. not only those waterways which have been constructed). A river such as the Wye, though natural, is still an inland waterway; and an order relating to its "operation" must be capable of being made under section 3(1)(a). There is no warrant for reading the phrase as being confined to the "management of works" as quoted by Mr. Willis at p. 37 of his closing submission. Furthermore, one need only to look at Schedule 1 to the TWA to see the kinds of matter which can be the subject of an order under the Act. See for example paragraphs 4, 8, 12, 13 which illustrate that in conferring power to make an order under section 3(1)(a) Parliament had in mind, amongst other matters, powers to manage inland waterways. In any event - see section 5(1) - Schedule 1 is not determinative of the scope of orders under sections 1 and 3, but merely illustrative.

20. **Mr Stockinger.**

- (a) Mr Stockinger confuses himself on *vires* by going to great lengths to show that the NRA was not the navigation authority for the rivers by reason of there having been no transfer order under Schedule 2 to the 1991 Act. See also section 2(1)(e). The Agency accepts that it is not the navigation authority for the Wye and that there has been no transfer order. There was nothing in the 1991 Act to oblige the NRA to seek to procure a transfer of powers of the 1809 Act company (cf. paragraph 62 of Mr Stockinger's substituted submission "dated" 19/6/1997 but received by DBM on 7th July) instead of applying for the Order. Although the Secretaries of State have power under TWA section 13(2) not to

make an order whose objects they consider can be achieved by other means, you are respectfully invited to report that the objects of the Order could not, fairly or reasonably, have been achieved by a transfer order under Schedule 2. See generally EA/E12, section 4.

- (b) Mr Stockinger also gets into a muddle on the question of section 4(1). He appears to think that the NRA could not apply to become the navigation authority for the rivers because it did not have at the time a navigation function. If this line of reasoning were correct, it would produce a catch 22 situation. But the reasoning is not correct. The only question is whether the opinion of the NRA that it would be conducive to the carrying out of its mainstream functions and/or its section 2(2) function, to apply for the Order, was a sustainable one.

21. Generally. The objectors' *vires* challenge was not purely legal. To succeed, those who raised the *vires* objection needed at the very least to adduce some evidence such that the Inspector could properly refuse to make findings of fact Nos. 1-4 mentioned in paragraphs 9 and 10 above. The Secretaries of State were satisfied that they would properly entertain the NRA's application and did so by directing a public inquiry to be held. They were satisfied that the rules had been complied with. The Secretaries of State indicated that it would be proper for the Inspector to entertain questions of *vires* at the Inquiry and he has done so. The Agency argued in DBM's letter dated 7/2/1997 to Mr Lee, the Programme Officer (EA/A21) that the decision whether the NRA had *vires* to apply for the Order should be taken in the light of the evidence; and that is what has happened.

State are no more precluded from making the Order in such a situation than Parliament was before them. There is nothing in the rules made under the TWA to require the Secretaries of State to satisfy themselves of an applicant's *vires* when deciding whether they can entertain an application; neither is there anything in those rules to prevent the making of an Order if, during or subsequent to the inquiry process, the Secretaries of State come to the view that the promoter lacks *vires*. The Agency accepts that an inquiry into an applicant's *vires* is not irrelevant because lack of *vires* to ask for, or promote, an Order may, on the facts of a particular case be material to the question whether an Order ought, on the merits, to be made. This is because the same evidence which throws doubt on the *vires* of an applicant to ask for or to promote an Order may be material to the question whether there is a need for the Order or, more particularly, whether the promoter is a fit person on whom to confer the powers and impose the duties of the Order.

25. That, however, is not a factor in the present case. If the Secretaries of State are satisfied on the merits that the Order should be made, nobody has suggested that there is anything further in the *vires* point which would detract from those merits. You are therefore invited to report to the Secretaries of State if you think fit to do so, that in the present case, even if the objectors' arguments on *vires* were well-conceived, they have put forward no arguments to say why the NRA's lack of *vires* to apply for the Order should result in the Order not being made in favour of the Agency. Accordingly, it is submitted that the Secretaries of State are entitled to make the Order even if persuaded by the objectors' arguments on *vires*.

26. **Conclusion.** The Agency has not, in this section of its submissions, rehearsed each and every point relevant to its having *vires* to continue the promotion of the Order. It has concentrated on the principal points understood to have been adduced in support of the point by Messrs. Grazebrook, Willis and Stockinger. For a comprehensive review of the Agency's arguments on *vires*, please see the whole of EA/E16.

D2: SECTION 112 TRANSPORT ACT 1968

Background

27. It has been argued by Mr Stockinger that the provisions of section 5(7) of the Transport and Works Act 1992 mean that the Order cannot be made in its present form, as the Agency's application for it is procedurally defective. This is not accepted by the Agency.

28. Section 5(7) provides:-

"Where an order under sections 104(3), 105(3) or 112 of the Transport Act 1968 (classification and maintenance of the British Waterways Board's waterways, and maintenance and use of other waterways) is required so as to give effect to any proposal⁸, no provision shall be included in an order under section 1 or 3 above which would -

- (a) remove that requirement, or*
- (b) alter the requirements of sections 104, 105 or 112 of, or Schedule 13 to, that Act relating to orders under those sections."*

29. Mr Stockinger accepts that the relevant section of the 1968 Act referred to in section 5(7) of the TWA is section 112. (Sections 104 and 105 apply only to inland waterways that are comprised in the undertaking of the British Waterways Board.) The relevant part of that section is subsection (1). That subsection and the heading to section 112 read as follows:-

Other inland waterways provisions

⁸ As the analysis which follows shows, (i) a proposal to repeal (with savings) the *whole* of a local enactment would not be caught by this subsection; whereas (ii) a proposal to repeal only a right of navigation conferred, or a duty to maintain imposed by, such an enactment would be caught by this subsection.

112. Power to extinguish statutory rights and obligations in respect of canals not comprised in the undertaking of Board

(1) *In the case of any canal which is not comprised in the undertaking of the Waterways Board, the Minister may by order direct all or any of the following, that is to say -*

(a) that any local enactment passed with respect to that canal shall cease to have effect so far as it confers any public or private right of navigation over that canal;

(b) that any such enactment shall cease to have effect so far as it imposes any duty to maintain that canal for the purposes of navigation (including any duty to supply, or maintain a supply of, water for the canal for that purpose);

(c) that section 17 of the Regulation of Railways Act 1873 if applicable to that canal, shall cease to apply to it."

30. Mr Stockinger does not contend that section 112(1)(c) is relevant to his argument; he is relying only on section 112(1)(a) and (b). Section 112(1)(c) is therefore ignored in the following submissions.

31. Section 112 refers to any "canal". Subsection (6) defines that term as follows -

"(6) In this section "canal" includes any navigation which has been made under, or in respect of which tolls may be levied by virtue of, any enactment, and references to a canal include references to part of a canal."

