

Harbours Act 1964 section 40A: Consultation on the applications of the statutory harbour authorities for 25 harbours in England and 6 non-fishery harbours in Wales for their designation with the power to give harbour directions

SUMMARY OF RESPONSES



Department
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Introduction

Background

1. This consultation concerned 31 applications received from statutory harbour authorities (SHAs) wishing to be designated with the power to give harbour directions under new section 40A of the Harbours Act 1964 (“the 1964 Act”), as inserted by section 5 of the Marine Navigation Act 2013:

<http://www.legislation.gov.uk/ukpga/2013/23/section/5>).

The power would allow designated SHAs to give harbour directions for the movement, mooring, equipment and manning of ships¹ in their harbours.

2. The mechanism under new section 40A of the Harbours Act is a simpler, quicker and far less costly means for an SHA to acquire the power to give harbour directions than applying for a harbour revision order under section 14 of the 1964 Act or the promotion of; a private bill. Once an SHA has been designated with the power, it represents an additional tool available for managing ships in its harbour alongside the other powers in its local statutes such as its harbour byelaw-making powers. The procedure for making harbour directions is far less cumbersome than that for harbour byelaws, which must be confirmed by the Secretary of State. The harbour directions power should, therefore, enable a harbour authority to have a more agile response to address/mitigate risks identified in its harbour.

3. The Secretary of State for Transport is responsible for designating SHAs for English harbours and non-fishery Welsh Harbours. Designation of applicant SHAs for Welsh fishery harbours and Scottish harbours are respectively the responsibility of the Welsh and Scottish Governments.

Harbour directions guidance

4. The Department for Transport issued Harbour Directions Guidance in November 2013 which can be found at the following link:

<https://www.gov.uk/government/publications/harbour-directions>

This is non-statutory guidance but is aimed at providing assistance to SHAs as to the requirements of the Secretary of State before an SHA is included in a harbour directions designation order.

¹ In section 57(1) of the Harbours Act 1964 the definition of 1 “ship”, where used as a noun, includes every description of vessel used in navigation, seaplanes on the surface of the water and hovercraft within the meaning of the Hovercraft Act 1968;

5. To ensure responsible use of the harbour directions power, an industry-led National Directions Panel (NDP) was set up whose membership comprises the following six organisations representative of either SHAs or harbour users:

British Ports Association (BPA)
Royal Yachting Association (RYA)
British Tugowners Association (BTA)
UK Chamber of Shipping
National Federation of Fishermen's Organisations (NFFO)
UK Major Ports Group (UKMPG)

The Department for Transport attends NDP meetings.

6. The NDP issued Supplementary Guidance: Code of Conduct on Harbour Directions in November 2013 to coincide with the issue of the Departmental guidance (see above) which can be found at the following link:

http://www.britishports.org.uk/sites/default/files/ndp_guidance_-_code_of_conduct_on_harbour_directions_-_november_2013.pdf

Under the Code of Conduct, harbour authorities applying to be designated with the power to give harbour directions are asked to submit a signed Assurance Statement that they will abide by the Code as part of their application and all applicant SHAs have done so. The Code sets out a recommended process of consultation with port users, provides model directions for harbour authorities, and sets out a local dispute resolution process.

7. The Departmental Guidance asked SHAs wishing to apply for the harbour directions power to include the following information in their applications:

- their rationale for seeking the new power, which could, for example, include reference to a risk assessment carried out in relation to their adherence to the Department's non-statutory Port Marine Safety Code.
- the outcome of a consultation carried out with their harbour users on their intention to apply to be designated with the power.
- details of any proposal for amending or repealing any statutory provision of local application (e.g. harbour byelaws) which overlaps with the new power.

The applications

8. A total of 31 applications were received from the SHA (SHAs) for, 25² harbours in England and 6³ non-fishery harbours in Wales and these were annexed to the consultation document. Two out of an original 18 applications made by Associated British Ports (ABP) were subsequently withdrawn. This was because ABP's harbours of Ipswich and Teignmouth Quays were found to have existing powers of general direction in their local statutes which they elected to retain rather than replacing them with the new harbour directions power.

