The Motoring Organisations' Land Access & Recreation Association.

Traffic Management Hierarchy.

Good Practice in Traffic Management on Unsealed Public Roads.

Part 2: Technical and Background Materials.

Second Edition: May 2014.

MOTORING ORGANISATIONS' LARA LAND ACCESS & RECREATION ASSOCIATION

25 years 1986 to 2011

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This report is revised and reissued periodically.

First published: 19 March 2013.

Revision date: 29 April 2014.

See also *Part 1: A Selective Approach to Traffic Management.*

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This publication has not been revised since April 2014 and is currently (summer 2021) being re-written. Significant developments in traffic management legislation and best practice have occurred since the paper was published. If you have any queries please contact LARA at admin@laragb.org

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1. Highways: the baseline duty of highway authorities.

1.1. S.130 of the Highways Act 1980 imposes on the highway authority the duty,

(1) To protect and assert the rights of the public to the use and enjoyment of highways for which it is the highway authority;

(3)(b) ... To prevent as far as possible the stopping up or obstruction of those highways.

The case for a prohibitive traffic regulation order must outweigh this baseline position.

1.2. The discretion of a highway authority in exercising this duty was considered by the Court of Appeal in R v. Surrey County Council ex p. Send Parish Council (QBD) (1979)40 P&CR 390, where Lane LJ said [our emphasis], "The local authority must at all times act with the object of protecting the highway and of preventing or removing any obstruction and, more broadly speaking, of promoting the interests of those who enjoy the highway or should be enjoying the right of way and the CC must likewise operate against the interests of those who seek to interrupt such enjoyment of the highway." Ackner, J, "I accept that there must be some discretion arising out of the words 'proper proceedings' taken together with the duty of the council under subsection (3) to prevent 'as far as possible' the stopping up or obstruction of highways. So I accept that in a proper case a proper compromise of proceedings may be made. But such a compromise must be intended to promote the policy and the object of the Act."

1.3. The 'policy and object' of the Highways Act is that the highway authority should operate to keep public highways open to the public 'as far as possible'. The provisions of the Road Traffic Regulation Act 1984 have to be read in light of this s.130 duty. 'Preventing stopping up' (i.e. keeping the road open to the public) is the starting point – the default duty – for highway authorities, and any regulation of traffic has to be done for reasons that outweigh this baseline duty in any particular case.

1.4. The Government has issued guidance on maintenance and obstruction standards.

Rights of Way Circular (1/09)

Guidance for Local Authorities. Version 2 October 2009

6. Managing and maintaining the network

"6.5 Maintenance should be such that ways are capable of meeting the use that is made of them by ordinary traffic at all times of the year. Under appropriate circumstances this might require the importation and application of suitable hard materials. Maintenance need not conform to an arbitrary standard of construction or appearance, but it should harmonise with the general appearance and character of the surroundings. Guidance has been issued on best practice in the maintenance of byways.

"6.6 Authorities should make use of available help from landowners and voluntary groups in carrying out their duties towards maintaining public rights of way."

[What does 'should' mean here? In this context it can only reasonably have two alternative meanings: to express obligation or duty, or to express probability or expectation. Whatever, paragraph 6.6 puts a significant degree of imperative upon the 'authorities'.]

Obstructions

"6.15 Under section 130(1) of the 1980 Act highway authorities are under a duty to assert and protect the rights of the public to use and enjoy those public rights of way for which they are responsible. They are also under a duty under section 130(3) of the 1980 Act to prevent, as far as possible, the stopping-up or obstruction of those public rights of way for which they are responsible."

2. Cart roads and carriage roads.

2.1. In determining the appropriate and necessary level of maintenance and traffic management on unsealed roads, and particularly on routes designated amber in a traffic management hierarchy, it is essential to appreciate the origins and consequent inherent character of these routes. 'Cart road' is the older generic term for an all-purpose highway.

2.2. The root of the three classes of highway at common law lies in the writings of Henry De Bracton (d. 1268) as followed by Lord Coke CJ (d. 1634) in Co Litt 56a:

> There be three kinde of wayes, whereof you shall (Fleta, lib. 4. cap. 27. Bracton, lib. 4. fol. 232. (1 Ro. Abr. 390.)) reade in our ancient books. First a footway, which is called *iter, quod est jus vel ambulandi hominis*; and this way the first way.
>
> The second is a foot way and horse way, which is called *actus ab agendo*; and this vulgarly is called *packe* and *prime way*, because it is both a foot way, which was the first or prime way, and a *packe* or drift way also.
>
> The third is *via* or *aditus*, which contains the other two, and also a cart way, &c. for this is *jus eundi, vehundi, et vehiculum et jumentum ducendi*:

2.3. Highways historians (such as Beatrice and Stanley Webb in *The Story of the King's Highway*) say that carriages in the sense of 'coaches' - horse-drawn vehicles by which people made journeys - hardly existed in the time of Queen Elizabeth I, and that public 'stage' coaches only became practicable in the early 18th Century, as the turnpiking movement gained a hold. In the 'General Highway Act' of 1767, in s.7, reference is made to 'Waggon, Cart, or Carriage ...' and in s.11 only to 'Cartway', rather than 'carriageway'.

2.4. In the 'General Highway Act' of 1835, 'Highway' is defined (in s.5) to encompass '... Carriageways, Cartways, Horseways, bridleways, Footways, Causeways ....' In ss. 64 & 65 (and in other sections), the reference is to

'Carriageway or Cartway', suggesting a distinction between the two, although this is not defined.

2.5. The use of the term 'public carriage road' is ubiquitous in parliamentary inclosure awards. The author has never come across an inclosure award that sets out a 'public cart road'. Some awards set out 'public highways', and all or most of the roads thus set out are named, e.g., 'Elsdon Public Carriage Road'. Other awards describe the group of 'roads' set out under the heading 'public carriage roads.' An inclosure awarded public carriage road will typically be '... for the public to pass and repass with carts and all manner of carriages, horses, cattle, on foot ...'

2.6. The setting out of a public carriage road in an inclosure award does not, of itself, indicate that the road is to be surfaced to a 'carriage-worthy' standard, although many were so made. Some awarded public carriage roads are named, e.g., 'The Drift Road' (Northumberland) and 'Bolter's Drove' (Dorset) and were not required by the inclosure process to be made up, nor were they made up, reflecting their utility as droving routes. Such routes would have been generally passable with pony traps and carts, but it is unlikely that they would have been in general use by a 'gentleman's carriage', or a stage coach.

2.7. The term 'cart road' is not much in general use after the late 18th century and before the 20th century, other than occasionally as a descriptive and somewhat derogatory term for a very minor and neglected public road.

2.8. 'Cart road' seems to have come back into use widely when roads were being metalled and tarred for motor use in the period after the Great War. A cart road was a road that had been left behind by progress - left for farm carts - by people in cars and trucks, to whom the longer distance around, by the sealed road, was of no consequence. When roads were increasingly being blacktopped, even a good metalled carriage road of the pre-motor era could have looked crude in comparison, but it is important to appreciate (from half a century later) that even in the early 1960s many motor roads in everyday use still had only a stoned surface. The cars then were able to handle the

potholes and ruts, and the drivers had the necessary skills. Nowadays people think that you are obliged to have a 4x4 on any road that is not billiard table-smooth.

2.9. This origin and usage became reflected in statutory practice by the National Parks and Access to the Countryside Act of 1949, and the guidance regarding the recording of roads used as public paths (RUPPs) as ‘cart road footpaths’ and ‘cart road bridleways’. As a term, ‘cart road’ needs little if any further description.

2.10. Lord Denning in Haydon v. Kent County Council [1975] 1 QB 343 grasps the distinction in form and function between a cart road and a carriage road, and 1975 was the year of R v. Secretary of State for the Environment ex p. Hood [1975] 1 QB 891, so His Lordship was certainly putting his mind to the RUPP matter. Lord Denning uses the term ‘cartway’ in Hood at 896-C, where (at 897) he looks at Lord Coke’s classification of highways, and notes the use of the term ‘cartway’ in R v. Saintiff (1705) 6 Mod. Rep. 255. In 1705 (and more

so in the age of Lord Coke) there were very few ‘carriages’ of any sort. Vehicles were generally carts. Persons of distinction, including Judges travelled on horseback or in a horse litter. It would have been curious to classify almost all roads by the rarest of forms of transport along them.

3. Cart roads: ‘in sufficient repair’ for vehicles.

3.1. Cart roads, in both the old and modern sense, are not inevitably unsurfaced. Many are stone surfaced, either with rough stone to fill holes, or originally well made, and repaired thereafter by the highway authority. Once their utility for farm and early local motor traffic diminished, the level of repair diminished, or it stopped altogether.

3.2. If you take a stone-surfaced road, in reasonable condition, which means sufficient drainage, no big potholes or washouts, then a 1960s car such as a Ford Anglia will get along it slowly but safely, and a mountain bike rider will have little problem. If the stone is ‘blinded’ with smaller stones - ‘fines’ - then a horse and trap will get along safely, as will a roadster bicycle (i.e. a ‘hybrid’ in current terminology). If a pony and trap can get along safely, then so can a saddle horse. Most stone roads have grassy margins and a saddle horse can generally pick a way along these, although drainage ditches are a very real danger here.

3.3. If you take a ‘grass drove’ - a cart road that has never had any stone surface - then so long as it is sufficiently well drained, not affected by recent extreme weather, and not suffering significant surface disturbance (e.g. by heavy agricultural or forestry machinery) then a car with suitable tyres (tall, narrow, decent tread) and good ground clearance will get along slowly, as will mountain bikes and horse traps, but residual wetness is more of a problem: that is why roads were stoned, and later sealed.

3.4. Sixty years ago, motor manufacturers made vehicles specifically for use on cart roads, even though most roads were by then blacktopped. The Series I and Series II Land Rover is probably the classic example of this, and in the motorcycle world it is the ‘colonial’ versions of the British ‘big singles’: Royal Enfield, BSA, AJS, etc.

3.5. If a cart road, whether stoned, or grass, is free from deep ruts (per Lord Denning) and big potholes; is properly drained (which is the key to road maintenance, whether sealed-surface, or not) and has the inevitable sloughs

filled with Mr Justice Wills' 'occasional spadeful of gravel', then the road is generally passable, with necessary skill and care on the part of the driver, by appropriate vehicles.