Application of section 112 of the 1968 Act

32. It is not accepted that the Wye, or any tributary of it, is a "canal" for the purposes of section 112. This is on the following basis -

(i) Sections 112 to 114 of the Act are headed "Other inland waterway provisions". Section 112 relates to what are termed canals, whilst sections 113 and 114 relate to inland waterways. Thus it follows that there must be a difference between the terms "canal" and "inland waterway".

(ii) Section 159(1) of the 1968 Act defines inland waterway as follows -

"inland waterway" includes every such waterway whether natural or artificial ;"

The Wye and its tributaries, to the extent that they are physically navigable, are certainly inland waterways within the meaning of this term.

(iii) In referring to "canals" as opposed to "inland waterways", it is submitted that the scope of section 112 is narrower than the scope of sections 113 and 114 which, as noted above, apply to inland waterways more generally.

(iv) In defining "canal", section 112(6) refers to any "navigation" but this term is not defined in the Act. Whilst the Wye is certainly not a canal in terms of being a totally artificial structure, it is submitted that neither is any part of the Wye a navigation within the meaning of that term. That reference would appear to be intended as a reference to those waterways that are called "the X Navigation" as opposed to "the X Canal" and which, because of impounding and other works (e.g. locks, weirs and embankments), are natural waterways which have been "engineered" to improve their navigability. See Schedule 12 to the Act, which sets out the commercial and cruising waterways of the British Waterways Board. It refers to three types of waterways, two largely artificial and one natural, viz. -

- waterways known as canals, e.g. The Gloucester and Sharpness Canal;
- waterways known as navigations, e.g. The Aire and Calder Navigation;

and

- natural rivers, e.g. The River Severn.

- (v) Whilst it is true that the old Acts, in conferring powers to make the Wye more navigable, used the noun "navigation", e.g. in 1809, setting up the Company of Proprietors of the Rivers Wye and Lugg Navigation and Horse Towing-path, it is submitted that the Wye cannot now be regarded as a navigation (i.e. an engineered/impounded waterway). Almost all evidence of the works authorised by the old Acts has disappeared; the Wye has now reverted to being a natural river. Section 112(6) is aimed at waterways - whether called canals or navigations - that are either totally artificial or which are engineered natural waterways.
- (vi) But even if the Wye can be termed a navigation in the sense used in the 1968 Act, it is certainly not a navigation which has been *made* under any enactment (see s.112(6)). Its navigability may have been improved in the past by the old Acts, but that is not the same as saying that the navigation (i.e. the river) was *made* under those old Acts. This is to be contrasted with artificial waterways, many of which were authorised to be constructed by local Acts of Parliament.
- (vii) Some canals and (particularly) navigations were not, however, made under Acts of Parliament, and so that would appear to be why the definition of "canal" in section 112(6) goes on to refer to navigations in respect of which tolls may be levied by virtue of any enactment. The purpose of levying tolls was to generate money to recoup the cost of capital works and to pay for their maintenance. Section 46 of the 1809 Act conferred a power on the 1809 Act Company to charge tolls for those using the towpath constructed by the Company under the powers of that Act. But that is the extent of the Company's power, and it is not the same as a wider power to levy tolls on those navigating the rivers irrespective of whether or not they use the towpath to help them to do so. For the purposes of section 112(6), tolls may therefore

be levied only in respect of the towpath and not in respect of the river itself. Clearly the Company did not construct the river; all it constructed was the towpath and so that is why the power to levy tolls was confined in the way that it was.

33. If, however, the Agency is wrong in submitting that the Wye cannot be regarded as a canal for the purposes of section 112, the result is that section 112 would give the relevant Minister power by order to direct -
- (a) that any (or all) of the old Acts shall cease to have effect *so far as* they confer any public or private right of navigation over the Wye and its tributaries; and/or
 - (b) that any (or all) of the old Acts shall cease to have effect *so far as* they impose any duty to maintain the Wye for the purpose of navigation (including any duty to supply, or maintain a supply of, water for the river for that purpose).

The origin, application and effect of section 5(7) of the TWA

34. Section 5(7) of the TWA was an amendment moved by the Government at Consideration Stage in the House of Commons on 20th February 1992 (amendment No.24).
35. The amendment was moved because concern had been expressed at the Bill's Committee Stage that orders made under section 3 (and 1) of the TWA might include provisions effectively circumventing the waterways closure procedures in the 1968 Act. There was a widespread fear that waterways would be closed, sold, abandoned or redeveloped with the benefit of the new TWA procedure, without recourse to the established procedures for dealing with such matters provided for in the 1968 Act. It is however to be noted that such procedures extended only to the removal of a right of navigation or duty to maintain. If the proposal was confined to doing either or both of these things then, the Agency accepts, an order under the 1968 Act would be the only way in practice to achieve it. Prior to the TWA, the jurisdiction of Parliament would

give way in such a case to the section 112 procedure. Conversely, however, if the proposal was to do more than to remove that right and/or duty, it could (all) still be done by promoting a Bill.

36. Section 5(7) reflects concern that the new TWA procedures would enable the 1968 Act procedures to be avoided. What it is saying is that where you would *require* an order under section 112(1)(a) or (b) *to give effect* to any proposal (i.e. a proposal which would involve (but would involve only) (a) terminating public or private rights of navigation or (b) removing any maintenance duties - such as a proposal to infill a canal) you cannot include in your TWA order any provisions to terminate those rights or to remove those duties because (if you did so) you would be unlawfully dispensing with the need for an order under the 1968 Act. You must in such a case have recourse to the 1968 Act procedures. (Neither can your TWA order alter the requirements of section 112 or Schedule 13 relating to an order made under section 112).
37. In referring to any "proposal", however, section 5(7) is referring to any proposal which forms part of, or which is related to, an application for a TWA order - see, for example, the reference to "proposals" in sections 9(1), 13(1) and 15(1) of the TWA.
38. The Agency's relevant proposal (so far as any "local enactment" to which an order under section 112 might apply is concerned) is, with savings, to repeal the old Acts (article 32). The proposal is not merely to provide that the particular provisions of the old Acts which confer a right of navigation or impose a duty to maintain the rivers for the purposes of navigation shall cease to have effect; it goes much further than that. However, as mentioned in paragraph 33 above, for a proposal to attract section 112 it needs to be a proposal whereby a local enactment shall cease to have effect *so far as* it confers a right of navigation or imposes a duty to maintain. A proposal pre-TWA which *confined* itself to either or both of those objectives could not, the Agency would accept, have been achieved by private Bill (without amending section 112 itself). It may be that, pre-TWA, a proposal wholly or substantially to repeal a local enactment could have been the subject of an order under section 112 to the limited extent provided for by section 112(1)(a) and (b) (with the rest of the repeal being achieved

by Parliamentary Bill), but that does not mean that it would have *had* to be dealt with in this dual manner. Pre-TWA, in other words, a Bill promoted to achieve a total repeal of a local enactment (or a partial repeal but going beyond mere repeal of the right of navigation and/or duty to maintain) would not have been rejected (or have had to be amended) on the grounds that part of its purposes could have been effected without the authority of Parliament; and post-TWA, the Agency submits, the position is no different. All section 5(7) TWA does, therefore, is to reproduce the position as it obtained pre-TWA, not to render it necessary to have two procedures where previously only one would have been necessary.

