Green Lanes Environmental Action Movement – written evidence (NER0038)

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Patron: HRH The Duke of Edinburgh, KG, KT

To the House of Lords Select Committee on the NERC Act
Evidence from the Green Lanes Environmental Action Movement (GLEAM)

Introduction

1. The Green Lanes Environmental Action Movement (GLEAM) was founded in 1995 to campaign for changes in the law of England and Wales to stop off-road drivers damaging or destroying green lanes and for the rights of walkers, horse riders, pedal cyclists, carriage drivers and the disabled to use green lanes without danger, difficulty or inconvenience. Green lanes are ancient highways which are not sealed with tarmac or concrete; they may be recorded on the definitive map of public rights of way, which will specify whether they are legally open to the public with motor vehicles, or they may only be recorded on highway authorities’ lists of streets which usually do not specify the level of public rights.

2. We supported part 6 of the NERC Act during its passage through Parliament, and in its implementation by county, unitary and national park authorities and Defra. However it has become clear since the passing of the NERC Act in 2006 that it, and the related guidance on the management of motor vehicle use of green lanes issued by Defra, have not always had the effects intended by Parliament and by the government. We explain below what we consider the deficiencies in legislation and guidance to be, and suggest how this might be remedied. This is our written response to question 11 in the Select Committee’s call for evidence. We would be glad to give oral evidence in addition, if required.

What the NERC Act did and didn’t do to protect green lanes

3. Up until the coming into force of part 6 of the NERC Act (2 May 2006 in England), any unsealed highway (green lane) which could be shown to have public vehicular rights created by horse-drawn vehicle use or modern motor vehicle use was legally usable by the public with modern motor vehicles, and became a byway open to all traffic (BOAT) on the definitive map and statement of public rights of way. But increasing public unease about the misuse of BOATs, and other green lanes with undefined public rights, by motorised users and about the impacts of such use on non-motorised use and the countryside led Parliament, in the Countryside and Rights of Way (CRoW) Act 2000 and in the NERC Act, to introduce measures to prevent BOATs
being added to the definitive map. In the government’s response to its consultation on the legislative proposals which were the basis of part 6 of the NERC Act, the Framework for Action published in January 2005, Defra wrote:

“.. we believe that there is a strong case for legislation to better reflect historic dedication for and use by non-mechanically propelled vehicles on ancient rights of way which are the subject of future claims to modify the definitive map and statement.”

4. The government’s intention for part 6 was therefore that green lanes with historic public rights for horse-drawn vehicles should become restricted byways on the definitive map, legally usable by the public with horse-drawn vehicles and other non-motorised users, but not by the public with motor vehicles.

5. Section 54A of the Wildlife and Countryside Act 1981 (inserted by the CRoW Act 2000) prevents BOATs being added to the definitive map after the cut-off date of 1 January 2026. However we understand that Defra does not intend to bring this provision into force, when other provisions relating to the cut-off date are implemented in 2018, i.e. it will be possible to add BOATs indefinitely, provided one of the exemptions in the NERC Act is met. However, the other relevant provision in the CROW Act, which automatically reclassified green lanes claimed as roads used as public paths (RUPPs) in the 1950s, and not reclassified as BOATs, bridleways or footpaths under subsequent legislation, was implemented on 2 May 2006, the same date as part 6 of the NERC Act. We estimate that this reclassification of RUPPs as restricted byways protected over 2,100 miles of green lanes in England by making public motorised use of them illegal.

6. The NERC Act was intended to be more comprehensive than the CRoW Act in its protection of green lanes. It prevents any green lanes becoming BOATs on the basis of use by motor vehicles after 2 May 2006. It requires that applications for BOAT status made before 20 January 2005 had to be complete in accordance with the regulations relating to map scale and evidence, in order to be valid applications for BOAT status. This requirement and cut-off date of 20 January 2005 were because the Trail Riders Fellowship (TRF) had made many applications, most of which were not in accordance with the regulations, to try to minimise the effect of the NERC Act on its members’ access to green lanes, and despite having offered a partial moratorium on applications. It is not clear how many of the BOAT applications made before 20 January 2005 have resulted in BOAT status, because some county and unitary authorities have still to decide these applications.

