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15 December 2014

Dear Sirs

HARBOURS ACT 1964

The Dee Estuary Harbour Revision Order

The Mostyn Docks Harbour Revision Order

1. I am authorised by the Secretary of State to inform you further to my letter of 11 July 2013 and the subsequent consideration of the representations that were received in response to it, of the final decision of the Secretary of State on the following orders:
 - The Dee Estuary Conservancy Harbour Revision Order ("the DHRO") applied for 20 January 2005 under section 14 of the Harbours Act 1964 on behalf of the Environment Agency (Wales), the functions of which were transferred to Natural Resources Wales on 1 April 2012, and
 - The Mostyn Docks Harbour Revision Order ("the MHRO") applied for on 11 April 2003 under section 14 of the Harbours Act 1964 on behalf of Mostyn Docks Limited, the harbour authority for the port of Mostyn.
2. The DHRO, if made, would confer powers on Natural Resources Wales (NRW), as the successor to the Environment Agency, to facilitate the implementation of the Port Marine Safety Code, modernise the Agency's conservancy functions and enable ship dues to be collected. References in this letter to 'the Agency' or 'EA' include Natural Resources Wales where appropriate.
3. The MHRO, if made, would confer powers on Mostyn Docks Ltd to facilitate the implementation of the Port Marine Safety Code (PMSC) and extend the powers of Mostyn in respect of aids to navigation, wreck removal and pilotage and statutory harbour jurisdiction.
4. The Inspector's report of the inquiry held into the applications for the Orders can be found at <https://www.gov.uk/government/publications/dee-estuary-and-mostyn-docks-harbours-revision-orders-inspector-report>. Unless otherwise indicated, numbers in square brackets in this letter refer to paragraph numbers in the Inspector's report.

Summary of the Inspector's Recommendations

5. The Inspector recommended in paragraph 11.34 of his report that the DHRO be made, subject to modification of details.
6. The Inspector recommended also in paragraph 11.34 of his report that the MHRO be made, but modified by the removal of its Article 3, which would extend Mostyn's powers as statutory harbour authority to the Channel to the port.

Summary of the Secretary of State's Previous Considerations

7. The Secretary of State, for the reasons given in the letter of 11 July 2013, was minded to agree with the Inspector that the DHRO should be made, with modifications of detail. He does not consider that the modifications proposed would substantially affect the character of the Order.
8. The Secretary of State, for the reasons given in that letter, was also minded to agree with the Inspector that the MHRO should be made once it has been modified by deleting its Article 3, along with consequential amendments to other articles. The Secretary of State considered that deleting Article 3 would substantially modify the nature of the MHRO, as this would significantly narrow the scope of the Order.
9. The Secretary of State's consideration of post-inquiry matters, including the grounding of MV Thunder and the subsequent Marine Accident Investigation Branch (MAIB) report, was set out at paragraphs 44-56 of that letter, in as much as he considers them to be material to his conclusions.
10. As the proposed decision represented a substantial modification to the MHRO, he was required to inform the applicants and other relevant bodies of the decision he was minded to make. Namely, that he proposed to confirm the MHRO after modifying it by removing Article 3, as well as making other revisions that do not substantially alter its character, and to confirm DHRO with revisions that do not substantially alter its character.

Summary of the Responses to the Proposed Decision

11. There were eight responses to the letter of 11 July 2013, three of which were after the 20th August deadline. The responses were from Dyne Solicitors on behalf of the Port of Mostyn, Bircham Dyson Bell on behalf of NRW, Chamber of Shipping, Wirral Council, Trinity House, Sharpe Pritchard on behalf of the Royal Yacht Association (RYA), and Mr Spencer Rogers, along with the MAIB.
12. The responses from the Chamber of Shipping and the MAIB made no comment on the proposed decision. The response from John Entwistle on behalf of Wirral Council stated that the Council was content with the proposed decision. The RYA were content with the proposed decision so long as the DHRO was in the form provided by Bircham Dyson Bell, on behalf of Environment Agency, now NRW, in October 2008.
13. Trinity House in its response was content for both HROs to be made, so long as NRW was clearly identified as the local lighthouse authority and the statutory harbour authority for the Dee Estuary. Trinity House considered that these points had been dealt with in the draft DHRO presented to the public inquiry (as document CD/3).