39. On one view, therefore, an order under section 112 of the Transport Act 1968 would not be "required" in order to give effect to the Agency's relevant proposal (to repeal with savings the whole of the old Acts) because it would simply be impossible for a section 112 order to achieve that result. The proposal goes too far to be given effect to by an order under section 112. On any view, however, a section 112 order cannot be said to be "required" to give effect to *part* of a relevant proposal viz. that part of the Agency's proposal whereby the public right of navigation conferred by the old Acts, and the duty to maintain imposed by them, would cease to have effect. If a section 112 order *were* required in such circumstances, the enactment of the TWA would have brought about an absurd situation whereby, far from the TWA circumventing the waterways closure procedures of the 1968 Act referred to in paragraph 33 above, those procedures would have become mandatory where previously they were not. The solution is therefore to confine the application of section 5(7) to those discrete occasions when the "proposal" attracting the operation of section 112 is a proposal operating, and operating only, to cause a right of navigation conferred, or duty to maintain imposed, by a local enactment, to cease to have effect.

40. Therefore the provision of the Order - article 32 - which would repeal the old Acts (with savings) is not a provision -

"which would

- (A) remove [the] requirement [of an order under section 112 of the Transport Act 1968], or
- (B) alter the requirements of section 112 of, of Schedule 13 to, that Act relating to orders under those sections" (section 5(7) TWA),

because

- (a) there is no requirement (to achieve such repeal, or to give it effect) that there be an order under section 112 of the Transport Act 1968 and article 32 therefore does not, and does not have effect to, remove it; and
- (b) article 32 in no way alters the requirements of the section or of Schedule 13 because neither section 112 nor Schedule 13 applies.

41. Put simply, why should an order under the 1968 Act (to provide that the old Acts should cease to have effect so far as they confer any right of navigation or impose any duty to maintain) be "required so as to give effect to" the Agency's proposal to repeal (with savings) those very same Acts?

42. It follows, if this is correct, that the Agency's proposal so to repeal the whole of the old Acts is not a proposal "for the purposes of which ... the making or confirmation of an order under [the Transport Act 1968] is required". The quoted words are from section 15(1) TWA 1992. That being so, section 15(2) is not in play. The fact that there are cases in which orders under the TWA and under some other enactment could be required in parallel (which explains the need for section 15 and section 15(2) in particular) is nothing to the point where, as here, the relevant "proposal" (section 5(7) TWA) of the Agency, is not one which is caught by that subsection at all.

43. These submissions are all consistent with the regulations (SI 1993 No.1119) which have been made under section 15(2), because as those regulations and the explanatory note to them rightly recognise:

Regulation 3(1): "Regulations 4 and 5 below shall apply where an order made under section ... 112 ... is required for the purposes of proposals included in an application [for an order under section 3 of the TWA 1992]". (Agency comment: In other words, the regulations mentioned do not apply where, as here, an order under section 112 is not required for the purposes of the relevant proposal);

Explanatory Note: "These Regulations make provision for the assimilation of procedures for [orders under section 6 of the TWA and section 112 of the Transport Act 1968] when an order under the 1968 Act is required in consequence of proposals contained in an application underthe 1992 Act." (Agency comment: In other words, where an order under the 1968 Act is not required in consequence of the relevant proposal, the regulations have no application).

44. There are some cases where e.g. there is a requirement of an order to give effect to the "purposes" of a proposal (section 15(1)) which can be got rid of by a TWA order, as section 15(2) recognises -

"where the requirement referred to in subsection (1) above would not be removed by the order to which the application relates"

but the fact that such cases exist is also nothing to the point.

45. It is separately arguable that s.5(7) TWA means what it says, literally. Where is the "provision" in the draft Order which removes the requirement of an order under the 1968 Act? It is not there.
46. Section 5(7) seems to be drafted on the basis that if one could identify a provision or provisions which would, if enacted, remove the requirement of a 1968 Act order, then the offending provision or provisions would simply be excluded from the order ("no provision shall be included ..."). If article 32 is (wrongly, as the Agency would submit) treated as being a provision which would, if enacted, remove the requirement of a 1968 Act order, and is for that reason simply (and wholly) excluded, the object of section 5(7) is achieved (on Mr Stockinger's reading of it), but a good deal more is also achieved, which section 5(7) is not driving at. So this also points to giving the subsection an interpretation which involves being able to identify a provision (or provisions) of the order which could simply be dropped if it or they were found to offend against section 5(7). Article 32 is not such a provision. It is worth noting, in this context, that section 5(7) could have been, but was not, drafted to provide:

"... no provision shall be included in an order under section 1 or 3 above *the effect of which would be to -*

- (a) remove that requirement ... etc."

Merits

47. It is relevant to comment on the merits of Mr Stockinger's argument (which, incidentally, was raised by him for the first time when he appeared at the inquiry on 3rd June.) If he is right to say that section 5(7) of the TWA applies and that therefore a separate application for an order should be made under section 112 of the 1968 Act, a consideration of the provisions of that section and Schedule 13 to that Act demonstrates that, procedurally, those who might be interested in such an application would have the benefit of procedural safeguards which are very similar to those applying to TWA orders, viz. -

- (i) consultation with users of the rivers (para. 4 of Schedule 13), and
- (ii) publication of the proposed order, consideration of objections and the holding of an inquiry (para. 5 of Schedule 13).

The only substantive difference procedurally is that, unlike TWA orders, orders made under section 112 may be annulled by a resolution of either House of Parliament. This is known as the negative resolution procedure, and it is a technical safeguard applying to the making of a considerable number of statutory instruments. It is very rare indeed for SIs to be rejected in this way (the procedure does not allow for them to be amended).

48. Mr Stockinger has not produced in writing any arguments as to *why* s.112 of the 1968 Act applies, and *why* s.5(7) of the TWA bites on aspects of the draft Order.

49. No other objector has raised the same point.

50. A further point is that s.112 provides a means to consider questions relating to public rights of navigation and maintenance obligations. Whilst the Agency is proposing to repeal the old Acts (and therefore their provisions relating to public rights of navigation, and obligations to maintain - if any) it is of course proposing their

wholesale replacement in any event - see article 5(b) and article 7(2), and these matters have been discussed extensively at this inquiry. It would be very odd if recourse to the 1968 Act procedure were separately necessary in order for the Minister carefully to consider the repeal of provisions conferring the public right of navigation and imposing a duty to maintain, when those self-same provisions are proposed to be replaced in any event.

