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Our reference:DC9798

8 January 2014

Dear Mr Hignett,

**Harbours Act 1964
The Lymington Harbour (Works) Revision Order 2014**

1. The Marine Management Organisation ("the MMO") informs you that consideration has been given to the application for The Lymington Harbour (Works) Revision Order 2014 ("the Order") for which you applied on behalf of Lymington Harbour Commissioners ("the Applicant"), under Section 14 of the Harbours Act 1964 ("the Act") on 23 September 2013.

Summary of Decision

2. The MMO has authorised the making of the Order with amendments and modifications which it considers necessary and appropriate.
3. The Order authorises the construction and maintenance of two overlapping rock breakwaters, one to the east of the main navigation channel of Lymington Harbour and the other on its western side. The west breakwater will consist of a mound of rocks 410m long with a 4m wide crest at 4.5m above Chart Datum (CD). The east breakwater will consist of a mound of rocks 495m long with a 4m wide crest at 4.5m above CD.
4. The MMO determined that the proposed Order would authorise a project. Accordingly Council Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment does apply to the proposal and an environmental statement (ES) has been supplied with the application.

Context

5. The Applicant is the statutory harbour authority for Lymington Harbour and operates under orders dated 1951 to 2002.
6. The harbour is sheltered and protected from wave attack by the saltmarsh at the mouth of the river. However, since the 1920's a long term trend of natural erosion



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has caused saltmarsh to retreat and it is progressively becoming less effective in protecting the harbour. In the next few decades the saltmarsh is predicted to disappear, exposing the harbour.

7. The harbour is of high importance to the local economy. In a 2006 assessment, Lymington Chamber of Commerce estimated that the harbour generated £93 million of local economic activity supporting some 966 jobs. A significant proportion of that activity is in the marine trades directly concerned with leisure boating and the local businesses, shops and services that support the community.
8. If the protection of the harbour is lost then it will cease to be viable in its present form as the 1,530 permanent moorings will become untenable. The consequences of losing protection would also be detrimental for Lymington and the local marine and tourism business that are dependent on a sheltered harbour.
9. In 2008, following an extensive evaluation consultation and consents process, the Applicant committed to building two overlapping rock breakwaters as part of a 6 phase plan covering approximately 35+ years in order to protect the harbour and ensure its long term viability. Phase 1 was completed in 2010. Phase 2 is planned for 2014 and Phases 3 to 6 will be built from 2024 onwards.
10. In progressing the project, the Applicant relied on permitted development rights granted by article 3 of, and Part 11 of Schedule 2 to, the General Permitted Development Order 1995 by virtue of Article 25 of the Pier and Harbour Order (Lymington) Confirmation Act 1951 (1951 Act). As the proposals affected a European site designated for its nature conservation importance, approval to use permitted development powers was required from the New Forest National Park Authority (as the local planning authority) under Regulation 62 of the Conservation (Natural Habitats, etc) Regulations 1994. The approval was obtained on the 18th December 2008.
11. As part of work undertaken in connection with an application for loan funding to construct the second phase of the breakwater, the Applicant received conflicting advice on whether Article 25 of the 1951 Act was sufficiently precise so as to permit the breakwaters. In order to remove any uncertainty, the Applicant applied for the Order to retrospectively authorise Phase 1 of the project and to specifically authorise phases 2 to 6 of the breakwater works before progressing.
12. The Order is sought to achieve objects 4 and 7B specified in Schedule 2 to the Act:

'Imposing or conferring on the authority, for the purpose aforesaid, duties or powers (including powers to make bylaws), either in addition to, or in substitution for, duties or powers imposed or conferred as mentioned in paragraph 3 above'

'Extinguishing public rights of navigation for the purposes of works described in the order or works ancillary to such works, or permitting interference with the enjoyment of such rights for the purposes of such works or for the purposes of works carried out by a person authorised by the authority to carry them out'

13. In summary, it is the case for the Applicant that the Order is necessary to protect the harbour and ensure its long term viability.

Application procedure

14. On 23 September 2013 an application for the Order was submitted on behalf of the Applicant to the MMO.

15. Notice of the application for the Order was advertised in the London Gazette on Friday 27 September 2013 and in The Lymington Times and the New Milton Advertiser on 28 September and 5 October 2013.

16. In addition, the MMO directed the Applicant serve the application and supporting documentation under paragraph 14 of Schedule 3 to the Act. Those served include:

- Environment Agency;
- RYA;
- Trinity House;
- Maritime and Coastguard Agency;
- The Crown Estate;
- Natural England;
- New Forest District Council;
- Highways Agency;
- Network Rail;
- RSPB;
- Lymington council;
- Department for Transport;
- Chamber of Shipping.

17. The MMO also consulted internally with its scientific advisor CEFAS and the local MMO office.

18. A number of representations were received during the statutory 42 day period provided for in schedule 3 to the Act. Representations are summarised as follows:

CEFAS

19. CEFAS advised that if impact piling is likely to be required, a noise risk assessment to estimate the impact should be produced and submitted to the MMO for approval prior to the commencement of the piling works. In addition they recommend all licence conditions included on licence L/2012/00288 authorising the construction of phase 2 remain.