3.6. What is an appropriate vehicle for use on a cart road in 2012? What sort of vehicle would be 'ordinary traffic'? A cart, obviously; and single-horse traps and gigs, which are the people-carrier equivalents of carts. A pedal cycle designed and equipped for that sort of surface: a mountain bike or a 'hybrid', with low gearing and good mud clearances; and the road cannot be so wet or rough that only an athlete has the strength to pedal along. A motor car or motor cycle of the type that can reasonably get along when the road is in sufficient repair for a pony and trap, or a pedal cycle. This sort of motor vehicle might reasonably be described by (but not limited to) two models that almost perfectly define a 'type' of motor: the Series I and II Land Rover (on period tyres, with standard suspension), and the Royal Enfield Bullet in colonial trim.

3.7. These motors, and indeed these pedal cycles, are ‘taking the cart road as they find it’, always supposing that they find it in sufficient repair for carts. As Lord Denning MR indicated in Haydon, the public would expect to find ruts on cart roads, but not ruts so deep as to impede passage.

3.8. The public and highway authorities sometimes have unrealistic expectations of how good a cart road would have been when in everyday use, or should be nowadays. When a cart road is in sufficient repair for horse carts (and that is carts, not necessarily wains or waggons) then it is also in sufficient repair for the type of road-going vehicles that can reasonably use a cart road. No greater standard is sought by recreational traffic.

4. BOATs: ‘in sufficient repair.’

4.1. Byways open to all traffic (BOAT) are a particular type of minor vehicular public highway (mainly ‘cart roads’ in origin) and which have statutory characteristics which might (but not necessarily do) influence the baseline condition of sufficient repair.

4.2. S.66(1) of the Wildlife and Countryside Act 1981 defines a BOAT: ‘“Byway open to all traffic” (BOAT) means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used.’

4.3. S.54(7) of the Wildlife and Countryside Act 1981 provides that nothing in s.54, or s.53, obliges a highway authority to provide on a BOAT a metalled carriageway or a carriageway which is by any other means provided with a surface suitable for the passage of vehicles. Neither s.53 nor s.54 have any bearing in themselves on the maintenance liability of a highway authority for any BOAT. And, in any case, all of s.54 has been repealed by ss. 47(1), 102, 103(3) and Sch. 16 Pt II, as commenced by SI 2006/1172 (England) and SI 2006/1279 (Wales).

4.4. What of the ‘mainly used ...’ clause in the definition? Why is that present? It is to limit the types of public vehicular roads that can be recorded in the definitive map and statement to those with a similar ‘use character’ to footpaths and bridleways. A BOAT is ‘conclusively vehicular’ by its statutory definition. The level of maintenance that a BOAT needs depends upon its physical character, weighed together with the ordinary traffic of the neighbourhood, which uses the BOAT. There has to be a baseline below which even BOATs with little public vehicular use are out of repair. Since the origin of most BOATs (but not all: some originate from modern-era motor traffic user) is as horse-era cart or carriage roads, that is a reasonable baseline: passable with care for a horse and cart, or the motor-era equivalents, the Series I or II Land Rover and the ‘colonial’ specification motor cycle.

4.5. A BOAT would be in sufficient repair for road-going motor vehicles when it is in sufficient repair for the type of road-going vehicles that can reasonably use a cart road of the character of that particular BOAT. For example, a BOAT that was formerly a well-made turnpike road would have a higher threshold of ‘in sufficient repair’ than would a BOAT that had never been more than an unsealed track.. No greater standard is sought by recreational traffic.

5. Ordinary and extraordinary traffic.

5.1. Burnside v. Emerson [1968] 1 WLR 1490, Lord Diplock: “The duty of maintenance of a highway which was by s.38(1) of the Highways Act 1959, removed from the inhabitants at large of any area, and by s.44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. I take most of those words from the summing up of Blackburn J., in 1859 in R v. Inhabitants of High Holborn, "non-repair" has the converse meaning.”

5.2. ‘Ordinary traffic’ only became an issue with the advent of ‘extraordinary traffic’ and the ability for highway authorities to recover the excess cost of highway repair under the provisions in the Highways and Locomotives Amendment Act 1878. ‘Locomotives’ were what are generally now called ‘traction engines’, and their increasing use and statutory regulation goes back to the middle of the 19th Century. By 1878 the use of steam locomotives to pull, e.g., heavy trailer-loads of timber was causing considerable adverse impact to macadamised road surfaces. There was a tension between the needs of commerce (good road communications for manufacture and distribution) and the burden on parish and county highway authorities. Horse-drawn traffic could also be ‘extraordinary’ in some circumstances.

5.3. Where allegations of damage by extraordinary traffic went to the courts, the court had to determine what was the character of the ordinary traffic of that neighbourhood, because ordinary traffic can change over time. In the modern context, the building of a trading estate adjacent to a residential area would change the ‘baseline’ of the ordinary traffic of the whole neighbourhood. Cases illustrating how the courts were generally reluctant to find that traffic was extraordinary include:

Wallington v. Hoskins [1880] 6 QBD 206.

Pickering Lythe East Highway Board v. Barry [1881] 8 QBD 59.

R v. Williamson (1881) 45 JP 505.

Raglan Highway Board v. Monmouth Steam Railway Company (1881) JP 23 September 1882.

Maidstone Rural Sanitary Authority v. Jesse Ellis & Co [1882] QB 466.

Whitebread v. Sevenoaks Highway Board [1892] 1 QB 8.

Colin Seymour v. East Riding of Yorkshire Council (2000) case number A200004

5.4. For traffic to be extraordinary it must have significantly greater impact than the ordinary traffic of the neighbourhood, essentially in terms of weight and frequency. Traffic might be extraordinary on some roads in a neighbourhood, but not on others, because of the respective character of those roads, and also because potentially extraordinary traffic using certain roads can become ordinary as respects those roads over the passage of time.

5.5. Could present day 'recreational traffic' be held to be extraordinary? In the Highways Act 1980,

S.59 Recovery of expenses due to extraordinary traffic.

(1) Subject to subsection (3) below, where it appears to the highway authority for a highway maintainable at the public expense, by a certificate of their proper officer, that having regard to the average expense of maintaining the highway or other similar highways in the neighbourhood extraordinary expenses have been or will be incurred by the authority in maintaining the highway by reason of the damage caused by excessive weight passing along the highway, or other extraordinary traffic thereon, the highway authority may recover from any person ("the operator") by or in consequence of whose order the traffic has been conducted the excess expenses.

(2) In subsection (1) above "the excess expenses" means such expenses as may be proved to the satisfaction of the court having cognizance of the case to have been or to be likely to be incurred by the highway authority by reason of the damage arising from the extraordinary traffic; and for the purposes of that subsection the expenses incurred by a highway authority in maintaining a highway are (without prejudice to the application of this section to a by-pass provided under this Act for use in connection with a cattle-grid) to be taken to include expenses incurred by them in maintaining a cattle-grid provided for the highway under this Act.

5.6. This provision might extend to the use of a heavy motor vehicle on an unsealed, or wholly 'dirt', road, where the weight and traction of that vehicle is excessive in comparison to 'ordinary vehicles', but there is no record of this ever having been tried by a highway authority on a BOAT or unsealed unclassified road as regards 'recreational traffic.'

5.7. It is hard to see how the ordinary traffic on a BOAT or unsealed unclassified road could not include pedal cycle and motor cycle traffic. It might be argued that because the ownership and use of horse carts and traps has declined to almost nothing in most places, that these are no longer ordinary traffic of the neighbourhood, and that a minor vehicular highway need not be maintained for such. But if, e.g., a BOAT needs to be in sufficient repair for saddle horses, pedals cycles, and 'recreational' motor vehicles, a normal (by today's standards) pony and trap will cope with that level of repair.

6. Road traffic regulation provisions.

6.1. The Government has issued guidance on the use of traffic regulation orders.

Rights of Way Circular (1/09)
Guidance for Local Authorities. Version 2 October 2009
Traffic regulation orders

6.28 The Road Traffic Regulation Act 1984 gives traffic authorities power to make traffic regulation orders. The orders may be temporary or permanent and may be applied to any highway and are therefore relevant to all classifications of public rights of way. They may be used to secure the expeditious, convenient and safe movement of all traffic including all types of user of public rights of way. Such an order may restrict, prohibit or regulate use of roads by traffic and the full effect on specified classes of user will be defined in each order.

6.29 Information on traffic regulation orders relating to byways open to all traffic is published in the revised edition of *Making the Best of Byways* 2005. [see below].

The TRO-making process.

6.2. Parliament has not provided traffic regulation powers to deal with anti-social or illegal use of the highway. Traffic regulation is intended to be used to regulate, fairly and only where necessary, everyday traffic. Illegal and anti social motoring should be targeted by the other statutory provisions that are available to the authorities.

6.3. The power to make traffic regulation orders (TRO) is set out in s.1 of the Road Traffic Regulation Act 1984 (our emphasis):

Traffic regulation orders outside Greater London.

(1) The traffic authority for a road outside Greater London may make an order under this section (referred to in this Act as a “traffic regulation order”)

in respect of the road where it appears to the authority making the order that it is expedient to make it—

(a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising, or

(b) for preventing damage to the road or to any building on or near the road, or

(c) for facilitating the passage on the road or any other road of any class of traffic (including pedestrians), or

(d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or

(e) (without prejudice to the generality of paragraph (d) above) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot, or

(f) for preserving or improving the amenities of the area through which the road runs or

(g) for any of the purposes specified in paragraphs (a) to (c) of subsection (1) of section 87 of the Environment Act 1995 (air quality).

6.4. This list has been amended by later amendments:

S.22. Traffic regulation for special areas in the countryside.

— (1) This section applies to roads of the following descriptions, that is to say—

(a) in the case of England and Wales . . . roads in, or forming part of, or adjacent to or contiguous with—

(i) a National Park,

(ii) an area of outstanding natural beauty, designated as such under section 82 of the Countryside and Rights of Way Act 2000.