Amending the draft Order

51. The Agency has, however, given consideration to the amendments to the draft Order which it considers would be necessary if, contrary to the arguments set out above, the Secretaries of State are of the view that section 112 of the 1968 Act applies to the Wye and that section 5(7) of the TWA also applies. (If the suggested amendments were made, they would in no way affect the substance of the Order which, as currently drafted, is proposed in any event to confer a public right of navigation and to impose a duty to maintain.) The substance of the amendments required is simply to drop the "proposal" to repeal (i) the public right of navigation conferred by the old Acts; and (ii) any duty to maintain imposed by them, (assuming that the proposal to repeal (with savings) the whole of the old Acts counts, contrary to the Agency's submissions, as such a proposal). If the Secretaries of State are doubtful as to the correctness of those submissions, however, they may feel that it would be appropriate to make the amendments suggested.
52. The necessary amendments in this event are set out in the Appendix to this section D2, and they refer to the final filled-up draft Order (EA/A47(a)). The amendments involve -
- (i) subjecting the Agency in a new article 5(2) to any duty to maintain which is saved from repeal (see (iv) below), and construing that duty as provided by article 5(1)(b);
 - (ii) restricting the ambit of article 7(1) to any non-statutory rights of navigation

and use (i.e. common law rights), and replacing those rights with the right conferred by article 7(2);

- (iii) saving from repeal any public or private right of navigation (defined in accordance with section 115(1)(a) of the 1968 Act) conferred by the old Acts - with the result that the provisions for selectively retaining the two passages from the old Acts to the extent that they may apply to the upper rivers and/or the tributaries become inappropriate and unnecessary; and
- (iv) saving from repeal any duty to maintain the rivers for the purpose of navigation (defined in accordance with section 112 of the 1968 Act) which is contained in the old Acts.

Appendix to D2

1. At the end of article 5 add the following new paragraph -

“(2) The Agency shall be subject to any duty to maintain the rivers for the purpose of navigation which is saved from repeal by article 32 of this Order, which shall be construed as a duty to maintain the principal rivers in the manner specified in paragraph (1)(b) above.”.

2. Delete article 7(1) and insert the following -

“(1) All such public rights of navigation and use over or along the principal rivers as exist immediately before the coming into force of this Order, other than those referred to in article 32 (a) of this Order, shall be extinguished and replaced by the public right referred to in paragraph (2) below.”.

3. Delete article 7(2) and insert the following -

“(2) Notwithstanding any public right of navigation conferred by any enactment saved from repeal by article 32 of this Order, members of the public shall have the right to navigate and use the principal rivers.”.

4. Delete the whole of article 32, and insert the following -

“32. The enactments specified in Schedule 2 to this Order are hereby repealed to the extent therein specified, save insofar as -

- (a) they confer any public or private right of navigation over the rivers (including any right to use or keep any vessel or craft on the rivers);
- (b) they impose any duty to maintain the rivers for the purpose of navigation (including any duty to supply, or maintain a supply of, water for the rivers for that purpose); or

(c) any public right of way over land is conferred by or acquired under those enactments.”.

5. In Schedule 2 (3rd column), leave out the words “, but not” to “the tributaries” in both places where they occur.

6. Delete the whole of the last paragraph (commencing “Part VI of the Order ...”) of the Explanatory Note (page 47).

D3: VIRES AND THE HARBOURS ACT 1964

(1) HA 1964, section 57(1):

- "harbour authority" means any person in whom are vested ... powers or duties of improving, maintaining or managing a harbour.

- "harbour" ... means any harbour ... and any ... tidal or other river or inland waterway navigated by sea-going ships.

(2) TWA 1992, section 3(1)(a): "The Secretary of State may make an order relating to ... (a) the ... operation of an inland waterway in England and Wales.

(3) TWA 1992, section 67(1): "inland waterway" includes both natural and artificial waterways, ... but not any waterway managed or maintained by a person who is a harbour authority (within the meaning of the Harbours Act 1964) in relation to the waterway.

53. As a separate part of the argument on *vires*, it is necessary to consider briefly a submission advanced by Mr Stockinger and Mr Willis relating to the alleged application of the Harbours Act 1964 to the (principal) rivers (Mr Stockinger) and to that part of the river Wye which runs through the area of Hereford City Council (Mr Willis). The Agency adopts but without repeating its contents the addendum to EA/E12 headed "The Rivers as Inland Waterways", but would add the following points.

54. *Are the rivers (or part of them) a harbour?* The objectors' contention that the Order cannot apply e.g. to the river Wye breaks down if it does not fall to be regarded as a harbour within the definition provided by section 57(1) of the 1964 Act. The Agency submits that the river Wye plainly cannot fall within the definition because, although it is a "river or inland waterway" it cannot be described as "navigated by sea-going

ships". The expression "navigated by sea-going ships" connotes a state of affairs such that the river can be spoken of as being so navigated, with some degree of regularity. The Wye has not, on the evidence, been navigated by any sea-going ship at all for many years prior to the NRA's application for the Order; nor has any sea-going ship subsequently navigated it. The vessels which have navigated certain stretches of it cannot reasonably be described as sea-going merely because some of them would be capable of embarking upon a sea voyage. For a vessel to be a sea-going ship, the Agency submits, it must be a vessel which *de facto* navigates or voyages on the ocean. There is no evidence, for example, that Mr Gardiner's commercial craft have ever plied the ocean; and Mr Simpson did not describe his particular navigations on the river with a view to establishing that his vessels were sea-going ones. Mr Stockinger advanced no evidence of his own on the point at all. The Wye Invader might or might not be regarded as a sea-going ship, but the tortuous long-drawn-out journey of that vessel hardly permits it to be said that the Wye was "navigated" by the Wye Invader, within the meaning of the expression "navigated by sea-going ships". If that latter point is wrong, there is no or insufficient evidence that the Wye is or has in recent times been "navigated by sea-going ships". Even if it can be established that the Wye has been or is occasionally navigated by sea going ships it cannot be said that the river is or has been so navigated with a sufficient degree of regularity for it to be described as "navigated by sea going ships".

You are therefore invited to find as a fact

Finding No.5: That no part of the rivers has at any material time been navigated by sea-going ships with sufficient regularity for it to be said that the rivers are "navigated by sea-going ships" so as to constitute the rivers (or parts of them) a "harbour" within the definition of that term in section 57(1) of the Harbours Act 1964.