14. Mr Spencer Rogers asked for assurances that the definition of the area of the Dee Conservancy statutory harbour authority did not indirectly change the accepted border between Wales and England. Mr Rogers also suggested that there should be a single Welsh authority to manage the Dee Estuary.
15. The response of 20 August 2013 from Bircham Dyson Bell on behalf of NRW confirmed that NRW was the successor to the Environment Agency, as the body responsible for the Dee Estuary Conservancy. NRW was content with the proposed decision in the letter of 11 July.
16. It also noted that since 2005 the Dee Conservancy (formerly Environment Agency, now NRW) had worked with the Port of Mostyn on safety management of the Dee Estuary and channels.
17. The response from Dyne Solicitors of 8 August 2013, on behalf of Port of Mostyn Ltd (PoM) the owners of Mostyn Docks Ltd, focused on issues related to the inner channel, the outer channel, the role and status of NRW, ships' dues for vessels visiting the port of Mostyn and the make-up of the Consultative Committee. These matters are described in more detail as part of the Secretary of State's consideration.
18. There was further correspondence in November and December 2013 from both Bircham Dyson Bell on behalf of NRW and Dyne Solicitors on behalf of Mostyn Docks Ltd commenting on the earlier correspondence. This focused on two aspects, the impact of Mostyn Docks Limited becoming statutory harbour authority for the channel through the Dee Estuary, and its impact for Dee Conservancy and the powers necessary to control the outer channel to North Rhyl Buoy. NRW is concerned about the implications of managing the Dee Estuary, were it to be divided into two parts and the potential impact of events moving across harbour authority areas. In turn, Dyne Solicitors on behalf of their clients, argued that PoM's risk register showed that a number of risks that the Port considered to rest with it would, in its view, be mitigated by having the powers of statutory harbour authority for both the channel within the Dee Estuary and the outer channel vested in Mostyn Docks Ltd, which would not be achieved if Mostyn Docks Ltd were only to be made the competent harbour authority for the outer channel (The company is already the competent harbour authority for the inner channel and the rest of the Estuary).
19. In July 2014, Bircham Dyson Bell and Dyne Solicitors on behalf of their respective clients asked that the final decision be delayed until a statement of common ground had been submitted. This was executed in October and sent to the Department on 10 November. The key terms, relevant to the two HROs, were:-
 - a. Mostyn Docks Ltd should be the statutory harbour authority (SHA) for the outer channel, as well as its competent harbour authority (CHA);
 - b. that the powers of Mostyn Docks Ltd in the outer channel should be the same as those exercised by the Dee Conservancy as an SHA, and that the NRW would support a further HRO by Mostyn Docks Ltd, if it was necessary to obtain these powers; and
 - c. a requirement for NRW to consult Mostyn Docks Ltd before implementing its charging scheme.

Secretary of State's consideration

20. The Secretary of State has considered the further representations received on each topic as set out below

Inner Channel

21. The representations on behalf of Port of Mostyn Ltd argued that the Inspector's report, and therefore the Secretary of State's considerations, failed to take account of the evidence presented by Mr O'Toole, managing director of Port of Mostyn Ltd. The Proof of Evidence to the Inquiry said that *"it is recognised that in places the inner channel is subject to lateral movement by natural processes but the consented maintenance dredging will allow the channel to be contained within this corridor width [of 500 metres]. The recent observations of channel behaviour after the capital dredge when there was no maintenance dredging allowed confirms the suitability of the corridor requirement. (It is also relevant to note that if the channel were allowed to meander outside such a corridor then the plan curvature of the channel would require an increased width to comply with guidelines for safe navigation, and this would require a variation to project consents – this is not a desirable course of action)."* Paragraph 8.7 of the Proof of Evidence also states *"This has shown the outer channel to be stable and the inner channel to be located such that maintenance dredging keeps it in position"*.
22. The PoM consider that ongoing maintenance dredging would prevent the defined inner channel shifting over time and that this does not seem to have been considered by the Inspector, nor does the Inspector's report give any reasons for disagreeing with the Mr O'Toole's evidence. The PoM continued that regular hydrographical surveys since 2005 have confirmed that the maximum lateral movement of the inner channel has been 120 metres, which is well within the 500 metre width of the proposed channel. PoM, therefore, argue that the position of the channel would not have moved between the two harbour authorities, as feared by the Inspector. Therefore in PoM's view there is no basis for the conclusion that extending the SHA status of Mostyn Dock's Ltd to include a channel through the Dee Estuary would be likely to lead to confusion and reduce safety of navigation. The Secretary of State was therefore asked to re-examine this aspect of his proposed decision. However, NRW remain concerned that the effect of this would be to divide its harbour authority area into two separate zones and that this would complicate dealing with incidents that may drift across the harbour authority areas of responsibility.
23. The Secretary of State remains concerned about the practicality for Dee Conservancy of managing an area for which it was the statutory harbour authority if this was divided into two separate parts, and the challenges associated with materials moving from one jurisdiction to another. The Secretary of State has considered the points raised by PoM, and has concluded that they do not allay his concerns or lead him to change his original conclusions. He is aware that it is not unusual for a competent harbour authority to be responsible for pilotage over an area wider than that for which it is the statutory harbour authority, and that sometimes this includes areas where other authorities act as the statutory harbour authority.