(2) This Act shall have effect as respects roads to which this section applies as if the list of purposes for which a traffic regulation order may be made under section 1 of this Act, as set out in paragraphs (a) to (g) of subsection (1) of that section and referred to in section 6(1)(b) of this Act, included the purpose of conserving or enhancing the natural beauty of the area, or of affording better opportunities for the public to enjoy the amenities of the area, or recreation or the study of nature in the area.

CRoWA 2000, s.82. Designation of areas.

— (1) Where it appears to the Countryside Agency (in this Part referred to as "the Agency") that an area which is in England but not in a National Park is of such outstanding natural beauty that it is desirable that the provisions of this Part relating to areas designated under this section should apply to it, the Agency may, for the purpose of conserving and enhancing the natural beauty of the area, by order designate the area for the purposes of this Part as an area of outstanding natural beauty.

[Commenced 1.4.2001].

S.22A Traffic regulation on certain roads for purpose of conserving natural beauty.

— (1) This section applies to roads other than—

(a) roads to which section 22 of this Act applies,

(b) special roads, or

(c) any road which is a trunk road, a classified road, a GLA road, a cycle track, a bridleway or a footpath, as those expressions are defined by section 329 of the Highways Act 1980.

(2) This Act shall have effect as respects roads to which this section applies as if, in relation to the making of provision with respect to vehicular traffic, the list of purposes for which a traffic regulation order under section 1 of this Act may be made, as set out in paragraphs (a) to (g) of subsection (1) of that section and referred to in section 6(1)(b) of this Act, included the purpose of conserving or enhancing the natural beauty of the area.

(3) In subsection (2) above the reference to conserving the natural beauty of an area shall be construed as including a reference to conserving its flora, fauna and geological and physiographical features.]

6.5. Parliament has provided a two-part test for an authority to apply when considering whether or not to make a TRO:

- Firstly, a set of conditions as are set out in one or more of sub-paragraphs (a) to (g) must be found to exist. For example, in (a) the authority must find that there is already 'danger', or must find on evidence that danger is likely to arise. Simply, these are evidence-based criteria.
- Secondly, once one or more of (a) to (g) have been found to exist, the making of an order does not follow *ipso facto*. The authority must then determine whether or not it is *expedient* to make an order.

6.6. The expediency test is to be found elsewhere in highway legislation, e.g. in the diversion order provisions in s.119 of the Highways Act 1980. Parliament has provided this second-stage test, and it must be addressed expressly. What does 'expedient' mean? In Kate Ashbrook v. East Sussex County Council & Another [2002] EWHC 481 (Admin).

Mr Justice Grigson on the meaning of 'expedient' (in s.119 of the Highways Act 1980).

(24) The *Concise Oxford Dictionary* gives two definitions of expedient:

i) convenient and practical although possibly improper or immoral.

ii) Suitable and appropriate.

(25) I think it safe to assume that parliament had in mind the second, although I dare say the Claimants would suggest that the first is an apt description of the Council's conduct.

6.7. Parliament has provided this second-stage expediency test for a reason. As regards criterion (a), 'danger' it has to be to ensure that a balance is stuck between the existence of some danger, and all the other factors bearing upon the case. Road travel is inherently dangerous. In 2008 government

figures say that 2058 people were killed on Britain's roads (and many more were hurt). But the response to this is not to prohibit motors generally, nor even to impose stringent speed limits and enhanced licence requirements. The government considers that a balance must be struck between 'road travel' and the inevitable death and injury that comes from this. Parliament has also provided statutes and guidance on ways of making road travel safer other than by simply stopping it, in general, or in any local case. Subsection (a) of the RTRA 1984 does not of itself provide, or raise a presumption, that where there is danger then a traffic regulation order should follow. Firstly, the danger or likelihood of danger must be sufficiently proved; and if this is done, must be weighed against all other factors – particularly other available controls – in the essential expediency test.

6.8. S.1 of the Act is not the only matter for an order-making authority to take into account.

S.122 of the Road Traffic Regulation Act 1984.

Exercise of functions by local authorities.

— (1) It shall be the duty of every local authority upon whom functions are conferred by or under this Act, so to exercise the functions conferred on them by this Act as (so far as practicable having regard to the matters specified in subsection (2) below) to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians) and the provision of suitable and adequate parking facilities on and off the highway or, in Scotland the road.

(2) The matters referred to in subsection (1) above as being specified in this subsection are—

(a) the desirability of securing and maintaining reasonable access to premises;

(b) the effect on the amenities of any locality affected and (without prejudice to the generality of this paragraph) the importance of regulating and

restricting the use of roads by heavy commercial vehicles, so as to preserve or improve the amenities of the areas through which the roads run;

6.9. The most recent case authority on TROs in the recreational motoring situation is G Wilson & W Troughear v. Yorkshire Dales National Park Authority [2009] EWHC 1425 (Admin).

6.10. HH Judge Behrens at paragraph 70: “In my view the duty to secure the expeditious, convenient and safe movement of vehicular traffic is that prescribed by s.122(1). However that duty takes effect so far as practicable in the light of the matters to be taken into account under s.122(b). Whether one describes the s.122(2) factors as primary or secondary does not seem to me to matter much.”

6.11. The primary purpose of road traffic regulation is to facilitate the movement of traffic not to impede it. Therefore, whenever a TRO is made, it *must* be made with a view to ‘securing the expeditious, convenient and safe movement of vehicular and other traffic.’ Inevitably, most TROs will have a negative (constraining) effect on the expeditious, convenient and safe movement of vehicular traffic, but in carrying out the balancing operation in s.122, the starting point, and the continuing burden upon the authority, is the retention of expeditious, convenient and safe movement of vehicular traffic, so far as practicable having regard to the matters specified in subsection (2).

6.12. S.122 requires a balancing exercise of a particular sort: the primary duty is that set out in s.122(1), and it is only to the extent that the subsidiary considerations make compliance with the primary duty impracticable that an authority can properly derogate from the primary duty. Foremost in the decision-maker’s mind should be the purpose of securing the expeditious, convenient and safe movement of vehicular traffic. Given the primary duty, it should also follow that a decision-maker should tend towards the least restrictive TROs necessary to achieve a particular purpose. The TRF’s evidence contains examples of least-restrictive TROs and the trend towards these, away from ‘broad prohibition’ TROs.

6.13. The phrase, 'the expeditious, convenient and safe movement of vehicular and other traffic' cannot properly be taken to mean only 'through traffic', and 'everyday traffic', and not to include 'recreational traffic. In making s.122 parliament can be taken to have had in mind the view of Lord Denning MR in Hood (below) as to the 'recreational purpose' of a way being recorded in the definitive map and statement. And further, s.1 of the Act makes BOATs liable to TROs; if parliament intended s.122 not to apply to 'recreational traffic' then it would have provided so expressly.

6.14. TROs can be made for motor traffic on BOATs, and a considerable portion of such motor traffic is recreational. That is a simple fact. A hundred years or more ago the principal traffic on footpaths and bridleways was 'everyday traffic': local people walking to work; the doctor riding on his rounds. Now footpaths and bridleways are primarily a recreational highway facility. Such a view has judicial approval: Lord Denning MR in R v. Secretary of State for Environment, ex p. Hood (CA) [1975] 891 at 896. Roads that are recorded as BOATs are no different in this respect.

6.15. The Highways Act also provides a mechanism for diverting, or stopping up, BOATs and other minor roads. S.116:

(1) Subject to the provisions of this section, if it appears to a magistrates' court, after a view, if the court thinks fit, by any two or more of the justices composing the court, that a highway (other than a trunk road or a special road) as respects which the highway authority have made an application under this section—

(a) is unnecessary, or

(b) can be diverted so as to make it nearer or more commodious to the public, the court may by order authorise it to be stopped up or, as the case may be, to be so diverted.

6.16. The best current guidance on the meaning of 'unnecessary' in this statutory context is to be found in The Ramblers Association v. Kent County Council [1991] JPL 530, Woolf LJ held (as reported), "... it should be unnecessary for the sort or purposes which the justices would reasonably expect the

public to use that particular way. Sometimes they would be using it to get primarily to a specific destination ... Another reason for using a way of this sort could be for recreational purposes. In his [Lord Woolf's] view, where there was evidence of use of a way, *prima facie*, at any rate, it would be difficult for justices properly to come to the conclusion that a way was unnecessary unless the public were, or were going to be, provided with a reasonably suitable alternative way ... It also had to be suitable, or reasonably suitable, for the purpose for which the public were using the existing way."

6.17. Recreational traffic on a highway is valid to disprove that the highway is unnecessary for the test in an application for an order to stop up the public rights. The stopping-up provision is analogous to a TRO order, because both deprive some of the public (if not all) of their rights.

7. Traffic regulation for 'danger' reasons.

Traffic regulation order criterion: '(a) for avoiding danger to persons or other traffic using the road or any other road or for preventing the likelihood of any such danger arising.'

7.1. Road accidents do not happen in a vacuum. They are reported and/or recorded. The police are obliged to use the national 'Stats 19 Report Form' to record injury accidents involving motors, pedestrians, cyclists and horse riders. 'Anecdotal evidence' of incidents has some evidential weight, but not much, and very little if those repeating/reporting these incidents are not available to give evidence in person and be questioned about it.

7.2. The police also log and investigate 'non-accident' allegations of bad driving made to them. These are given incident numbers and logged by the police for statistical and other purposes.

7.3. If there is no proven current danger 'to persons or other traffic' on any road, then the likelihood of there being danger in the future is presumptively low unless some significant circumstance has changed, or is going to change. It is an actuarial 'given' that where a situation has existed for a length of time, then that situation is likely to remain unless and until there is an intervening event. Thus, no record of danger is a presumptive indicator of no likelihood of danger. An example of the proper anticipation of danger would be where an urban road scheme makes it probable that a road, or roads, will become 'rat runs' and, in that situation councils properly do make anticipatory traffic regulation provisions. In considering the likelihood of danger, a traffic authority or public inquiry must consider and weigh the statutory and non-statutory methods currently provided to reduce danger or the likelihood of danger, *other* than the imposition of a prohibition of driving order. These available provisions are set out below. The first priority should be to remove or ameliorate the danger, or to warn drivers; only the final option being to prohibit traffic.