55. *The "Navigation Trustees"*. The other point the Agency would wish to add to its submissions is this. The claim of the so-called navigation trustees to be the harbour authority is no more tenable today than it would have been or was at the time Laddie J.

gave his judgment in *NRA v. Stockinger and Others*. However, Mr Stockinger introduced the point for the first time when going through his objection letter on 3rd June that the Company of Proprietors acting through the navigation trustees was actively managing or maintaining the river. It will be for the Secretaries of State in due course to take a view on whether the new material relating to proceedings in the Central London and Birmingham County Courts in any way alters the conclusions of Laddie J. and of the Agency as expressed in EA/E22. The Agency is even now in the process of trying to unravel the full implications (if any) of those proceedings and reserves the right to add an addendum to EA/E22 (by way of submission to the Secretaries of State) when it has done so. For present purposes the point is to reiterate that in theory the 1809 Act Company could be reactivated and could, as so reactivated, carry out management or maintenance of the river. That is precisely what Mr Stockinger says the so-called trustees as harbour authority have been doing. However the activities carried out by the so called trustees are too sporadic and disorganised to amount to management and maintenance of the rivers. The Agency therefore asks you to find as a further fact:

Finding No.6: That the activities of those claiming to be navigation trustees taken together do not amount, and have never amounted, to management or maintenance of the rivers (or either or any part of them), such that the rivers can be said, for the purposes of section 67(1) of TWA to have been or to be "managed or maintained" by those individuals (whether by themselves or through the agency of any other person).

56. *The position of Hereford City Council.* Hereford's position is slightly different because Hereford City Council may be able to claim to be a "harbour authority" by virtue of its powers under section 20 of the 1985 Act. A harbour authority is a person in whom is "vested ... powers or duties of improving, maintaining or managing a harbour" (section 57(1), Harbours Act 1964).
57. Mr Willis is wrong at p.24 of his closing submission to imply that it is for the Agency to prove that the river is not maintained by Hereford City Council as harbour authority. As

it is Hereford City Council which suggests that the Order cannot properly extend to the part of the Wye which flows through its area because that part falls to be regarded as a harbour managed or maintained by a harbour authority, it is for Hereford City Council to adduce evidence that *qua* harbour authority Hereford City Council has carried out such maintenance. However, not only has there been no such evidence; there could be none. Even if in some other capacity Hereford City Council had proved that it in some way has maintained the river in its area, it would need to show that it has done so *as* harbour authority. It could not successfully do this, because the only power which Hereford City Council has *qua* harbour authority (assuming, which is denied, that the river is to be regarded as a harbour) is its byelaw-making power under the 1985 Act, its other powers in relation to the river being conferred by general local government or public health legislation. That power having never been exercised, Hereford City Council cannot claim to have carried out either maintenance or management of the river for the purposes of saying that the Wye in its area is not an "inland waterway" under section 67(1).

You are therefore invited to find as a further fact:

Finding No.7: If Hereford City Council is a harbour authority in relation to that part of the Wye which flows through its area, that part of the river has not at any material time been, and is not, managed or maintained by Hereford City Council in its capacity as such harbour authority.

E. STATEMENT OF MATTERS

1. In this section I set out where in the Agency's submissions the various matters referred to in the Statement of Matters (EA/A17) are addressed. I also deal with that part of matter number 5 which is not dealt with elsewhere.

E1: The effectiveness of the current arrangements for regulating navigation and use of the rivers Wye and Lugg and their tributaries.

2. This was dealt with on pages A50 (paragraph 117) to A54 (paragraph 127).

E2: The case for introducing a new regulatory regime on all or part of the rivers Wye and Lugg and their tributaries.

3. This was dealt with on pages A1 (paragraph 1) to A54 (paragraph 127).

E3: The appropriateness of the powers sought by the Environment Agency for the licensing and control of vessels using the principal rivers (as defined in the draft Order), and for the licensing of works in or on the principal rivers.

4. The proposed powers for licensing and control of vessels were discussed at pages C1 (paragraph 1) to C5 (paragraph 10); page C13, paragraph 35; and pages C13 (paragraph 38) to C16 (paragraph 44). The powers for the licensing of works were discussed on page C1 (paragraph 1) to C5 (paragraph 10); and page C16 (paragraph 45) to C18 (paragraph 49).

E4: The adequacy of the proposed Wye Advisory Committee for consulting relevant interests about matters substantially affecting the operation of the rivers.

5. This was dealt with on pages A21 (paragraph 53) to A24 (paragraph 59); and page

C5 (paragraph 13) to page C10 (paragraph 25).

E5: The extent to which the exercise of the powers contained in the proposed Wye Navigation Order would be likely to have an environmental, ecological or economic effect on the rivers and the surrounding area.

6. The question of environmental and ecological effect was partly addressed on pages A2 (paragraph 3) to A9 (paragraph 23) which described the past, present and anticipated conflicts between recreation and navigation and the environment. Pages C2 (paragraph 5) to C3 (paragraph 6) described the benefits which the Order will confer on the environment and ecology of the rivers.
7. The Agency's position on the economic effects of the Order is to be found in the documentation as follows:
 - (a) Background Papers EA/E18 and E19. These have been prepared in compliance with the requirements of the previous government's deregulation initiative (see documents EA/D49 and D50 for the relevant government literature), but the Agency also relies on them as the documents principally addressing point 5 of the Statement of Matters in so far as it relates to economic effects.
 - (b) The evidence of Mr. McGarvey (EA/P3(a) paragraphs 8.1-8.6) and Professor Penning-RowSELL (EA/P5(a) paragraphs 15.1-15.7).
 - (c) EA/A42, a summary of the economic position prepared by Professor Penning-RowSELL.
8. The Agency does not consider that questions of economics are particularly relevant to the question of whether the Order should be made, and for that reason has not discussed the question under the heading of "why bother". It certainly does not rely on economic considerations as a *justification* for the making of the Order. Your

consideration of the economic effect of the Order should, in our submission, be primarily to decide whether the making of the Order would have an adverse economic effect so detrimental that it outweighed the (non-economic) reasons for making the Order.

9. The Agency's evidence is that the impact of the Order on local businesses, voluntary organisations and the consumer is likely to be slight. Background Paper EA/E19, Appendix 1, undertakes an article by article analysis of the Order and the type of costs that each article is likely to impose. It identifies the main types of costs arising from the Order as likely to be:

- (a) the costs to owners and operators of pleasure boats of meeting safety requirements (article 15 of the Order) and, if a registration scheme is introduced, paying registration charges (articles 14(2)(k) and 14(4)(a));

- (b) the costs to activity centres, and owners and operators of canoes and other vessels, of registration charges should a registration system be introduced (articles 14(2)(k) and 14(4)(a));

- (c) the costs to landowners of removing and marking obstructions to navigation (article 11) and applying for a works licence where the landowner proposes to construct works (articles 19 and 20). (EA/E19 paras 12-17).