The Outer Channel

24. In its response to the letter of 11 July 2013, the PoM reiterated its wish both to extend the area for which Mostyn Docks Ltd is the competent harbour authority in the Outer Channel and to make it the statutory harbour authority for the whole Channel, which would extend to the position of the Rhyl Buoy (which was removed in 2007; the location would now be defined by OS co-ordinates). PoM had concluded that this was necessary as the powers of direction, available to a competent harbour authority, would not enable it to exercise control over safety concerns in a number of situations. Pilotage powers can only be exercised in respect of vessels over 20 metres in length, and trawlers in excess of 47.5 metres in length. As many of the vessels using the port are offshore wind farm service vessels and smaller trawlers, Mostyn would be unable to exercise control or oversight of them. For example, Mostyn considers that as a competent harbour authority it would be unable to issue directions to small craft that fail to give way to deep-drafted vessels; to small trawlers obstructing the channel; or to leisure craft tying up to navigational buoys.
25. Mostyn Docks Ltd provided its risk assessment for the outer channel that set out the potential impact of a range of incidents. While many of the risks identified for the Outer Channel would be mitigated by the exercise of the powers by Mostyn Docks Ltd as a competent harbour authority, there would be additional benefits in having a statutory harbour authority exercise control over the channel.
26. The Secretary of State has also considered again the recommendation of the MAIB in its report on the MV Thunder, on clarifying the status of the Outer Channel and that the responsible authority had the necessary powers to ensure the safety of navigation in the channel. He considers that one authority with the powers of both an SHA and a CHA should be able to provide this.
27. After considering the further representations from PoM, and, the statement of common ground, and the MAIB's recommendation, the Secretary of State has concluded that Mostyn Docks Ltd should be the CHA for the whole Outer Channel and the SHA for that part of it outside the jurisdiction conferred by the DHRO. Its powers as the new SHA for that part of the Outer Channel should be the powers it currently has as SHA for the port of Mostyn. That is the approach incorporated in the draft MHRO, as applied for, in respect of the whole enlarged area described in that draft. The Secretary of State has noted that the statement of common ground proposes a different approach to powers in the outer channel, but is of the opinion that, as this was not considered at any stage of the application, inquiry or consultation, it is not a matter to be considered for inclusion in the proposed Order by further modification.

Role of Natural Resources Body for Wales

28. Mostyn Docks Ltd raised an issue about the wording of *The Natural Resources Body for Wales (Functions) Order 2013 (SI 2013 no. 755 (W90))*, which provides that references to the Environment Agency in local enactments should be read as a reference to the Natural Resources Body for Wales (NRW), other than where it related to navigation. Mostyn Docks Ltd were concerned that since this the Environment Agency got its powers in relation to the Dee Estuary from the Dee Conservancy Act 1889, the functions were not transferred to the NRW. Trinity House in their letter raised a similar concern that the Dee HRO should explicitly

identify the Dee Conservancy as the statutory harbour authority and local lighthouse authority for the Dee Estuary.