7.4. See the Inspector's view as to danger to persons proposed to be prohibited in the 'case study' (below) regarding the 2010 Stonehenge order.

Government guidance regarding 'danger'.

7.5. *Regulating the use of motor vehicles on public rights of way and off road. A guide for Local Authorities, Police and Community Safety Partnerships. December 2005*.

7.6. This guidance is a government circular, and is therefore quite strongly persuasive on this inquiry. It says in the introduction (our emphasis and elision):

"This circular stems from Defra's consultation paper issued in December 2003 on the 'Use of Mechanically Propelled Vehicles on Rights of Way'. There was a strong consensus in the responses to the consultation in favour of Proposal 1 which said: "we will develop a strategy to disseminate and better inform the police, local authorities, the courts and others about the extensive powers and penalties already available for dealing with vehicles using rights of way illegally, anti-socially, or, in sensitive areas, harmfully".

"This circular is a first step – to provide information on getting the most out of existing legislation, and to encourage the formation of local partnerships to tackle abuse.

"While this circular is aimed at illegal use of public rights of way, the anti-social and environmentally damaging use of motor vehicles away from public highways both in the countryside and in urban areas cannot be ignored.

"<u>While most people who drive motor vehicles away from the public highway do so in a responsible manner, a minority disregard the negative impacts that their activity has not only on the environment but also on local communities and visitors</u>.

"<u>The powers currently available to the police</u> and local authorities are an important tool in tackling illegal and inappropriate motor vehicle use, but

there are additional ways in which the local community, together with the police and local authorities and of course the relevant motoring clubs, can work to provide solutions. We are aware of areas where the police, local authorities and the clubs are working together to reduce the level of illegal off road use.

"It is hoped that this circular will bring together local authorities, the police, motoring clubs and the local community to help stop this continued illegal use of motor vehicles on rights of way."

7.7. The powers available to the police are set out later in this submission.

7.8. *Making the best of byways. A practical guide for local authorities managing and maintaining byways which carry motor vehicles.* December 2005.

7.9. *Making the best of byways* is not a circular, but it is expressly referenced in the circular *Regulating the use of motor vehicles on public rights of way and off road. A guide for Local Authorities, Police and Community Safety Partnerships. December 2005,* and should therefore be given appropriate weight.

7.10. *Making the best of byways* does not rule out the use of TROs – these are one of the listed available management tools – but does indicate that TROs are not the first choice of traffic management method in most circumstances.

7.11. The whole thrust of *Making the best of byways* (as with *Regulating the use ...*) is that it is the bad motorists who should face sanctions, and not the wider motoring community (unless particular circumstances dictate otherwise). Criminals regularly use the motorway network to travel to and from the scenes of their crimes. Motorways are not closed to ordinary citizens as a consequence.

7.12. In *Making the best of byways* it says (our emphasis):

"Action sheet 3: Key actions for land owners and others who use byways for access. Make a report to the local authority or the police if you witness irresponsible or illegal driving. The local authority may be collecting data to

manage its byway network. Be as specific as possible and include notes on any vehicle markings and photographs if you can."

"Action sheet 6: Key actions when making a traffic regulation order. The type and quality of evidence required before making a traffic regulation order should include one ['one' because each bullet point here refers to one criterion in RTRA 1984 s.1] of the following: Sufficient substantiated reports in one year which show that the byway has become unsafe for users not using mechanically propelled vehicles."

The Highway Code.

7.13. The Highway Code sets out rules and advice for all types of traffic on minor vehicular roads:

Rules for motorists.

144 You MUST NOT: drive dangerously; drive without due care and attention; drive without reasonable consideration for other road users

154 Take extra care on country roads and reduce your speed at approaches to bends, which can be sharper than they appear, and at junctions and turnings, which may be partially hidden. Be prepared for pedestrians, horse riders, cyclists, slow-moving farm vehicles or mud on the road surface. Make sure you can stop within the distance you can see to be clear. You should also reduce your speed where country roads enter villages.

206 Drive carefully and slowly when approaching pedestrians on narrow rural roads without a footway or footpath. Always slow down and be prepared to stop if necessary, giving them plenty of room as you drive past.

214 Animals. When passing animals, drive slowly. Give them plenty of room and be ready to stop. Do not scare animals by sounding your horn, revving your engine or accelerating rapidly once you have passed them. Look out for animals being led, driven or ridden on the road and take extra care. Keep your speed down at bends and on narrow country roads. If a road is blocked

by a herd of animals, stop and switch off your engine until they have left the road. Watch out for animals on unfenced roads.

Rules for horse riders.

52 make sure you can control the horse

54 Use a bridleway where possible.

Rules for pedestrians.

2 If there is no pavement keep to the right-hand side of the road so that you can see oncoming traffic. You should take extra care and be prepared to walk in single file, especially on narrow roads or in poor light. Keep close to the side of the road

5 Organised walks. Large groups of people walking together should use a pavement if available; if one is not, they should keep to the left. Look-outs should be positioned at the front and back of the group, and they should wear fluorescent clothes in daylight and reflective clothes in the dark.

Motoring offences and cautions.

7.14. *Breach of a prohibition of motors order*.

7.15. The Road Traffic Regulation Act 1984, s.5(1): "A person who contravenes a traffic regulation order, or who uses a vehicle, or causes or permits a vehicle to be used in contravention of a traffic regulation order, shall be guilty of an offence." This is *not* a penalty point offence, nor is it one to which fixed penalty tickets apply.

7.16. Where the effect of some traffic regulation orders is conveyed to the public by road signs, then it is a penalty point offence to disobey the road sign (as distinct from the underlying TRO). The Traffic Signs Regulations and General Directions 2002 No. 3113 provides:

7.17. Application of section 36 of the Road Traffic Act 1988 to signs and disqualification for offences

10.—(1) Section 36 of the 1988 Act shall apply to each of the following signs:

(a) the signs shown in diagrams 601.1, 602, 606, 609, 610, 611.1, 615, 616, 626.2A, 629.2, 629.2A, 784.1, 953, 953.1, 7023, 7029 (except when varied to omit the legend "NO OVERTAKING"), 7031 and 7403;

(2) The following signs are hereby specified for the purposes of column 5 of the entry in Schedule 2 to the Road Traffic Offenders Act 1988(1) relating to offences under section 36 of the 1988 Act—

(a) the signs shown in diagrams 601.1, 616, 629.2, 629.2A and 784.1;

7.18. The 'prohibition of motor vehicles' signs (e.g. the 'flying motorbike') are not specified in paragraph 10 of the Traffic Signs Regulations and General Directions 2002, so persons found guilty of being in breach of a prohibition of motors TRO/sign cannot be given penalty points on their driving licence; and neither is such a breach a 'fixed penalty' offence. It is a matter for a summons and the court in the traditional way.

Careless driving

7.19. In the Road Traffic Act 1988:

S.3. Careless, and inconsiderate, driving. "If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence."

S.3ZA. Meaning of careless, or inconsiderate, driving.

(1) This section has effect for the purposes of sections 2B and 3 above and section 3A below.

(2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives falls below what would be expected of a competent and careful driver.

(3) In determining for the purposes of subsection (2) above what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be

aware but also to any circumstances shown to have been within the knowledge of the accused.

(4) A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.

Cautions and seizure of vehicles for bad driving.

7.20. The Police Reform Act 2002 introduced a provision intended to target the growing nuisance of 'boy racers' in cars, typically gathering in numbers and staging 'burnouts' or drag races in car parks or seaside promenades. The same provision was drafted also to be effective against 'illegal off-roaders', and is regularly used by police forces across the UK (Scotland and Northern Ireland have similar provisions) (our emphasis).

S.59 Vehicles used in manner causing alarm, distress or annoyance

(1) Where a constable in uniform has reasonable grounds for believing that a motor vehicle is being used on any occasion in a manner which— (a) contravenes section 3 or 34 of the RoadTrafficAct 1988 (c.52) (careless and inconsiderate driving and prohibition of off-road driving), and (b) is causing, or is likely to cause, alarm, distress or annoyance to members of the public,

(2) A constable in uniform shall also have the powers set out in subsection (3) where he has reasonable grounds for believing that a motor vehicle has been used on any occasion in a manner falling within subsection (1).

(3) Those powers are— (a) power, if the motor vehicle is moving, to order the person driving it to stop the vehicle; (b) power to seize and remove the motor vehicle; (c) power, for the purposes of exercising a power falling within paragraph (a) or (b), to enter any premises on which he has reasonable grounds for believing the motor vehicle to be; (d) power to use reasonable force, if necessary, in the exercise of any power conferred by any of paragraphs to (a) to (c). he shall have the powers set out in subsection (3).

7.21. S.59 of PRA 2002 is the ideal weapon in the armoury of a police officer to deal with bad driving on an unsealed public road. The officer need not be

there as he or she need not witness the driving himself, so long as there are sufficient and believable witnesses to an act of careless driving, with those witnesses suffering alarm, distress or annoyance. Simply driving along the road cannot cause alarm, distress or annoyance: the driving must fall within the offence definition in s.3 RTA 1988.

7.22. The Serious Organised Crime and Police Act 2005 provides strong powers for the police to seize on the spot uninsured motors, and those being used by drivers without a driving licence. All ‘scramblers’ are vulnerable to these sanctions:

S.152 Power to seize etc. vehicles driven without licence or insurance

After section 165 of the Road Traffic Act 1988 (c. 52) insert—

"165A Power to seize vehicles driven without licence or insurance

(1) Subsection (5) applies if any of the following conditions is satisfied.

7.23. The police have very wide and effective powers to deal with careless drivers, and to seize uninsured motors and those driven without a licence. The police can do this without there being a prohibition of driving order in place. Since a TRO cannot (in reality) prohibit horses, then it cannot physically prevent motorcycles from passing along the road. Since breaching the TRO with a motor is not a penalty point offence, and will demand a considerable degree of proof to convict if disputed, it is hard to see what worthwhile additional sanction a TRO delivers against ‘bad driving’. What it would do, of course, is prohibit the law abiding, careful motorist, whilst the ‘cowboy scrambler’ goes through unchecked. The *defra* circular (above) indicates that action should be taken against illegal and harmful motorists; not against law-abiding, tax-paying citizens.

Quiet Lanes.