10. The conclusion is that the overall costs of complying with the Order will be small, representing (for businesses) a negligible proportion of turnover. Any landowners who have constructed or permitted to be constructed on their land a number of obstructions to navigation may have more substantial costs if the Agency requires the obstructions to be removed. (EA/E19 para. 22).

11. These minor costs will be more than off-set by the economic benefits (discussed in EA/E18) which are expected to flow from the improved management of river use which the Order will allow, i.e.

(a) an increase in the economic value of recreation, as conflicts between recreational users of the rivers are reduced and recreational use of the rivers grows;

(b) the economic value of the avoidance of a deterioration in the rivers' environmental quality, which would be likely to occur in the absence of the improved management of the rivers which the Order will allow.

(EA/E18 paras. 22-23).

12. The Agency's witnesses have given evidence that they are aware of the Order's potential economic impact, and will take this into account in the decision-making process. Mr. Fowles states that registration charges may be set at a level which optimises income recovery whilst encouraging participation in navigation (EA/P4(a) para. 8.4.3). Mr. McGarvey, at paragraph 8.6 of his proof (EA/P3(a)) says that the Agency will seek to ensure that the benefits of , for example, a registration scheme, outweigh any negative impacts.

13. No serious challenge has been made by objectors to the Agency's economic case. Those objectors who claim that the Order will have an adverse economic effect, principally Hereford City Council and the other local authorities, have merely asserted that claim without providing *any* evidence to support it. Those objectors have not addressed the question of whether the Order may bring economic benefits of the kind outlined in paragraph 11 above. All the provisions identified above as most likely to lead to costs are preceded in the legislation of other inland waterways: precedents for articles of the Order are given in EA/E10 section 4, and those relating to (inter alia) vessel registration and licensing of works are set out in EA/X7, which was used in the cross-examination of Mr. Willis. On it being put to Mr. Willis that the provisions for registration of vessels and licensing of works contained in the Anglian Water Authority Act 1977 (EA/B13), the Norfolk and Suffolk Broads Act 1988 (EA/B30) and the Thames legislation (EA/B20-24) did not seem to have an adverse economic impact on those waterways, he replied that a

relatively unestablished river such as the Wye could only attract visitors and compete with other more established waterways if it was relatively free from regulation. The hope of gaining a competitive advantage is not, in our submission, a reason not to confer on the Agency powers to manage the rivers when those rivers are in need of management and when those powers are (for good reason) well preceded in inland waterways legislation.

14. The Agency invites you to find, in the light of the evidence summarised above, that the benefits of making the Order are not outweighed by the economic impacts.

E6: Did the NRA have the *vires* to apply for the Order? Does the Environment Agency have the *vires* to continue the NRA's application? Can the Agency's purposes be achieved by ministerial order?

15. This was dealt with in pages D1 (paragraph 1) to D41 (paragraph 57).

F. CONCLUSION

1. On one view of the matter, it may be said that the Order if made will create a "new" function for the Agency. For it would, locally, give the Agency the full powers and duties of a navigation authority. But the function thus conferred on the Agency would, as already noticed, be merely the local expression of a function already possessed by the Agency nationally viz. its duty generally to promote recreation and conservation. There is however a problem for the Agency with its section 6(1) function. The *duty* generally to promote recreation is cast on the Agency, under section 6(1), together with the *power* to carry out that duty "to the extent that it considers desirable". The implication is that the Agency may, if it considers it desirable to do so, do anything which it wishes in furtherance of its duty. However, the language in which the function is expressed is not cast in terms strong enough to enable it to do everything it may wish to do in furtherance of its duty. On the Wye, for example, the Agency has no power to remove obstructions to navigation however "desirable" it may consider it to be in carrying out its duty to promote recreation. The Order is intended to be an instrument which makes careful and detailed provision for the local removal of the fetters which currently inhibit the Agency from carrying out its national duty to the full extent that it considers desirable. If the section 6(1) function imposes a duty coupled with inadequate powers to carry it out, the Order may be seen as the local means of curing that inadequacy. Accordingly, if the Order is made, the Agency will henceforth be able to say - "we've been given the powers; now we'll finish the job".
2. Understandably, the promotion of an order such as this gives rise to considerable interest. In the Agency's Opening Statement (EA/A28 paragraph 1) I spoke first of the very special qualities of the Wye Catchment. I said -

"Its rivers are amongst the most beautiful and environmentally significant in England and Wales. But they are also used extensively for various recreational purposes by a large number of people."

Plainly this explains the interest shown in this Order.

3. Looking back at the inquiry, we are struck by a number of factors:

- (i) There is considerable support for the Order. (Witness all the letters received in support of the Agency's initial consultation exercise: EA/A4.) Much of that support comes from important bodies, e.g. English Nature, the Countryside Council for Wales and the Countryside Commission: the government's statutory advisors on nature conservation and landscape matters. Many "objectors" to the Order are, as we have seen, actually qualified supporters as, in many cases, they are concerned only with a limited aspect of the Order, such as the duty to promote navigation in article 5. Otherwise they support it.
- (ii) Opposition in principle to the Order has come from a relatively small number of objectors, who, we venture to suggest, have taken up a disproportionate amount of inquiry time. They have made many allegations and assertions without adducing evidence to support them, and have not made any real attempt to scrutinise the detail of the Order. Their vision is, we submit, so at odds with the rivers' environmental and recreational importance that we hope that you will have no difficulty in rejecting it.
- (iii) The Agency has been able to answer many detailed points on the Order - see, particularly, EA/A23, EA/A25 and EA/A30, and most recently EA/A47. This has enabled many objectors to withdraw or to support the Order, e.g. the Inland Waterways Association, the Sports Council, the British Canoe Union, and the various statutory undertakers.
- (iv) The Agency's evidence (including its Background Papers (the "E" series of documents)) has, it submits, emerged from the inquiry substantially

unscathed.

4. Six questions remain. First, has the Agency shown that the Order is needed? Second, should the powers sought in the Order be given to the Agency? Third, are the provisions of the final draft filled-up Order (EA/A47(a)) the right ones? Fourth, have we fairly dealt with the various issues on *vires* which have been raised? Fifth, have we properly addressed the Statement of Matters? Sixth, have we answered satisfactorily your questions? The Agency very much hopes you will be able to answer all these questions in the affirmative and accordingly report to the Secretaries of State your recommendation that the Order should be made.