MMO response

The MMO has varied licence L/2012/00288 to include a condition ensuring a noise assessment is submitted to the MMO for approval prior to the commencement of the piling works if impact piling is required.

Environment Agency

20. The Environment Agency (EA) made the following general observations:

The proposed works are within the 'Lymington' and adjacent to the 'Solent' Water Framework Directive (WFD) water bodies. The WFD requires that all inland and coastal waters within defined river basin districts must reach at least Good Status or Good Potential. The WFD requires no deterioration in the current status of the water body. It also includes an objective to 'aim to improve' any water body that is not presently at Good Status or Potential.

The works are within an EU designated Shellfish Water, namely 'Lymington and Sowley'. Care will therefore need to be taken to ensure any material released to the water column by the works is kept to a minimum.

MMO response

The MMO notes the EA have no objection to the proposed Order. The MMO is satisfied the proposal is in accordance with the WFD and that that licence L/2012/00288 contains conditions to mitigate the release of material into the water column.

Natural England

21. Natural England (NE) have no objection to the Order.

NE advise that in their view, the project, either alone or in-combination with other plans or projects, is not likely to have a significant effect on the interest features of a designated European site in light of the sites conservation objectives.

In addition NE note Section 3.3 (c) Flora and Fauna (pg. 27) of the ES which highlights that high tide counts have recorded "substantial decreases in the numbers of ringed plover, golden plover, dunlin and black-headed gull".

NE advise that ringed plover and dunlin are Features of the Solent and Southampton Water Special Protection Area (SPA) and although no conclusion can be drawn for the reason for the population decrease, it would be advisable to continue monitoring these populations in order to assess potential impacts associated with this project.

NE also advise that the ES submitted in support of further marine licence applications for future phases of the breakwater project (phases 3 to 6), is likely to require updating at that time.

MMO Response

The MMO notes NE have no objection to the Order and the comments made are general observations intended to assist the Applicant in supporting future applications associated with the project. The MMO also notes and agrees with NE advice that the proposal is not likely to have a significant effect on the interest features of a designated European site in light of the site's conservation objectives.

English Heritage

22. EH advised that whilst they have no specific concerns over the impacts of this project to the historic environment, they would like additional information to be provided on setting impacts to the Lymington Sea Water Baths before they would be prepared to accept that such issues have been adequately addressed in the ES. In addition, to ensure the delivery of the agreed mitigation, EH requested licence conditions to ensure the protection of known and reporting of unknown archaeology over the course of works, must be produced and agreed with EH prior to any marine licence being granted.

MMO response

The applicant provided an update to the ES (the "*Environmental Statement Addendum 2013 Phases 2-6 Version 3*") which included the additional information requested by EH. This included the production of an archaeological protocol for reporting finds which had been requested as a pre-works condition by EH. EH are therefore content that their concerns have been addressed and requested the proposed mitigation strategies listed in the document be placed as conditions on any marine licence.

The MMO is satisfied with the contents of the ES addendum and has varied licence L/2012/00288 to include conditions that ensure the archaeological protocol is adhered to at all times and an exclusion zone is placed around the area known as the "boat graveyard".

Trinity House

23. TH welcome the inclusion of a saving for Trinity House in Article 16 but requested a minor change be made to the drafting of draft regulation 13(1) (Lights on tidal works during construction, etc.) in the form of the deletion of the words ", if any", which appear twice.

MMO response

The MMO notes the Applicant has accepted the request of TH for amendment and the modifications form part of the final order. The MMO is satisfied that the drafting in its current form is appropriate.

Maritime and Coastguard Agency

24. The Marine and Coastguard Agency (MCA) requested minor modifications to the drafting of the Order, in particular modifications to paragraph 9(1) and (2), 12(1) and 13(1) to require MCA and the UK Hydrographic Office is notified in certain situations and appropriate lights, shapes and signals are used in restricted visibility during daylight hours.

MMO response

The MMO notes the Applicant has accepted the MCA request for amendments and is content with the modifications to the Order. The MMO also notes that TH has no objections to the revised wording to articles 9(1) and (2) but requests that the proposed changes to articles 12(1) and 13(1) are not made

Discussions between the parties resulted in agreement that changes to articles 12 and 13 should not be made in this instance.

The MMO is satisfied the revised drafting in its final form is acceptable and appropriate.

New Forest District Council

25. New Forest District Council have no objection to the Order.

MMO response

The MMO note the response.

New Forest National Park Authority

26. The New Forest National Park Authority (the Authority) have no objection to the Order and support the conclusions of the ES. In addition they make the following comments:

The Authority are pleased that the ecological compensation works that have been undertaken as part of the first phase are showing signs of success and that the Applicant is actively investigating options for positive management of the estuary in the future.