7.24. In 2002 parliament introduced regulations providing for the designation of 'Quiet Lanes'. These extracts below from the government circular set out the purpose and effect:

SI 2006 No. 2082 Road Traffic, England.

The Quiet Lanes and Home Zones (England) Regulations 2006

[see also: DfT Circular 02/2006]

3. … A road in a Quiet Lane network or in a Home Zone is a place where the whole of the space is available for a range of different uses. The speed of vehicles must be low enough to satisfy the local traffic authority that any permitted activities may be enjoyed safely by people of all ages and abilities. Designated roads should be recognised as places where prescribed local activities may be carried out, as well as being public thoroughfares.

4. Quiet Lanes are minor rural roads or networks of minor rural roads appropriate for shared use by walkers, cyclists, horse riders and other vehicles. The aim of Quiet Lanes is to maintain the character of minor rural roads by seeking to contain rising traffic growth that is widespread in rural areas. There are three key elements to a Quiet Lanes scheme: community involvement to encourage a change in user behaviour; area-wide direction signing to discourage through traffic; and Quiet Lane entry and exit signs to remind drivers that they are entering or leaving a Quiet Lane, a place where they may expect people to be using the whole of the road space for a range of activities.

6. The Department considers that only minor roads or networks of minor roads which have low flows of motorised vehicles travelling at low speeds and are suitable for shared use by walkers, cyclists, equestrians and motorists are appropriate for designation as Quiet Lanes. They should be rural in character, though they do not necessarily have to be in a rural area. Whilst single roads can be designated under the Act, the aim of creating a coherent network of routes for non-motorised users should remain.

16. The Transport Act 2000 enables local traffic authorities to designate roads for which they are the traffic authority as a Quiet Lane or a Home Zone. In this instance 'road' has the same meaning as in the Road Traffic Regulation Act 1984, where it is defined (in section 142) as meaning any length of highway or other road to which the public has access. The power to designate does not allow for designation of a part of a width, for example one side of a road only.

7.25. The regulations also provide that a speed limit can be imposed as part of the designation of a Quiet Lane:

Speed Orders

9.—(1) An authority who have designated a road as a quiet lane or a home zone may make a speed order, which complies with the requirements in the following paragraph, as respects the designated road.

(2) The requirements are that the speed order shall— (a) state that it is made with a view to reducing the speed of—

(i) motor vehicles; (ii) cycles; or

(iii) both motor vehicles and cycles;

(b) describe in general terms the measures which the local traffic authority is authorised to take with a view to reducing that speed below the speed specified in the order; and

(c) specify the speed referred to in paragraph (b) above.

7.26. Quiet Lane designation is intended to make all types of traffic 'share equally' a minor road. If pedestrians and horse riders feel that they are second-class passengers on an unsealed road, and if a speed limit would make the environment better, then designation as a Quiet lane is intended to, and on experience elsewhere will, deliver this better environment without the need to prohibit members of the public lawfully and carefully driving motor vehicles.

7.27. The signage for Quiet Lanes is small and unobtrusive. Far smaller and less intrusive than TRO roundels.

8. Traffic regulation for 'preventing damage to the road'.

Traffic regulation order criterion: (b) for preventing damage to the road or to any building on or near the road.

8.1. The highway authority for any publicly repairable unsealed road and has a statutory duty to repair the road and keep it to the common law standard of being in sufficient repair for the 'ordinary traffic of the neighbourhood.' This duty is regularly discussed and tested in the courts (generally in accident injury claim cases). These are still the leading cases:

Burnside v. Emerson [1968] 1 WLR 1490. Lord Diplock: "The duty of maintenance of a highway which was by s.38(1) of the Highways Act 1959, removed from the inhabitants at large of any area, and by s.44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. I take most of those words from the summing up of Blackburn J., in 1859 in R v. Inhabitants of High Holborn, "non-repair" has the converse meaning."

Haydon v. Kent County Council [1975] 1 QB 343. Lord Denning: "'Repair' means making good defects in the surface of the highway itself so as to make it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. That is the combined effect of the statements of Blackburn J. in R v. Inhabitants of High Halden (1859) 1 F. & F. 678; of Diplock L.J. in Burnside v. Emerson [1968] 1 W.L.R. 1490, 1497 and Cairns L.J. in Worcestershire County Council v. Newman [1975] 1 W.L.R. 901, 911. Thus deep ruts in cart roads, potholes in carriage roads, broken bridges on footpaths or bushes rooted in the surface make all the highways 'out of repair'."

Both views considered and approved by the Lord Chancellor in the Court of Appeal in Department for Transport, Environment & the Regions v. Mott MacDonald & Others [2006] EWCA Civ 1089.

8.2. ‘Damage’ is not ‘wear and tear’. Roads inevitably need repair (maintenance). It is not just the effect of traffic. Roads decay through time and weather. Damage, for the purpose of the RTRA 1984 must be something more than wear and tear, and it must also be something more than the natural state of a road. Unsealed roads are often described as ‘cart roads’ and, as Lord Denning said in Haydon, ‘deep ruts’ would indicate that the road is out of repair. So, for a cart road, deep ruts are not evidence of ‘damage’, but are simply a result of the lawful and ordinary passage of cart road traffic (Haydon was heard in 1975, so it is not likely that His Lordship was considering horse-drawn traffic on cart roads). ‘Deep ruts’ on cart roads are not damage, but are wear and tear from ordinary use that requires statutory maintenance. The Road Traffic Regulation Act is not set out (and cannot properly be so constructed) to provide for traffic regulation orders to circumvent the statutory requirement for maintenance.

8.3. ‘Damage’ must be something more significant. Heavy vehicles breaking up culverts would be damage.

8.4. ‘Damage’ is also sometimes alleged where vehicles leave marks of their passing (*aka* ruts) in unsealed highways that have not been maintained. If drainage is neglected, then unsealed roads almost inevitably get waterlogged and thereby more susceptible to vehicle impacts. Is this ‘damage’, or is it a manifestation of the failure to repair as statute and the common law require?

8.5. There will of course be situations where a road is naturally wet and heavy vehicle impacts on it are greater than repair can cope with. That could reasonably be construed as damage that can be regulated by RTRA 1984. But this situation is not common. In the centuries before tarmac roads had to be reasonably passable, and so most were well sited and sufficiently drained and filled. They had to be. Society depended upon this.

8.6. In Haydon Lord Denning was making a relationship between the type of road, its traffic, and the baseline surface condition. Bicycle tyre tracks on a muddy bridleway are not ‘damage’, and neither are motorcycle tyre tracks – sometimes ruts – on a cart road. That is what roads without blacktop surfaces were and are like. They are not smooth greenswards. They are general purpose cart roads and the public cannot reasonably expect them to be better than the term ‘cart road’ imports.

9. Traffic regulation for the 'character' of the road.

Traffic regulation order criterion: (d) for preventing the use of the road by vehicular traffic of a kind which, or its use by vehicular traffic in a manner which, is unsuitable having regard to the existing character of the road or adjoining property, or ...

9.1. What is 'unsuitable'? Even fifty years ago the public regularly drove ordinary cars on unsealed roads. Farmers use 4x4s and quad bikes on unsealed roads. So do people with properties along such roads. So just what is the difference in character between this use and the general public's use? The use of the road by the adjoining landowners is *prima facie* a public use. This provision goes not to the suitability of all vehicular traffic, but admits the possibility of the unsuitability of some vehicular traffic, in the context of the character of the road.

Traffic regulation order criterion: (e) (without prejudice to the generality of paragraph (d) above) for preserving the character of the road in a case where it is specially suitable for use by persons on horseback or on foot, or

9.2. 'Specially suitable'. 'Special': "distinguished from, set apart from, or excelling others of its kind." 'Suitable': "appropriate, proper, fit" (*Collins Dictionary*). Taking the two words together, the only meaning that fits this criterion is 'excellingly fit'. So for this criterion to be valid to prohibit motors, an unsealed road must have a character considerably (specially) better (suitable) for horses or walkers than the character of other roads. But those other roads cannot be all or any other roads. It would not be realistic to draw a comparison on special suitability between, for example, an unsealed road and a nearby dual carriageway. So this comparison has to be limited to the difference, the distinction, between a particular unsealed road and other public roads of this type: BOATs and unsealed unclassified roads. It is then a matter of evidence as to the special suitability of that particular road, set against the character of the other roads. Special suitability cannot exist or be

quantified in isolation. It is by its very definition a comparison. It is an objective test and not a subjective test. a traffic authority, in proposing an order founded upon this criterion, must provide objective evidence of special suitability.

10. Traffic regulation for ‘amenity’ reasons.

Traffic regulation order criterion: (f) for preserving or improving the amenities of the area through which the road runs.

10.1. This is primarily an ‘urban provision’. It is the basis upon which ‘access only’ TROs are made in towns to prevent rat-running. It might be crudely rendered as a provision to ‘keep nice places nice’. But the fact of a road does not, of itself, render a nice place less nice, although it is highly probable that a great many people, particularly in the countryside, would prefer to have the rest of the public kept off ‘their’ road. This truth was recognised by the Lord Chancellor, Lord Hailsham: In Suffolk County Council v. Mason *[1979] AC 705*, in the House of Lords, Lord Hailsham LC said of the definitive map, “ ... its target is the maintenance of access to the countryside, not primarily in the interest of the local inhabitants ... but of the public at large, including particularly perhaps the inhabitants of our towns, who might wish to enjoy access to the amenities of countryside and areas of natural beauty. Still further from the mind of the legislature seems to have been the idea of extinguishing any existing right. On the contrary, its targets appear to have been the inroads of nature, the apathy of local inhabitants, the proprietary zeal of rural occupiers and the fallibility of human memory.” That is absolutely crystal clear: the purpose of the definitive map is to record ancient highways so that the general public can enjoy these, even if ‘rural occupiers’ would prefer that they do not – and lobby their local councillors accordingly.

10.2. Noise can indeed render a place less nice. People say ‘I came to live in the countryside for the peace and quiet.’ Maybe they did, but that does not mean that they are thereby entitled to peace and quiet. Some people live near the factories that make the everyday necessities of life for the people fortunate enough to live in the countryside and suffer the inevitable noise and nuisance generated by commerce. People fortunate enough to live in the countryside fly off on holiday, and many more people live under the flight path.