PROPOSED WYE NAVIGATION ORDER

LIST OF KEY DOCUMENTS

Document description	Reference
A series: Documents relating to the application for the Order	
Proposed Wye Navigation Order Consultation Draft (Oct 95-Jan 96)	EA/A1
Proposed Wye Navigation Order Consultation Document (Oct 95)	EA/A2
Response to comments and views (Mar 96)	EA/A5
Proposed Wye Navigation Order as applied for	EA/A6
Letter dated 31st July 1996 giving notice that the Secretaries of State intend to cause an inquiry to be held	EA/A14
Response to Objections (Oct 96)	EA/A16
Statement of matters	EA/A17
Environment Agency Statement of Case (Oct 96)	EA/A18
Letter dated 11th February 1997 from the Agency to Objectors and Supporters concerning the Wye Advisory Committee	EA/A23
Letter dated 12th March 1997 from the Agency to Objectors and Supporters concerning amendments to the Order	EA/A25
Opening statement of the Environment Agency	EA/A28
Consolidated draft Order	EA/A30
Consolidated version of paragraph 1 of Schedule 25 to the Water Resources Act 1991	EA/A40
Inland waters and inland waterways - a Venn diagram	EA/A41
The Economic Effect of the Order, the Regulatory Appraisal and the Compliance Cost Assessment	EA/A42
Evidence Management Table	EA/A44(a)
Objection Management Table	EA/A45
Final filled-up draft Order (which is a "marked-up" copy, with riders, of the consolidated draft Order EA/A30)	EA/A47(a)

Commentary on final filled-up draft Order	EA/A47(b)
The Agency's closing submissions	EA/A51

B Series: Legal documents

The 1695 Act	EA/B2
The 1727 Act	EA/B3
The 1809 Act	EA/B4
<i>NRA v Stockinger</i> judgment of Laddie J.	EA/B42
Transcript of the 1662 Act	EA/B48
Water Resources Act 1991	EA/B8
Environment Act 1995	EA/B12

C Series: General and historical background documents

Report of the Abergavenny Conference 1987	EA/C11
The Wye Project Report	EA/C13
The Wye Project Responses to public consultation	EA/C14
Affidavit A.J. Weare	EA/C37
Evidence given by Keith Rayner to the House of Lords considering the	EA/C48
Hereford City Council Bill	
<i>The Tragedy of the Commons</i> by G.Hardin	EA/C57
Map	EA/C64

D Series: Policy documents

The Wye CMP Action Plan	EA/D10
<i>British Waterways and the Environment Agency Review of Navigation</i>	EA/D15
<i>Functions: Government Conclusions</i>	
<i>The Environment Agency and Sustainable Development</i> (DoE Nov 96)	EA/D20
<i>The Environment Management Statement</i> (DoE Nov 96)	EA/D21
The Environment Agency Draft Navigation Strategy	EA/D22

The Environment Agency Draft Recreation Strategy	EA/D23
The Environment Agency Draft Conservation Strategy	EA/D24
The Wye CMP First Annual Review	EA/D30

E Series: Background Papers

The whole series

P Series: Proofs of evidence

The whole series

Q Series: Responses to the Inspector's questions

The whole series

APPLICATION FOR COSTS BY THE ENVIRONMENT AGENCY

**NOTE OF SUBMISSIONS MADE BY MR GEORGE LAURENCE QC ON 11TH
JULY 1997**

1. The starting point is the Local Government Act 1972. By section 11(5) of the Transport and Works Act 1992, section 250(2) - (5) of the Local Government Act 1972 apply to this inquiry.

2. We are seeking from the Secretaries of State an order in favour of the Agency under section 250(5) of the 1972 Act as applied by section 11(5) of the 1992 Act directed to the following persons:-
 - (i) Hereford City Council.

 - (ii) Victor Stockinger.

 - (iii) Frank Barton.

 - (iv) Anthony Gardiner.

 - (v) Dennis Parkhill.

 - (vi) James Simpson.

3. We seek only a partial order against them in such proportion of the Agency's total costs as the Secretaries of State may think right. We recognise that not every one of those six has a similar degree of responsibility. One broad division is between Hereford City Council and Mr. Stockinger on one hand, and the other four individuals on the other. Within that division, two further sub-divisions can be made. The position of Hereford City Council is not precisely the same as that of Mr. Stockinger;

and the position of Mr. Simpson is not quite the same as that of Mr. Parkhill, Mr. Barton and Mr. Gardiner. Mr. Simpson's position at the inquiry was, in our submission, that of reluctant acquiescence in the policy of non-co-operation which Mr. Gardiner, Mr. Barton and Mr. Parkhill engaged in more enthusiastically and seemed happy to abide by.

4. Turning to Mr. Stockinger and Hereford City Council, it is a matter for you, sir, to determine how their positions may be distinguished. But, broadly, in our submission Mr. Stockinger took up significantly more Inquiry time and put the Agency to significantly more trouble by the way he posed his questions in writing, and failed to provide a proof of evidence on time. You may think that in other respects their positions are not precisely similar.
5. The policy of non-co-operation was not general. Mr. Parkhill, Mr. Barton and Mr. Gardiner were, in our submission, putting forward their arguments in the best way they could according to their lights. But in one respect, they developed an almost implacable policy of non-co-operation, and that was in relation to the question of what proceedings in the courts Mr. Stockinger and his associates had been bringing since the judgment of Laddie J. Mr. Simpson, we submit, reluctantly acquiesced in this policy, whereas Mr. Gardiner, Mr. Parkhill, Mr. Barton, Mr. Stockinger and Mr. Willis all stonewalled attempts to discover what had been going on. There was another aspect of the non-co-operation policy, in relation to the appointment of the "navigation trustees" as such.
6. Details of these "policies" are set out in detail in the Agency's closing submissions, see in particular section A3. Merely not to co-operate is not in itself unreasonable behaviour if the non-co-operation is irrelevant to anything with which the inquiry is concerned. But on the objectors' own cases (excluding Hereford City Council) it is material for you to take a view as to whether the "trustees" can properly claim to speak for or to represent the old navigation authority for the rivers. This is material because Mr. Stockinger's arguments amount to the following: whatever Laddie J. may have held, you do currently have on your hands an active navigation authority for the

rivers. So it is plainly material (for reasons which you will see Anthony Weare dealt with in his Affidavit before the High Court (EA/C37)) to see whether there is a navigation authority.