29. It should be noted that *The Natural Resources Body for Wales (Functions) Order 2013 (SI 2013 no. 755 (W90))* in Article 4(1) and Schedule 2 specifically provides for the NRW to succeed the Environment Agency as the Dee Conservancy Authority. Therefore, Mostyn Docks Ltd can be assured that the Dee conservancy functions of the Environment Agency do now rest with the NRW.
30. To provide Trinity House with the assurances it seeks, the Secretary of State proposes that the wording of the Preamble, and Articles 4(1) and 45 make this clear, as provided in the 'filled up' Dee HRO that was presented to the inquiry [Doc ref CD/3 EA/A 16]. This specified the role of the Environment Agency, now NRW, as conservancy authority, harbour authority, and local lighthouse authority. The insertion of such text in the Dee HRO would remove the apparent ambiguity.
31. The response from Mostyn Docks Ltd noted that NRW had inherited responsibilities of a number of bodies, such as the Countryside Commission for Wales, as well as the Environment Agency in Wales. As a result Mostyn Docks Ltd was concerned that in exercising its functions as the Dee Conservancy Authority, the NRW would give greater emphasis to nature conservation and recreation interests at the expense of maintenance, dredging and aids to navigation in the estuary. This could not have been envisaged by the Inspector because the new body did not exist, nor was it proposed to exist, when the public inquiry took place. Mostyn Docks Ltd asked that the Secretary of State should consider whether the Body is likely to give sufficient weight to aids to navigation and commercial interests within the estuary.
32. The Secretary of State has considered this point and concluded that the Environment Agency had a wide range of responsibilities and roles beyond that of the Dee Conservancy authority. This is not dissimilar to the position of some harbour authorities elsewhere that are local authorities with other responsibilities and so it is not without precedent for there to be a juggling of roles and balancing of responsibilities. Under the proposed Dee HRO, the powers are, like those of similar harbour authorities, generally drafted as discretionary powers, which must be exercised reasonably for the purposes, for which the powers were conferred. Therefore, the Secretary of State has concluded that this is not an unusual situation. He also notes that the Inspector, recommending the direction advocated by EA, considered that, while the interests of nature conservation would not be subordinate, the business needs of the port would be taken into account [para 11.33].

Ship's dues

33. Mostyn Docks Ltd in its response was concerned about Dee Conservancy levying ship dues. It considered that with the exception of the provision and maintenance of one buoy in the inner channel by the Dee Conservancy, Mostyn Docks Ltd provided or maintained all other aids to navigation in the channel approaches to the port, including providing hydrographic survey information to estuary users, annual monitoring reports and maintenance dredging work. Any dues levied by Dee Conservancy on ships using the port of Mostyn would need to be proportionate to reflect the fact that all the aids for navigation are funded by the Port of Mostyn. Therefore, Mostyn Docks Ltd would like to see the Dee HRO amended to include in Article 24 provisions that vessels visiting Port of Mostyn Ltd should not be charged

by Dee Conservancy for facilities that the vessels do not use or benefit from, as the Port itself maintains the navigation aids used by vessels visiting the port.

34. The statement of common ground provides an agreement to ensure that Mostyn Docks Ltd is consulted by NRW on its charges.
35. The Secretary of State noted this concern and also noted that the Dee HRO, already exempts vessels going to or from the port of Mostyn from passenger and goods dues. As noted by the Inspector in his report, it is reasonable for ship dues to be charged and based on the 'user pays' principle and the Secretary of State supports his suggestion that it is for the Dee Conservancy Consultative Committee, which NRW would have to consult about charges in relation to the estuary, to recommend to the conservancy authority the proportionality of the payment in respect of dues payable by ships bound from PoM to the sea or vice versa. He considers that the agreement in the statement of common ground provides a useful check to meet PoM's concerns. This is not a matter that alters the effect of either harbour revision order or the outcome.

Consultative Committee

36. The PoM noted that the Inspector's report at paragraph 11.19 noted the concerns of the Chamber of Shipping that commercial interests were insufficiently represented in the membership of the Consultative Committee and that these were dealt with in the 'filled up order', which was presented as evidence to the hearing [Doc Ref CD/3 EA//A 16]. However, a subsequent revision omitted some of the changes in the filled up order and these will now be reinstated. Therefore the provision Article 5(2)(l) will be modified to omit the words 'shipping and', which would allow commercial shipping interests to be represented by others in addition to the Port of Mostyn.
37. The PoM also asked that the Secretary of State consider increasing the number of Committee members representing commercial users of the estuary. The port of Mostyn is important to the local and national economy, for the movement of freight in a sustainable manner and supporting sustainable development through the development of renewable energy. Therefore the bodies such as Airbus and the renewable energy companies may have an interest in the management of the Dee Estuary. The Secretary of State notes that subject to the changes at Article 5(2) to reflect the establishment of Natural Resources Wales, Article 5 already provides for up to two other members interested in the estuary, other than in the categories specified and considers that these should provide the opportunity for commercial bodies moving goods or providing services by water to be members of the Consultative Committee.