10.3. Nobody is entitled to complete protection from noise and nuisance. There is a legal concept of ‘reasonable user’ as a defence to nuisance. Simon J in Watson, Watson & Wilson v. Croft Promo-Sport Ltd [2008] EWHC 759 cited (at paragraph 60) Lord Goff in Cambridge Water v. Eastern Counties Leather [1994] 2 AC 264 at 299D-F:

10.4. “... although liability for nuisance has generally been regarded as strict, at least in the case of a defendant who has been responsible for the creation of a nuisance, even so that liability has been kept under control by the principle of reasonable user – the principle of give and take as between neighbouring occupiers of land, under which ‘those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action:’”

10.5. ‘Amenity’ in the sense of this criterion of RTRA 1984 must include, if not wholly mean, ‘the absence of nuisance’. This principle of ‘reasonable user’ is analogous to the relationship – the balance – between the interests of any class of road users, the interests of other classes of road users, and the interests of streetward residents. Plainly this is again an objective test. Is the amenity of the streetward residents or other road users unreasonably harmed by the passage of the public with motors along a particular unsealed road? And in asking that essential question, it must also be asked, how is the passage of motors along any particular unsealed road any different from the passage of motors along other roads in the vicinity?

10.6. See the Inspector’s view as to the ‘amenity’ of persons proposed to be prohibited in the ‘case study’ regarding the 2010 Stonehenge order, below.

11. Experimental traffic regulation orders.

11.1. The Road Traffic Regulation Act 1984 provides in s. 9, Experimental traffic orders.

(1) The traffic authority for a road may, for the purposes of carrying out an experimental scheme of traffic control, make an order under this section (referred to in this Act as an "experimental traffic order ") making any such provision—

(a) as respects a road outside Greater London, as may be made by a traffic regulation order;

11.2. Experimental traffic regulation orders (ETRO) must be for a genuine 'experimental purpose', beyond the 'predictive-by-skill and experience' ability of professional highway engineers. A purported experiment to prohibit motor vehicles in order to see if motor traffic levels fall as a consequence is not a proper experiment. A typical and proper use of an ETRO is where a decision has been made to provide a bus lane in a road and engineers wish to vary the start and finish points in order to get the best traffic flow.

11.3. In the *defra* guidance: *Regulating the use of motor vehicles on public rights of way and off road. A guide for Local Authorities, Police and Community Safety Partnerships. December 2005*, at section 5.3:

A local traffic authority must be able to demonstrate that the order is a genuine experiment. An order made without good reason would leave a traffic authority vulnerable to judicial review. Experimental orders should not be used to circumvent normal procedures for making permanent traffic regulation order.

11.4. The courts are not reluctant in striking down 'false experiments', typically: UK Waste Management Ltd v. West Lancashire District Council [1997] RTR 201 and, as regards prohibition of motor traffic on a BOAT, Trail Riders Fellowship v. Peak District National Park Authority [2012] EWHC 3359 (Admin).

12. Time extensions for temporary traffic regulation orders.

12.1. On 10 February 2009, LARA wrote to the Department for Transport, and the Welsh Assembly Government, saying:

"Re: The approval of extensions to temporary traffic regulation orders.

"The time period for which a highway authority may make a temporary traffic regulation order is set out in s.15 of the Road Traffic Regulation Act 1984. Where the authority seeks a time extension for an order, it must apply to you and obtain your direction for a further period:

Section 15. Duration of orders and notices under s.14.

— (1) Subject to subsections (2), (3) and (5) below, an order under section 14 of this Act

shall not continue in force—

(a) if it is in respect of a footpath, bridleway, cycle track or byway open to all traffic, for more than six months; and

(b) in any other case, for more than eighteen months, from the date on which it comes into force.

(2) ... the Secretary of State [amended to include WAG] may, subject to subsection (4) below, from time to time direct that the temporary order shall continue in force for a further period not exceeding six months from the date on which it would otherwise cease to be in force.

"It is the experience of our Member Organisations that single and multiple time extensions are automatically granted on application, with no checks being made as to why such are needed, nor on the detrimental effect to the public in losing the use of the road – for months and sometimes years.

"We believe that no time extension should be granted without your being satisfied that the authority has consulted the national organisations representing persons likely to be adversely affected, and that any responses should be copied to you along with the application for a direction, so that you can consult further and reach an informed decision. There is an ideal 'consultation list' now provided in Schedule 1 of Statutory Instrument 2007 No. 2542 : The National Park Authorities' Traffic Orders (Procedure) (England) Regulations 2007. Given that your granting of a direction for a time extension is discretionary, it would seem to be in order for you to require such a consultation to ensure fairness and open government."

12.2. On 2 March, the Transport and Strategic Regeneration Office of WAG replied:

"I can assure you that when we receive a request from a local authority to extend a temporary traffic order ... we do not automatically agree to it. I accept that in recent times we have become more aware of the concerns of local user groups and to address this in most cases we have requested local authorities confirm they have carried out consultations with local users and to clarify the details of any representations received and their responses to them... This should be provided in all cases but even more so when no alternative route is available.

"... paragraph 15 of Local Authority Circular 31/92 [Department of Transport Circular 4/92] reminds local authorities that Welsh Ministers will look for evidence that the views of local users have been taken into account when considering extension requests ..."

12.3. On 25 March, DfT replied:

"The Secretary of State for Transport does not automatically grant an extension, but relies on the local highway authority to confirm that the original conditions for making the order still exist, and that a realistic timescale for the completion of the work has been set. As extension requests can be received close to the original order expiry date, there is little time to

consult with national organisations representing persons likely to be affected, before the Secretary of State grants an extension."

12.4. The response from WAG is heartening in that officers can see the reality of the issue and are taking steps to avoid problems arising. If WAG can do this, then so can DfT. It is simply a matter of revising the operating protocols. Traffic authorities in England should also follow the guidance in DoT Circular 4/92.

13. Powers of national park authorities to make traffic regulation orders.

13.1. National park authorities were given limited powers to make traffic regulation orders by s.72 of the Natural Environment and Rural Communities Act 2006.

Traffic regulation on byways etc. in National Parks

After section 22B of the Road Traffic Regulation Act 1984 (c. 27) insert—

22BB Traffic regulation on byways etc. in National Parks in England and Wales

(1) This section applies to a road

(a) which is in a National Park in England or Wales,

(b) which is

(i) shown in a definitive map and statement as a byway open to all traffic, a restricted byway, a bridleway or a footpath, or

(ii) a carriageway whose surface, or most of whose surface, does not consist of concrete, tarmacadam, coated roadstone or other prescribed material, and

in respect of which no relevant order is in force.

13.2. This provision gave rise to regulations setting out the process by which national park authorities can make such TROs: Statutory Instrument 2007 No. 2542. The National Park Authorities' Traffic Orders (Procedure) (England) Regulations 2007

13.3. A national park authority may make an experimental TRO (s.22BB(2)(b) of the Road Traffic Regulation Act 1984, as amended) and must consult the highway authority for the road before making any order (s.22BB(4) of the Road Traffic Regulation Act 1984, as amended)

13.4. *defra* has issued guidance with regard to the exercise of these powers by national park authorities: *Public Rights of Way Guidance for National Park Authorities making Traffic Regulation Orders under section 22BB Road Traffic Regulation Act 1984. Guidance to accompany the National Park Authorities' Traffic Orders Regulations.*

14. ‘Wet Gates’.

[This proposal was not taken-up by government, and has been largely superseded by ‘Default Traffic Regulation Orders’, as set out in Part 1 of this paper. LARA thinks that this scheme still has merit and applicability for minor sealed-surface roads, where ‘default TROs’ are not appropriate.]

Regulating the Use of Unsealed BOATs and Unclassified Roads in Waterlogged Ground Conditions.

A LARA Proposal for Minor Legislative Amendment.

Introduction.

14.1. One of the principal causes of friction between recreational vehicle users and other highway users, and between recreational vehicle users and highway authorities, is the impact on some unsealed roads, from vehicular traffic, when the ground is very soft due to unusually high rainfall, rivers flooding, or melting snow. Routes that would otherwise carry vehicular traffic without undue impact can become susceptible to damage – sometimes quite serious and lasting damage – in ‘waterlogged’ conditions. Over the past three years – and at the start of 2009 – the weather patterns and resulting ground conditions suggest that Britain is becoming ‘wetter for longer’ in each year, not just in terms of precipitation, but, more importantly, as regards the surface condition of minor roads. This paper looks at proposals for minor legislative or regulatory change to allow quick, simple, cheap and responsive ‘conditions-sensitive traffic management’ on Byways Open to All Traffic (BOAT) and Unsealed Unclassified Roads (UUR) in England and Wales. The proposals would work in Scotland, lightly amended to fit into existing Scottish statutes (there are no BOATs in Scotland).

What is Needed?

14.2. To make immediate traffic regulation more-readily available to highway authorities during wet ground conditions, there has to be a system with the bite of a traffic regulation order (essentially criminal sanctions for breach, the availability of command signage, and the power to gate and barrier) but

without the formalities, cost, delay to make, apply, or disapply, a temporary traffic regulation order. The necessary process could be made available by amending current provisions within the Road Traffic Regulation Act 1984. We call these lawful barriers ‘wet gates’.

Current Management Systems.

14.3. Currently, traffic management in such situations on BOATs and UURs comes down to six types:

- Individual commonsense.
- Formal voluntary restraint.
- Temporary traffic regulation orders.
- Full time, weather-dependent, traffic regulation orders.
- Full-time, selective (i.e. prohibiting certain traffic) TROs.
- Repair and improvement by the highway authority.

14.4. Taking these in turn:

14.5. Individual commonsense is cheap, flexible, applicable where needed, and engages the driver in the wider context of his activity. Unfortunately, common sense is lacking in some people (if it were not, we might not need speed limits, or give-way lines, etc.) and effective management needs some bite.

14.6. Voluntary restraint has been shown to work, particularly with drivers who are members of national organisations, but is relatively slow to impose, and demands a considerable level of immediate and ongoing liaison and publicity.

14.7. Temporary traffic regulation orders are relatively expensive, slow and cumbersome, and while highway authorities might use these for ‘one-offs’, they are reluctant to use them for repeating circumstances.