The Authority understands that there are limitations to what is delivered by this scheme and the limitations on expenditure imposed on the Applicant. The Authority encourages active consideration of how the surface of the structures could be managed and manipulated either now or in the future to provide suitable habitat for special interests such as nesting terns. This would provide significant enhancement for interest features within the designated sites and special qualities of the National Park.

MMO response

The Authority's comments are noted and have been passed to the Applicant to consider as part of the later phases of the project.

MMO consideration

27. Paragraph 19 of Schedule 3 to the Act provides that the MMO shall consider any ES supplied with the application, the result of any consultations, any opinion under paragraph 16(5) and the result of any consultations with other European Economic Area (EEA) states, any objections made and not withdrawn, any representations received and the report of any person who held an inquiry before making a determination.

28. Regulation 7 (1) (a) of the Conservation of Habitats and Species Regulations 2010 (“The 2010 Regulations”) provides that for the purposes of the 2010 Regulations ‘competent authority’ includes any Minister of the Crown [sic] government department, statutory undertaker, public body of any description or person holding office.

29. The MMO is therefore a competent authority for the purposes of the 2010 Regulations

30. Regulation 61 of the 2010 Regulations provides:

A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.

31. Section 14(1) of the Act provides for an order to be made under this section (“a harbour revision order”) in relation to a harbour which is being improved, maintained or managed by a harbour authority in the exercise and performance of statutory powers and duties for achieving all or any of the objects set out in Schedule 2 to the Act.

32. By virtue of section 14(2)(a) a harbour revision order may not be made in relation to a harbour unless the MMO is satisfied that an appropriate written application has been made by the authority engaged in improving, maintaining or managing it or by a person appearing to it to have a substantial interest or body representative of persons appearing to it to have such an interest.

33. By virtue of section 14(2)(b) a harbour revision order shall not be made in relation to a harbour unless the MMO is satisfied that the making of the order is desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner, or of facilitating the efficient and economical transport of goods or passengers by sea or in the interests of the recreational use of sea-going ships.

MMO’s decision

34. The MMO has assessed the Order in line with the requirements of the EIA Directive and transposing legislation.

35. The MMO concludes that the environmental impacts of the works authorised by the Order have been adequately identified, described and assessed and is satisfied that

the mitigation proposed in the ES is sufficient in combination with the conditions applied to the associated marine licence to enable the approval of the application.

36. The MMO also assessed the Order in accordance with the 2010 Regulations.

37. In its assessment the MMO considered the information provided by the Applicant in support of their application and the advice of NE. The MMO also noted that saltmarsh recharge to mitigate the anticipated short term loss in saltmarsh is now in place.

38. Having considered the factors referred to above in its assessment the MMO has determined that the project, either alone or in-combination with other plans or projects, is not likely to have a significant effect on the interest features of a designated European site in light of the sites conservation objectives.

39. In its consideration of the requirements of section 14(1) and in particular whether the Order is sought to achieve all or any of the Objects specified in Schedule 2 to the Act the MMO must be satisfied that all of the purposes for which the Order is sought are intra vires.

40. In doing so the MMO gave specific consideration to the retrospective approval element of the application detailed in paragraph 11. The MMO noted in its consideration that other legislation, most notably the Town and Country Planning Act 1990, provides for retrospective permission through express wording but the MMO takes the view that neither section 14, nor Schedule 2, nor the Act as a whole provides expressly or by implication for the retrospective approval of works already done and that such approval would be ultra vires. The MMO therefore concluded that the retrospective approval of phase 1 of the project is not capable of falling within the construction of any of the paragraphs set out in Schedule 2.

41. In accordance with paragraph 30 to Schedule 3 to the Act, the MMO wrote to the Applicant to notify them of that decision and proposed modifications to remove the offending element of the Order. The Applicant responded to indicate its acceptance of the proposed modifications.

42. The MMO is satisfied that the remaining purposes for which the Order is sought would achieve those objects set out in paragraph 12 above.

43. Consequently the MMO is satisfied that the Order in its current form meets the requirements of section 14(1) and 14(2)(a) of the Act.


44. The MMO concludes for the reasons set out by the Applicant in their statement of support and summarised above that the making of the Order is desirable in respect of multiple purposes set out in section 14(2)(b) of the Act and should be made.

45. The MMO authorises the making of the Order with amendments and modifications which it considers necessary and appropriate.

Challenge to decisions

46. Information on the right to challenge this decision is set out in the Annex to this letter.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M Kirby', with a large, sweeping underline.

Mark Kirby
Inshore Licensing Team

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Annex

Right to challenge decisions

Right to challenge orders made under sections 14 and 16 of the Harbours Act 1964

Any person who desires to question the making of the Order on the ground that there was no power to make the Order or that a requirement of the Harbours Act 1964 was not complied with in relation to the Order, may within 6 weeks from the date on which the Order becomes operative make an application for the purpose to the High Court or the Court of Session, as the case may be.

A person who thinks they may have grounds for challenging the decision to make the Order is advised to seek legal advice before taking any action.