

Report of the CRoW Working Group to the BCA AGM 2014

Introduction

In June 2013 BCA accepted my proposal to set up a Working Group with the following remit:

That BCA investigates the position with regard to access to caves on CRoW land in England and reports back to BCA Council as soon as possible.

Wales comes under the same CRoW (Countryside and Rights of Way) legislation as England but the administration of this is overseen by the Welsh Assembly under separate Welsh organisations and Cambrian Caving Council is recognised as the “governing body for caving in Wales”, hence I felt a BCA working group should concentrate on England.

Appendix 1, “A POSSIBLE APPLICATION OF CROW TO CAVING”, produced by Bob Mehew, examines in detail what is meant by access land under the CRoW Act - basically it is “open country” (i.e. mountain, moor, heath, or down), RCL (registered common land), land more than 600 m above sea level or is land Dedicated for the purposes of the Act.

It is acknowledged that, if land is covered under the CRoW legislation, this has the added benefit of reducing the level of liability to the landowner.

My proposal was prompted by the acknowledged level of concern over access to Casterton Fell, which is an access area under the CRoW legislation (hence walkers may wander wherever they will on the surface of the land) but where access for cavers to the multiple entrances to the huge cave system underlying the Fell is controlled by CNCC at the request of the landowner, who requires that only a limited number of permits are issued. CNCC is put in the position of being threatened with withdrawal of all access to the Casterton area unless it can control caver access; while a substantial number of cavers consider the restrictions to be unreasonable and feel that access for cavers to land designated under the CRoW legislation should be on the same basis as for walkers.

Two articles in DESCENT have since highlighted the issue: Sam Allshorn in issue 235 “Caves and Crow, an analysis of caves in Northern England” and Tim Allen in issue 237 “Cave Access, out in the open”. I have written a response to Tim’s article, which will appear in issue 238.

Initial Work

Having been appointed convenor of the group I began by seeking help to compile a database for all caving regions in England which would identify as a minimum:

1. caving areas covered by the CRoW legislation;
2. caving areas which include SSSIs (Schedules Sites of Scientific Interest) designated by NE (Natural England) or SAMs (Scheduled Ancient Monuments) designated by EH (English Heritage); and
3. areas where a special permit or permission (obtained in advance) and public liability insurance are required in order to obtain access to caves;

and the overlap between these different areas within the various regions.

The point being that designation as an SSSI or SAM confers protection which can override the CRoW access legislation if this is required for reasons of conservation. Hence access to a cave under any revised CRoW legislation would not necessarily mean that it is a “free-for all” - either NE or EH may impose restrictions on access or take legal action if damage is caused underground. I have been told by one cave scientist that 75% of caves overall are covered by SSSI legislation, though this clearly varies from region to region.

Cavers in Northern England, the Peak District, Devon & Cornwall and the English part of the Royal Forest of Dean are already at work but I have yet to hear from any Mendip cavers although I have kept their C&A Officer informed.

I now have some interim results from the North, the Peak District and Forest of Dean which already show the great variation in the situation around the regions, although the database has yet to be completed.

Northern England: 71% of their 2,500+ caves are on CRoW land; in some cases, e.g. Leck Fell, this applies to 100% of caves; a number of other areas, e.g. East Kingsdale, Easegill, The Allotment and Fountains Fell, have more than 90% of the caves on CRoW land.

Peak District: Out of a total of 645 sites, 459 have been checked so far and of these only 11% are on CRoW land; 58% of sites overall are SSSIs but 79% of the SSSIs lie on CRoW land; only 1 cave on CRoW land has access restrictions and one show cave lies under CRoW land; there are a few sites with no access at all.

Royal Forest of Dean: All 171 sites in the English area have been checked. 43% are on Designated Access Land and 84% of these require Crown permission for access underground; less than 5% overall are SSSIs, only 2 of which are on Dedicated Access Land. The Forest is unique in that it has no ordinary CRoW access land but it does have land which has been specially "Dedicated" by the Forestry Commission under the CRoW Act; here permission from the landowner to reach the entrance and permission from the Crown to go underground are both required and this applies to both caves and mines. It must be emphasized that there is no right of underground access in the FoD without specific Crown consent.

Anomalies

It has become apparent firstly that the CRoW legislation itself says **nothing at all** about access to caves; caving is not listed as being permitted but neither is it listed as an activity prohibited under CRoW in the 2010 guideline document issued by Natural England, NE 13FS[1].