14.8. Full-time, weather-dependent traffic regulation orders have been used successfully in (e.g.) Hertfordshire, Bedfordshire, and the Lake District, but demand the cost and complexity of making individual orders.

14.9. Selective traffic regulation orders typically restrict 'larger/heavier' traffic, e.g. prohibiting 4x4s whilst not prohibiting motorcycles. These are not uncommon.

14.10. Pro-active repair and improvement is increasingly unlikely in these cash-starved times.

The Benefits of 'Wet Gates'.

14.11. By this provision, highway authorities would be able to move quickly to prevent vehicular traffic where BOATs and unsealed unclassified roads are 'waterlogged'. The effect would be very much like a temporary traffic regulation order (and not unlike voluntary restraint) but without the cost, complexity and delay involved. The highway authority would be under a duty to remove the 'gates' as soon as conditions allow, and would not be able to plead 'waterlogging' as a defence to a notice under s.56 of the Highways Act 1980 as regards a long-term situation.

The Negatives.

14.12. It might be argued that highway authorities would abuse the system and leave gates up longer than necessary. That might be so, but the authorities would remain open to notices under s.56 and s.130A of the Highways Act 1980 (the latter are not applicable to unclassified roads). Would occasional instances of such breach be any worse than occasional instances where drivers do not comply with voluntary restraints, or with temporary traffic regulation orders, and cause significant damage in the process?

'Notices': the Existing Process, Lightly Amended.

14.13. When (for example) a culvert collapses under a road in England or Wales, and the highway authority has to close the road to make emergency repairs,

there is no way of making a temporary traffic regulation order quickly enough. The Road Traffic Regulation Act 1984 provides, in s.14, a provision for an authority to make a 'notice' to close a road in such circumstances. A 'notice' can remain in force only for a short period.

> S.14(1): if the traffic authority for a road are satisfied that traffic on the road should be restricted or prohibited –
>
> (b) because of the likelihood of danger to the public, or of serious damage to the road, which is not attributable to [works being done on or near the road] …
>
> the authority may by [traffic regulation order] restrict or prohibit temporarily the use of that road, or any part of it, by vehicles, or vehicles of any class … subject to such conditions or exceptions as they may consider necessary.
>
> (2) The traffic authority for a road may at any time by notice restrict or prohibit temporarily the use of the road, or of any part of it, by vehicles, or vehicles of any class … where it appears to them that it is –
>
> (b) necessary for the reason mentioned in paragraph (b) of [subsection (1) above]
>
> … that the restriction or prohibition should come into force without delay.
>
> S.15(7) A notice under s.14 of this Act shall not continue in force –
>
> (b) if issued for the reason mentioned in paragraph (b) [of s.14(1) above] for more than twenty-one days from that date;
>
> … but the Secretary of State may by regulations alter the number of days for the time being specified in this subsection.
>
> S.15(8)(b) a restriction or prohibition imposed by a notice … may be continued – (i) by an order … or (ii) if the notice was issued for the

reason mentioned in [s.14(1)(b) above] by one (but not more than one) further notice under that section.

14.14. So, if wet ground conditions suggest the 'likelihood of serious damage to a road', the highway authority already has the power to use a notice – thus allowing the use of barriers and prohibition signs – to exclude all or some vehicular traffic. This notice can be kept in force, if necessary, for twenty-one days, and may, if necessary, be followed by one further notice for twenty-one days, giving forty-two days (six weeks) in total. Beyond that, a temporary traffic regulation order is needed to continue the prohibition of traffic.

14.15. The Government's current national guidance is: Making the best of byways: A practical guide for local authorities managing and maintaining byways which carry motor vehicles, December 2005. ''Making the best of byway's has no reference to the availability and application of 'notices' to short-term traffic management situations such as waterlogged ground. Where it looks as though the waterlogging may dry out within six weeks, the current provision is adequate, and its use by authorities might usefully be publicised in revised or additional guidance.

14.16. But, is six weeks maximum regulation sufficient for freak-weather waterlogging situations? Experience suggests not. Twelve weeks is long enough for natural drainage and drying in the great majority of cases – if the problem persists beyond that, then it is most likely because of an underlying drainage problem, or serious overgrowth, and repair and/or clearing is needed. To have the opportunity to use a notice for up to twelve weeks (in any year) would require that s.15(8)(b) is amended by regulations so to read:

14.17. S.15(8)(b) a restriction or prohibition imposed by a notice … may be continued – (i) by an order … or (ii) if the notice was issued for the reason mentioned in [s.14(1)(b) above] by one (but not more than one) further notice under that section, except where the notice is made due to flooding or waterlogged ground conditions, where three further notices may be made

consecutively (a total of 84 days) but no more than 84 days of traffic regulation by notice may be imposed in any calendar year.

The Benefits of Extended Notices.

14.18. This is cheap, easy, quick, flexible, responsive, allows the use of existing statutory signage, the use of gates and barriers, and has a criminal sanction for breach. Overall, the availability of such a process should save money compared to the use of temporary traffic regulation orders, or surface damage resulting where quick intervention does not happen.

15. Case studies.

This section looks at individual traffic regulation proposals and orders in greater detail.

BOAT CL23/41, Burledge, Bath and North East Somerset, 5-foot width restriction, prohibition of motor vehicles order 2012.

The old public road over Burledge Common, near North Widcombe, is part minor unclassified road and part byway open to all traffic (BOAT), with an ancient stone surface up and over what is a steep climb up from the west side. This road has been a feature of the Allen Trial for over 40 years and has probably been used for other trials (cars and motorcycles) for a lot longer than that.

In recent years there has been a problem with 4x4 drivers (believed to be coming out of the Bristol area) deviating off the stone carriageway and carving ruts in the roadside banks. These people were then driving off the road and on to Burledge Common itself, and making a real mess. There was no suggestion that these drivers come from responsible groups such as the Association of Land Rover Clubs or GLASS.

Something had to be done to tackle this, and there were suggestions that the road should simply be closed completely to motors, with the local police saying that it is not easy for them to identify and catch the people causing this damage. In August 2011, Andrew Knightly Brown (Association of Classic Trials Clubs), Dale Wyatt (GLASS) and Alan Kind (LARA) met with BANES council officers and the police on site, and started a dialogue about measures to control the vandals without totally closing the road to the law-abiding public.

LARA suggested a ‘prohibition of driving order’ that allowed gates at the road end to be locked (with side passage for motorcycles and non-motor traffic), key access for horse-drawn vehicles by arrangement, and an agreed number of ‘open days’ each year for 4x4 and classic car trial traffic.

This form of traffic order was drafted, consulted, amended and approved, and it came into force in October 2012, with the Allen Trial taking place as scheduled on 25 November. LARA and its Members thank Bath and North East Somerset Council for putting the effort into achieving the ‘least restrictive option’ solution to a very real problem, rather than just prohibiting all responsible drivers from a public road that they have enjoyed for decades.

Above: damage done on the embankments of the sunken metalled road.

An entrant in the Allen Trial 2012 on the steep stoned section of byway.

Photograph: © Dave Cook.

Stonehenge 'World Heritage Site'.

The County of Wiltshire (Stonehenge World Heritage Site, Parishes of Amesbury, Berwick St James, Durrington, Wilsford Cum Lake, Winterbourne Stoke and Woodford) (Prohibition of Driving) Order 2010.

In 2010 Wiltshire Council, effectively on behalf of English Heritage, sought a prohibition of motors order on a cluster of BOATs at and around Stonehenge. These extracts from the Inspector's report make interesting reading, particularly as regards the 'amenity' and safety of those people whose activities would be prohibited.

Inquiry Opened: 22 June 2011.

"On 23 June 2010 the Council granted planning permission to English Heritage (EH) under reference S/2009/1527/FULL for:
"'Decommissioning of existing visitor facilities and a section of the A344; the erection of a new visitors centre, car park, coach park and ancillary services building; and related highways and landscaping works at Airmans Corner, land south east of the junction of the A360 and A344 Salisbury.'

"1.3 On 11 August 2010 EH applied for a Stopping Up Order (SUO) on the A344 between its junction with the A303 at Stonehenge Bottom and the crossing point of Byway3. I held an Inquiry concerning this and an associated SUO (on the B3086 north of Airman's Corner) between 22 and 27 June 2011. I reported with recommendations to the Secretary of State for Transport who, by letter dated 31 October 2011, announced her decision to make the Orders as proposed.

"1.4 The proposed Traffic Regulation Order (TRO) would relate to the remaining length of A344 from Byway 12 to Airman's Corner, together with various Byways Open to All Traffic (BOATs) within the Stonehenge part of the Stonehenge, Avebury and Associated Sites World Heritage Site (WHS), (referred to for convenience as 'the Stonehenge WHS').

“In the interim, I had received written submissions by the Land Access and Recreation Association (LARA) regarding the adequacy of the notice of the Inquiry. This contended that the requirements of the Local Authorities’ Traffic Orders (Procedure) (England and Wales) Regulations 1996 had not been met. In particular these state that, where a public Inquiry is held in connection with an order, the order making authority (OMA) shall give notice in writing containing specified details to each objector (Reg. 10(3) (b)) and that the Inquiry shall not begin less than 21 days after that requirement was complied with (Reg. 10(4)).

“1.13 On resumption of the Inquiry the Council referred to a letter it had sent to me in response to LARA’s letter. In oral submissions the Council accepted that the notification of the Inquiry by the Programme Officer, referred to in its letter, did not (as had been suggested in the written response) meet the statutory requirements as the Programme Officer did not represent the Council as OMA. It expressed concern that consideration of, and decisions on, the merits of the TRO should not be undermined by procedural points. Accordingly, and with regret, the Council sought an adjournment of the Inquiry to enable the statutory notification to be carried out. It was noted that, although the Inquiry had opened, it had not yet ‘begun’ in the terms of the Regulations as no evidence had been heard and no submissions on substantive matters had been made.

“1.14 LARA, EH, Mrs Foster-Young and Messrs Doxey11 and Pendragon all agreed that in the circumstances the suggested adjournment, while regrettable, was necessary. No parties dissented from this.