Conclusion

38. The Secretary of State considers on balance, having reviewed the evidence as set out in the letter of 11 July and the representations subsequently received, that the overall needs of the estuary would be best maintained by Natural Resources Wales, as the successor body to the Environment Agency for the Dee Conservancy.
39. The Secretary of State therefore concludes in agreement with the Inspector's recommendation that the overall interests of the Dee Estuary and its users would be best served by making the DHRO, subject to modifications of detail, as a whole.

40. The Secretary of State concludes, for the reasons given above in this letter and those in the letter of 11 July, that making the DHRO would satisfy the requirements of section 14(2)(b) of the Harbours Act 1964.
41. The Secretary of State considers that the MHRO should be made in a modified form without the provision to extend Mostyn Docks Ltd's jurisdiction as harbour authority within the area to which the DHRO applies, but with the extension of such jurisdiction to the outer channel beyond that area. It should also extend Mostyn Docks Ltd's jurisdiction for the purposes of pilotage under part I of the Pilotage Act 1987 (Article 4) to the whole outer channel, as applied for. He is satisfied that this meets the requirements of section 14(2)(b) of the Harbours Act 1964.

The Secretary of State's Decision

42. The Secretary of State is satisfied, for the reasons given above and in the letter of 11 July, that the making of the Dee Estuary Conservancy Harbour Revision Order is desirable in the interests as set out in section 14(2)(b) of the Harbours Act 1964 and that the DHRO should be made.
43. The Secretary of State authorises the making of the DHRO with the amendments already indicated above and with other modifications not substantially affecting the character of the Order which appear to him to be necessary or appropriate.
44. The Secretary of State is satisfied, for the reasons given above and in the letter of 11 July, that the making of the Mostyn Docks Harbour Revision Order with modifications indicated above is desirable in the interests as set out in section 14(2)(b) of the Harbours Act 1964.
45. A copy of this letter is being sent to all those who objected or made comments and representations, along with those who were entitled to appear and who did appear at the Public Inquiry, and those who requested a copy of the Secretary of State's decision. The decision will also be published on the Department for Transport website.

Challenge to Decision

46. The circumstances in which the Secretary of State's decision may be challenged are set out in the Annex to this letter.

Yours faithfully

Linda Willson
Head of Maritime Commerce & Infrastructure Division
Authorised by the Secretary of State to sign in that behalf

Right to Challenge the Decision

Right to challenge an order made under sections 14, 15A and 16 of the Harbours Act 1964 (the 1964 Act).

As provided for by section 44 of the 1964 Act, any person who desires to question a harbour revision or harbour empowerment order (which are not confirmed by an Act of Parliament under section 6 of the Statutory Orders (Special Procedure) Act 1945, or under section 2(4), as read with section 10, of that Act) or an order under section 15A, may challenge the order on the grounds that:

- (1) there was no power to make the order; or
- (2) a requirement of the 1964 Act was not complied with in relation to the order.

Any such challenge should be made within six weeks from the date on which the order comes into force.

Upon such application, the High Court may, by interim order, suspend the operation of the order or any provision contained in it, either generally or so far as may be necessary for the protection of the interests of the applicant, until the final determination of the Court proceedings.

If the Court is satisfied that there was no power to make the order or that the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement of the 1964 Act, the Court may quash the order or any provision contained in it, either generally or so far as may be necessary for the protection of the interests of the applicant.

Where section 44 is not relevant to the complaint - for example, because the Secretary of State has decided not to make an order - a person aggrieved by the Secretary of State's decision may seek permission to initiate judicial review proceedings, if appropriate. Any challenge must be brought promptly and in any event within three months of the decision being challenged.

It is suggested that anybody who is contemplating applying to the High Court to challenge the validity of an order, or applying for leave to judicially review a decision (such as a decision not to make an order), seeks legal advice.