7. As explained above, the government’s intention was that, for green lanes not
covered by the exemption for pre-existing BOAT applications, historic public rights for horse-drawn vehicles should result in restricted byway status, not BOAT status, i.e. that unrecorded public rights for motorised vehicles should be extinguished. But because the NERC Act was drafted so that this extinguishment applied to all highways, not just green lanes, various other exemptions had to be included to ensure that the public’s rights to drive motor vehicles on the ordinary road and motorway network remained. One of these exemptions is for highways which were on the highway authority’s list of streets, i.e. highways which it is responsible for maintaining, but not on the definitive map of public rights of way as at 2 May 2006. Defra said that this exemption was to guard against “unintended consequences on the ‘ordinary roads network’” and on “people who access their properties by minor highways, without any recorded rights”\(^1\). But it did not provide any estimate to Parliament of how many green lanes would fall into this exempted category.

8. This exemption means that green lanes which are on the list of streets can only be added to the definitive map as footpaths, bridleways or BOATs, depending on the level of public rights (on foot, on horseback, or vehicular) which are found to exist. They cannot be added as restricted byways, unless they were omitted from the list of streets in whole or in part at 2 May 2006. (See below for a discussion of a recent High Court judgment which affects this.) The experience of authorities (primarily Derbyshire and Northumberland County Councils) which have been adding green lanes on their lists of streets to their definitive maps for the last few years confirms this and shows that the majority of such green lanes become BOATs. (No problems about unrecorded rights for owners and occupiers of property accessed by the minority of green lanes which have become footpaths, bridleways or restricted byways, have been reported, belying Defra’s fear of such consequences. This is because either such owners/occupiers already had private rights or because part 6 of the NERC Act converts unrecorded public motor vehicular rights to private motor vehicular rights where necessary for access.) However, in 2006, and again in 2016, the government was urging authorities to add green lanes on the list of streets to the definitive map as restricted byways\(^2\). This evidence indicates that Defra does not understand the consequences of this exemption, nor has it monitored its effects.

9. GLEAM has surveyed English county and unitary authorities to find out the lengths of restricted byways, BOATs and green lanes on the list of streets. The results of this survey show that there are at least 2,100 miles of restricted byways (most of which resulted from the reclassification of RUPPs at 2 May 2006), at least 2,700 miles of

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\(^1\) Part 6 of the Natural Environment and Rural Communities Act 2006 and Restricted Byways; a guide for local authorities, enforcement agencies, rights of way users and practitioners, Defra, May 2008, paragraph 30.

\(^2\) Letter from Dave Waterman, Head of Rights of Way Branch, Defra, to all local authorities in England, 28 November 2006 and letter from Rory Stewart OBE MP, Parliamentary Under Secretary of State, Defra, to national park authorities, 11 February 2016.
BOATs and at least 3,200 miles of green lanes on the list of streets. When authorities with green lanes on the list of streets follow Derbyshire’s and Northumberland’s examples in adding these lanes to the definitive map, most of the 3,200 miles will become BOATs, legally open to motor vehicles. This exemption is therefore the primary reason why BOATs are being and will continue to be added to the definitive map, more than 10 years after the NERC Act was passed.

10. Paragraphs 94 to 97 of Defra’s memorandum about post-legislative scrutiny of the NERC Act discuss various court judgments which have clarified part 6 of the Act. However they do not mention a judgment given in July 2017 by the High Court, about the impact of differences between the alignments of a green lane, with historic public vehicular rights, on the definitive map and on the list of streets. Hertfordshire County Council had argued that a mistake on its list of streets such that part of the alignment differed from the definitive line meant that that part of the definitive line was restricted byway, not BOAT. The inspector appointed by the Secretary of State to decide the case agreed. The TRF challenged the inspector’s decision in the High Court and the judge quashed the inspector’s decision, because he agreed with the TRF that the inspector’s conclusion was “perverse and which Parliament cannot have intended”.

11. Paragraph 117 of Defra’s memorandum says that “Part 6 of the Act has been successful in achieving its primary aims.” We disagree, in that we think that the list of streets exemption has turned out to be a major shortfall from what Parliament and Government intended in part 6 of the NERC Act, and that amending legislation is required to close this loophole.

Traffic Regulation Orders (TROs) on green lanes following the NERC Act

12. County and unitary authorities have been able to make traffic regulation orders (TROs) to restrict or prohibit motor vehicles on green lanes and other highways for many years. The NERC Act extended these powers to national park authorities for

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green lanes and public rights of way on the definitive map in their areas, “to control excessive or inappropriate use of mechanically propelled vehicles away from the ordinary roads network”.5

13. However, since national park authorities (NPAs) got TRO powers in October 2007, only two of them, Peak District NPA and Yorkshire Dales NPA, have used these powers. GLEAM thinks this is for the following reasons:

- the reclassification of RUPPs to restricted byways and the changes in the NERC Act making it more difficult to get BOAT status for existing public rights of way meant that some green lanes in some national parks were protected by legislation.