“1.15 I agreed that the requirements of the Regulations in this respect had strictly not been complied with. Although the Programme Officer had notified all respondents of the Inquiry in April 2011, she did so as an officer of the Inquiry not, as the Council now acknowledges, on behalf of the OMA. While the distinction is a fine one, it seemed to me that this could leave any subsequent decision on the TRO vulnerable to challenge. Accordingly I adjourned the Inquiry until 20 September 2011 to enable the statutory notification to be carried out.

“The Inquiry sat on 22 and 27 June 2011 as above, and on 20-23 & 27-29 September and 3-4 October 2011. I undertook inspections of all the routes covered by the TRO, other routes in the area, Stonehenge itself and Avebury on various occasions before, during and after the Inquiry, mainly accompanied by the Assistant Inspector (see below) but in some cases unaccompanied.

“BOATs Durrington 10, Amesbury 12, Wilsford cum Lake 1, Berwick St James 11 and Woodford 16 form a continuous route running generally through an open landscape south-westwards from Fargo Road in Larkhill, crossing the A344 and A303 west of Stonehenge, to the A360 just north of Druid’s Lodge. For convenience this route as a whole is generally referred to as ‘Byway 12’, though some objectors have also referred to it as the ‘Netheravon Coach Road’.

“173 persons including 9 representatives of recreational motoring groups – including the Trail Riders Federation (TRF), Green Lane Association (GLASS), All Wheel Drive Club and South London and Surrey Land Rover Club – objected to the restriction of motorised vehicles on the Byways. Of these, 58 were identified as trail riders and 30 as 4x4 or multi-purpose vehicle users of the BOATs.

“7.31 Objectors consider that the alternative routes would be more dangerous for motorcyclists, particularly those riding the relatively low powered and slower bikes habitually used by trail riders [6.2, 6.9, 6.36, 6.61, 6.62, 6.81, 6.93, 6.110]. Accident statistics have been produced by various objectors seeking to support that contention, and the Council and EH have submitted evidence intended to show that they would not be unsafe [5.45(iii), 6.62]. Several objectors have also pointed to the lack of a risk assessment regarding the use of the alternative routes by trail bikes [6.36, 6.61, 6.95, 6.110]. No evidence has been put forward to show that any accidents have occurred on the BOATs [6.9]. I also note that the WHS Management Plan 2009 states that road safety is a significant issue within the WHS [6.95].

“7.32 Taking these factors into account, it seems to me that diverting trail riders from BOATs onto roads would be likely to increase the level of risk to their safety, even if the particular roads involved are not in themselves significantly more dangerous than other similar ones.

“7.35 I accept that Wiltshire has a considerably greater length of BOATs than any other County [5.45(i)]. This is not however, in itself, a reason for allowing a further loss for recreational motor vehicle users. In this case, the loss of a further 7km, particularly given the strategic importance of those routes, and without similar alternative routes being available would in my view be significantly detrimental to the current users. There would therefore be a substantial loss of amenity to the motorised recreational users of the BOATs, particularly motorcycle trail riders, despite their relatively low numbers

“7.36 I have seen no evidence of actual, as opposed to potential, adverse effects on pedestrians as a result of use of the BOATs by motor vehicles. Such evidence as there is, and my own observations, suggest that other than in the vicinity of Stonehenge use of these routes by pedestrians is low. Given the level of use by motor vehicles, conflicts between these classes of users are likely to be infrequent, and the substantial widths of many parts of the BOATs allow ample room for passing.

“7.38 The prevention of continuing damage to monuments and archaeological features within the WHS is a further reason given by the Council and EH for the proposed TRO [5.26, 5.30-5.34]. No evidence other than anecdotal comments by third parties was provided to the Inquiry regarding the extent of ongoing damage caused by recreational vehicles as opposed to agricultural vehicles which tend to be larger and heavier and which, a number of objectors suggest, are more likely to cause such damage [5.32, 5.33, 6.3, 6.37, 6.105]. Even if the TRO were introduced, agricultural vehicles would still be able to use the BOATs [4.2(1)].

“7.39 It has been suggested that better maintenance of the BOATs, or width restrictions, localised realignment and/or extra surfacing in the vicinity of monuments and archaeological features could help reduce or prevent damage [6.3, 6.47]. Having regard to the success of measures taken by EH to accommodate hundreds of thousands of visitors who walk around the Stones each year while protecting both the grassland and the archaeology, it seems to me that there is greater potential for sensitive application of measures such as those suggested

(within the existing boundaries of the BOATs) than the Council was prepared to recognise [4.79].

"7.40 In response EH showed that several monuments and archaeological features were severed by BOATs. They also indicated that discussions with local farmers regarding their use of the BOATs was ongoing, and that at least one farmer would need to check his boundaries less frequently if recreational vehicles were removed from the WHS [5.32, 5.33].

"7.41 It seems to me that, given the level of use by recreation vehicles, and taking into consideration the above factors, the introduction of the TRO would be likely to result in an unquantified but probably only minor reduction in the damage to the monuments and archaeological features within the WHS. I also consider that there remains potential for other measures to prevent or at least mitigate damage to such interests, and that insufficient consideration has been given to appropriate and sensitive application of such measures as alternatives to a blanket TRO.

"7.42 Inevitably traffic along the BOATs would pass close to other Scheduled Monuments, potentially affecting their settings. However, the 500m 'buffer' drawn in evidence by EH is arbitrary and ignores the topography and other features that influence the extent to which there is any actual effect on the settings of these features [4.47, 5.23, 5.29]. In any event, the physical Byways, including boundary fencing, would be unaffected by the TRO. Only the vehicular use would change, and this is of low level and accordingly only occasional. In my view the effect on the settings of most monuments is negligible, but I address below the impact of parking in the vicinity of Stonehenge itself.

"7.43 The Council suggests that removal of recreational vehicles from the BOATs would also be beneficial in reducing disturbance to the small breeding population of Stone-curlews, a priority species that nests on the ground, on the Normanton Down Nature Reserve in close vicinity to the BOATs south of the A303 [4.40, 4.51, 5.67-5.70]. The Stonehenge WHS Management Plan encourages measures to increase the Stone-curlew population through, amongst other things, avoiding disturbance [4.51]. However, LARA suggests that most disturbance to these birds is

caused by walkers with children and dogs, and that the birds are only present in the WHS for one season out of four [6.67]. I also note that the success of the breeding programme here to date has been achieved while use of the adjacent BOATs has been unrestricted.

"7.44 On balance, I am not persuaded that the loss of amenity to recreational vehicles users would be outweighed significantly by any potential benefit to the Stone-curlew population.

"7.60 I have found that the introduction of the TRO would lead to a significant loss of amenity to the motorised users of the BOATs, as well as increasing the level of risk to their safety, particularly those on motorcycles. I recognise that the numbers affected would be low in absolute terms as well as relative to the number of other visitors to the WHS, but the impact of the TRO on their enjoyment of the BOAT network would be exacerbated by the importance of these particular links. The loss of amenity in this respect has to be balanced against the gains in other aspects of the amenity of the WHS.

"7.65 As regards the tranquillity of the WHS, to my mind only 'Byway 11' south of Normanton Down could truly be said to be tranquil, but the use of this route by recreational vehicles appears to be very low, so any impact on the amenity of this part of the WHS by continuation of such use would be minimal [2.8, 5.27-5.28, 5.43, 5.46].

"7.66 I recognise that the BOATs cross a number of archaeological features, and that most or all of these have been damaged. I fully recognise the significance of damage to such irreplaceable heritage interests. However, there is scant evidence that such damage has in the past been, or more importantly would in the future be exacerbated by, recreational use of these routes as opposed particularly to agricultural vehicles that could not be excluded by the TRO from using them. Again the level of recreational use is significant. It seems to me that the potential for addressing such matters other than through the TRO has not been fully considered.

"7.67 For the reasons indicated above I consider that the effect of use of the BOATs by motor vehicles, other than for the purpose of parking near Stonehenge,

has negligible effect on the settings of other Ancient Monuments. Similarly there is little evidence of an adverse effect on nature conservation interests.

“7.68 In the light of the above factors and all other material considerations, I am not persuaded that the gain to the overall amenity of the WHS would outweigh the loss of amenity of motorised users, and consequently I consider that the TRO should not be implemented with respect to the BOATs.

“7.70 I conclude in respect of the BOATs that it would be expedient – in the sense of ‘convenient and practical’ – for the authority to make the Order for preserving or improving the amenities of the WHS. In my view it would not be expedient in the sense of ‘suitable and appropriate’, but I accept that this may not be the appropriate test in this instance [4.9]. In coming to the conclusion that it would be expedient as indicated I have had regard to the limited benefits of the Order that could not reasonably be achieved by other means, and to the substantial loss of amenity to recreational motor vehicle users. Moreover, in this case I do not consider that the duty of the local authority to secure the expeditious, convenient and safe movement of vehicular and other traffic (including pedestrians), having regard to the effect on the amenities of the WHS and other relevant matters, would be fulfilled. Accordingly in this respect the statutory grounds for implementing the proposed TRO would not be met.”

Breast High Road, Cumbria.

Breast High Road is a steep and high stony unclassified road and (later) BOAT, in an area prone to heavy rain and hard winters. The route is difficult to maintain and vulnerable to gradual and bouts of extreme erosion. Driving and riding over the route is never easy and can never be expected to be so. In 2011 a 4x4 driver went off the stone carriageway almost tipping the vehicle into a deep stream bed. As a consequence of this ‘danger’ the highway authority made an 18-month temporary traffic regulation order prohibiting passage by horse riders and motor vehicles but not prohibiting motor cycles or pedal cycles, 'in order to 'maintain the safety of the public and to carry out repairs.'

Local users expressed concern about the principle applied here because, in their view, the 4x4 driver had driven himself into danger on a road that other users had travelled without abnormal danger for many years; although users appreciated the route was then in poor repair. The county council was clear that the fear of an action for damages was driving their approach. The highway authority did make the road good, and it was reopened within 6 months, but interestingly, in the winter of 2012-13, Cumbria County Council has made a succession of ‘emergency notice’ closures on various high roads and passes on ‘danger from ice’ grounds.

This photograph (© Robert Wilson) shows a new section of drainage repairs almost immediately washed out again by a severe thunderstorm.