7. A good deal of inquiry time was spent trying to find out what had been going on in the court proceedings and what was the status of the "trustees". Mr. Willis and Mr Stockinger played a full part in resisting the Agency's attempts to throw light on these two matters. They were aided and abetted in their resistance by Mr. Parkhill, Mr. Gardiner, Mr. Barton and, to the extent that I have mentioned, Mr. Simpson. So the inquiry was prolonged and expense incurred in the process. Bircham & Co. (Dyson Bell Martin is the name for the parliamentary branch of Bircham & Co.) incurred considerable expense. The Agency is a client of that firm. The expense to which the Agency has been put is the expense of Bircham & Co. investigating and trying to provide information for the inquiry on the court proceedings.
8. It is not in our submission open to the objectors to claim that the proceedings are irrelevant because they have themselves divulged and taken advantage of details of some of the proceedings. They have sought to take advantage of the Cooke Order and the Boggis Order in relation to the surrender of forty shares. Mr. Stockinger has tried to have it both ways - he has defended his refusal to give details on the grounds that he accepted that doing so would have a detrimental effect on his case, while at the same time inviting you to attach importance to those two Orders. You need, sir, to go to the closing submissions of Mr. Stockinger to see what reliance he placed on those two Orders and others. In our submission, each and every avenue that Bircham & Co. have, during the proceedings at the inquiry, sought to explore in relation to the court proceedings and the appointment of the "trustees" has been legitimately explored. The footnotes on page 3 of EA/A49 (the bundle of litigation papers) describe Bircham & Co.'s activities. You will have your own views about how much inquiry time was wasted.
9. We say that there was unreasonable behaviour on the part of those against whom we seek an order for costs. This was the most unreasonable behaviour that I have ever

encountered, and although that is not relevant, what matters is your view as to how unreasonable it was, to what extent the inquiry was needlessly prolonged, and to what extent it was reasonable for Bircham & Co. to investigate the full effect of the various county court judgments.

10. There is also the distinct matter of the way in which Mr. Stockinger has bombarded the Programme Officer and ourselves with correspondence, documents, and questions without complying with the basic rule, which is to supply a proof and a summary proof so as to enable his part in the inquiry to be dealt with according to the usual procedures. Every time 10 to 15 minutes were lost while we discussed what to do about the non-provision of material by Mr. Stockinger, the inquiry was prolonged. The Agency was put to expense because its advisers had to decide how to deal with the voluminous material provided otherwise than in a form we were entitled to expect.
11. This is a vivid illustration of what the Circular says at paragraph 5 - deliberately unco-operative behaviour by any objector is a ground for an award of costs. You will need, sir, to consider in due course the general conditions for an award. The Circular gives examples of unreasonable behaviour.
12. There are three examples of unreasonable behaviour that you might like to bear in mind.
 - (a) Mr. Stockinger revised his submissions and these were received on Monday 7th July, although they purported to be dated 19th June. There are substantial differences between the version received on 7th July and the version delivered by Mr. Stockinger at the inquiry. We tried to take these on board, because we saw no reason to make a song and dance about the matter. Furthermore, Mr. Stockinger's response to a document we sent him in May 1997 - namely Background Paper EA/E22 - was received on Tuesday 8th July 1997, although it also purported to be dated 19th June 1997.

We invite you to find that these documents could not have been dated 19th

June 1997.

- (b) On the 16th and 17th June no fewer than 7 letters were written by Mr. Barton and Mr Stockinger for the "navigation trustees" (EA/A39-29-36). That is an example of bombardment. The letters were written to you, Mr. Lee and to Dyson Bell Martin. A further letter (EA/A39-42) was written directly to me!
 - (c) Then there is the matter of the non-provision of Mr. Stockinger's proof. Mr. Stockinger gave evidence to the inquiry and, in our submission, this took longer than it should have done. In the end, we had no option but to go along with it. Mr. Stockinger had the advantage of several days of submissions in the form in which he chose to make them. What he was doing, we submit, was playing fast and loose with inquiry procedure in a way which was disgraceful for a solicitor. It was also disgraceful for Mr. Stockinger and Mr. Willis as solicitors, competent, intelligent and articulate, to fail to tell the Agency about court proceedings and to provide proper details of all of the instruments of appointment of the so-called Trustees. The inquiry was given information on a need to know basis, with Mr. Stockinger being the judge of that need.
13. I am not here taking the opportunity to have a go at Mr. Stockinger. I am not here addressing the merits of his case. The behaviour I have been complaining of has implications for the inquiry itself. I am not trying to make another closing speech. But this behaviour of Mr. Stockinger, aided and abetted by Mr. Willis, and to a lesser extent by the others, was unreasonable behaviour which prolonged the inquiry and put the Promoters to considerable extra expense.
14. It is not only the Agency who has severe reservations about the way these gentleman behaved. You have received, sir, letters from Miss Lickorish and Captain Dereham themselves. Everyone is affected when one or two do not play by the rules.
15. The 1972 Act and 1992 Act are in very general terms. There is nothing in the governing legislation which says that limitations may be laid down on an award of

costs. We don't say that there is anything wrong with the Circular, but we would ask you, sir, to bear in mind that guidance is merely guidance. If there is any respect in which you consider that behaviour is unreasonable in a way that does not fit with the precise wording of the Circular, I would just remind you that there is no limitation in the underlying legislation. But, in any case, there is behaviour which falls within the Circular - and the Agency has been put to considerable extra expense as a result.

Dyson Bell Martin

14.7.97

APPLICATION FOR COSTS BY THE "NAVIGATION TRUSTEES"

RESPONSE BY THE ENVIRONMENT AGENCY

The Agency submits that the application for costs by the so-called "navigation trustees" made by letter of 10th July 1997 should be rejected, for the following reasons:

1. The so-called "navigation trustees" are not who they say they are, and so those purporting to be "navigation trustees" are not entitled to make an application for costs as such. See Background Paper EA/E22, and the Agency's Closing Submissions pages A26-A33.
2. The letter of 10th July 1997 gives no explanation of why the so-called "navigation trustees" consider that they are entitled to an award of costs against the Agency, either by reference to the relevant Circular, or at all. The letter of 10th July 1997 makes no reference to DoT Circular 3/94, except to ask the Inspector to advise on what basis he could award costs in addition to the advice given in that Circular. It is for the "navigation trustees" to say on what basis they are entitled to costs from the Agency. They have not done so and so the Agency submits that the application should not be granted.
3. Insofar as the "navigation trustees" imply that they are entitled to costs on the basis of their arguments concerning *vires*, the Agency denies that the original application was *ultra vires* the NRA or that its continuance is *ultra vires* the Environment Agency. See Background Paper EA/E16 and the Agency's Closing Submissions pages D1-D41.

4. If further the "navigation trustees" are implying that they are entitled to costs because the Agency has failed to reply, or reply properly to their questions, this too is denied. Those purporting to be "navigation trustees" have received full replies to the questions which they put to the Agency witnesses during the inquiry. Mr Gardiner and Mr Simpson cross-examined Agency witnesses. Mr Stockinger, in fact, chose not to do so. The Agency's witnesses took considerable trouble to reply in detail to the written questions purporting to come from the "navigation trustees"- see EA/A36, App 1.

5. Finally, if the "navigation trustees" are arguing that they are entitled to costs from the Agency simply because they are now the navigation authority for the rivers, the Agency reiterates that the Order should be made whether or not they really are the navigation authority, see EA/E22, and the Agency's Closing Submissions pages A33-A43

6. Further reference should be made to the correspondence at Appendix 2 to EA/A36 (page 19A) and at EA/A39, page 40.

11th July 1997