However, the legal guidance issued separately by NE and Defra (Dept. of Environment, Food & Rural Affairs) is that the CRoW legislation relates to "open air recreation" and that caves are not "open air", thus CRoW does not allow access to caves. One of their advisors also commented that:

CRoW boundaries relate to surface areas. Cave systems may meander around under the ground in a way that is very difficult for anyone to relate to the mapped boundaries. If the caver reaches the point underground where he crosses the boundary and the land above is no longer open country or RCL, how is he to know it? He has no means of relating his position to the statutory maps.

Despite this surface mapping of SSSI boundaries, cavers are currently monitoring SSSIs underground on behalf of NE and, of course, know exactly where the features they are monitoring lie in relation to the surface. In addition, SSSI and SAM legislation allow for the prosecution of anyone who causes damage to a scheduled site underground - so the existence of caves and mines frequented by people is acknowledged and the exact position of their activities underground must be known for a prosecution to succeed.

Tim Allen's DESCENT article challenges this definition of "open air" and it has been conceded by EN and Defra that descent of an open shaft from the surface **does** constitute an "open air activity" - the question then becomes: where does the "open air" end and the "cave" begin?

In the case of some open shafts surrounded by CRoW land, the boundaries have been drawn to exclude the shaft itself from the surrounding CRoW land, e.g. Marble Steps and Eldon Hole. In other cases the shaft itself is included within the CRoW boundaries.

In 2009 an NE commissioned a report, NECRO 12 edition 2, which recommended in section 3.2.1:

*"The CROW Act provides for open-air recreation, basically on foot, which would **include** the following activities:- ... **potholing** ..."*

It then went on to list those activities which should be specifically excluded.

However, the 2010 EN guideline document referred to above did not follow this 2009 recommendation - it makes no mention at all of caving but instead says:

13.4.2 The access afforded by CRoW

CROW provides the public with a right of access on foot only. This includes running, climbing, photography, having a picnic, and bird watching. Wheelchairs are also allowed.

It does not include cycling, horse riding, camping, or rock climbing.

So climbing is included but rock climbing is excluded under this definition!

In some areas, particularly in the Yorkshire Dales, by longstanding custom and practice, no permission is required to descend caves whether they are on CRoW access land or not.

NCA and BCA's past Role in this

The history of attempts to include caves in the CRoW legislation dates back to 1998, when the then NCA Conservation and Access Committee responded to the government proposals on the projected legislation. It is clear from the minutes of the C&A Committee meetings of the time that all regions, including the Forest of Dean, as well as BCRA, Pengelly, etc. were included in the formulation of the responses in favour of caving being included in the CRoW legislation. There was no dissent recorded at the time, nor was there dissent when this decision was reported to NCA Council.

All these decisions were reported in NCA's magazine "SpeleoScene", which was posted free of charge to every member club of NCA and was available for free in caving shops. The progress of the legislation through Parliament was followed in succeeding SpeleoScenes and was reported to NCA Council and to the 1999 NCA AGM. In SpeleoScene of May 2000 an article: "**The Countryside Bill**" appeared, quoting a CCPR (Central Council for Physical Recreation) press release from Robert Pettigrew, Chair of the Outdoor Pursuits Division, which included the following:

"... We wish to take forward the principles of free and responsible access in a spirit of collaboration, to the benefit of countryside interests as well as those of recreation and environmental understanding. ... England is not a land in which everything is forbidden except what is expressly permitted, but one in which everything is permitted except what is expressly forbidden. ... We need to follow best practice elsewhere, especially in Europe where there is a history of recreational enjoyment of land and water, and open-air tourism, to the economic benefit of local communities."

Mick Day, NCA and later BCA Chairman, was the caving representative on the Outdoor Pursuits Division of CCPR and there was no question but that caving was regarded by CCPR as an "outdoor pursuit".

In 2008 the BCA Chairman's Report to the AGM referred to BCA's membership of the CCPR Outdoor Pursuits Division and went on to say:

CCPR Access Policy: *CCPR has a long-standing history of supporting members' desire for increased access to land and water. One of CCPR's key strategic priorities is to secure sustainable access to land and water for sport and recreation, underpinned by good practice in outdoor and adventurous activities. The initial draft document merits further work to satisfy as wide a range of members as possible. Also, DEFRA has just (iv-2008) published the draft Marine Bill, including provisions on access to the English coast.*

He also noted that CCPR acknowledges a single named representative of each member body in order to provide a democratic structure for meetings of its divisions (BCA is a member of the Outdoor Pursuits Division, OPD).

(What was formerly the CCPR has now been renamed the Sport & Recreation Alliance.)

Where Next

It seems clear that in order to obtain access to caves under the CROW Act BCA itself, on behalf of cavers, will need to seek a new interpretation of the law relating to access underground.

It is therefore for members at this AGM to decide whether BCA should attempt to take this matter forward.

Jenny Potts, 12 May 2014