- insufficient resource for the TRO process; for example, North York Moors National Park Authority spent 3 years (2012-14) on a programme of assessing its 201 green lanes (mainly on the list of streets) and deciding which of the 82% which are highly vulnerable to motor vehicle use should be considered for TROs, before it decided to stop the programme because of the cuts to its funding.

- the risk of legal challenges by the TRF and other organisations representing recreational motor vehicle users, and consequent costs.

14. We think that the latter two reasons are also affecting county and unitary authorities in the exercise of their TRO powers to protect green lanes. The Defra memorandum on post-legislative scrutiny of the NERC Act reports the 2009 challenge in which four of the TROs made by Yorkshire Dales NPA were quashed by the High Court, but it does not mention the three subsequent court cases brought by the TRF and other organisations against TROs made by Peak District NPA, Powys and Devon County Councils, of which the first two were lost by the authorities. In addition we know that TROs made by Durham, Hampshire and North Yorkshire County Councils on green lanes have been challenged by the TRF and quashed by consent. According to its Technical Directorate Report of April 2017 the TRF is also currently challenging TROs made by Carmarthenshire, Powys and Essex County Councils.

15. GLEAM is analysing these challenges, where the results have been published as judgments and in authority reports, to try to explain what the authorities got wrong (or right) in the way they made these TROs and so provide guidance for all authorities on what mistakes to avoid.6 But we think that this guidance should not

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be the responsibility of a pressure group such as us, but should be developed by a more broadly-based group and then endorsed by government.

**Defra and Natural England remit for the current working group on green lane issues**

16. Members of the Select Committee may recall that the minister then (February 2015) responsible for environment business in the House of Lords, Lord de Mauley, acknowledged the public’s concern about motor vehicles on green lanes and gave a commitment on behalf of the coalition government that Defra and Natural England would set up a stakeholder working group to make recommendations to ministers, with majority and minority reports should the group be unable to reach consensus, to be followed by full public consultation. This followed evidence and debate on the issues during Parliament’s scrutiny of the Deregulation Bill. The Conservative government which came to power in May 2015 established a stakeholder working group (which includes a representative of GLEAM) in November 2016, but it rejected the coalition government’s commitment to subsequent public consultation and made it clear that the group must reach consensus on any recommendations and that legislative changes for green lanes are unlikely in the foreseeable future. It seems to us that these constraints go against Lord de Mauley’s commitment that the group should be able to recommend changes in legislation and that it should be able to make majority and minority reports to ministers, if necessary.

17. GLEAM thinks that the motor vehicle stakeholder working group should a) be free to produce majority and minority reports if necessary, b) be free to recommend to ministers that they consult on a change in legislation to resolve the issue of green lanes which are not protected by the NERC Act because they are on the list of streets, and c) be encouraged to develop new guidance on the use and making of TROs. This guidance should then be endorsed by Defra, following public consultation if necessary.

18. We believe that the Select Committee should advise Defra

a) that new legislation appears to be necessary to protect the over 3,200 miles of green lanes not currently protected by the NERC Act because they are on the list of streets

b) that the motor vehicle stakeholder working group be free to produce majority and minority reports and to advise ministers on new legislation to protect green lanes on the list of streets

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b) that the motor vehicle stakeholder working group be free to produce majority and minority reports and to advise ministers on new legislation to protect green lanes on the list of streets

c) that new guidance is needed on using and making of traffic regulation orders on green lanes.
19. These reforms would, in our view, be substantial improvements to the working of part 6 of the NERC Act.

**Diana Mallinson, on behalf of GLEAM**  
**September 2017**

Photos, showing examples of recreational motor vehicle damage to green lanes which are not protected by the NERC Act because they are on the list of streets, are provided on page 6.

**Examples of damage to green lanes not protected by the NERC Act**

<table>
<thead>
<tr>
<th>Narrow lane used by motorbikes in Otterton, East Devon Area of Outstanding Natural Beauty. Photo taken July 2015.</th>
<th><img src="image" alt="Photo of lane damage" /></th>
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</thead>
<tbody>
<tr>
<td>The damage by recreational motor vehicles (note tyre track in foreground) to this green lane has forced other users to make parallel paths. Osmotherley, North York Moors National Park. Photo taken July 2016.</td>
<td><img src="image" alt="Photo of parallel paths" /></td>
</tr>
<tr>
<td>This lane has not been considered for a TRO by the national park or the highway authority.</td>
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10 September 2017