9. As part of their application the SHAs summarised the outcome of informal consultations they had carried out with their harbour users on their intention to apply to be designated with the harbour directions power. In all cases there was overall support of harbour users for the SHA to acquire the power.

Consultation

10. Given the nature of the subject matter and the fact that the applicant SHAs had carried out an informal consultation with their harbour users prior to submitting their applications, a targeted consultation exercise, carried out over a reduced 4 week period was considered appropriate.

11. The consultation ran from 15 December 2014 till 16 January 2015. The consultation documentation was published on the Department's website (www.gov.uk/dft) as well as being sent by e-mail to relevant national organisations and local stakeholders identified by the applicant SHAs at the 31 harbours in respect of which applications had been made.

12. Consultees were asked to say whether they considered the applicant SHAs to be fit and proper bodies to be designated with the power, whether they were content with the proposed port user group arrangements at each harbour, as well as given the opportunity to add any further comments not covered under the first two questions.

13. A total of 23 responses were received: 5 from national organisations and 18 from harbour users/stakeholders from individual harbours. The respondents are listed in the Annex. The Royal Yachting Association's (RYA) response contained comments on the Port User Group (PUG) arrangements at all of the applicant harbours but has been treated as a single response. The majority of respondents replied using a proforma Consultation Response Form. This incorporated the 3 consultation questions on

² 25 English Harbours: 18 Associated British Ports(ABP) harbours (Goole, Grimsby, Hull, Immingham, Barrow, Fleetwood, Garston, Ipswich, Kings Lynn, Lowestoft, Plymouth (Mill Bay), Silloth, and Teignmouth Quays

³ 6 Welsh non-fishery harbours: 5 ABP harbours (Barry, Cardiff, Newport (South Wales), Port Talbot and Swansea) and Mostyn Docks Ltd.

which the structure of this summary of responses is based. The comments from respondents replying by e-mail were ascribed to the most relevant question. Not all the respondents replied to all of the questions and local respondents directed their response to the application of the SHA for the harbour which they were a user or stakeholder of.

Question 1

Do you consider the statutory harbour authorities for the harbours for which applications have been made (see Annexes C-1 to C-14 to the consultation document) to be fit and proper bodies to be designated with the power to give harbour directions?

All 23 respondents either explicitly supported or registered no objection to the applicant SHAs being endowed with the power to give harbour directions.

Question 2

Are you content with the port-user group arrangements proposed at the 31 harbours for which harbour directions applications have been made?

Cattewater: The RYA's request that the port user group (PUG) should be a sub-committee of the Port of Plymouth Liaison Committee had already been taken on board following the earlier informal consultation undertaken by Cattewater Harbour Commissioners leaving no outstanding issues.

Chichester: The 2 local responses (the RYA member on the Chichester Harbour Advisory Committee and Chichester Harbour Federation) all supported Chichester Harbour Conservancy's proposed PUG which would comprise the marine members of the Advisory Committee who were representative of the harbour users likely to be affected by harbour directions.

Crouch: Five respondents with a stake in the harbour (2 on or formerly on Crouch Harbour Advisory Committee and 3 from groups representing certain categories of users of Crouch Harbour) thought the Crouch PUG should be the Advisory Committee. Crouch Harbour Authority (CHA) proposed, like Chichester, a more focussed PUG comprising those Advisory Committee members most likely to be affected by proposed harbour directions. In any event all proposed harbour directions would subsequently be referred to the Advisory Committee for consideration/discussion before any direction was presented to the Board for decision. As both the Advisory Committee and the smaller more focussed PUG included a representative from the RYA it was content with either proposal.

Dart: Two local respondents (a representative organisation of Dart river users leisure clubs and a local boating association) supported the proposed PUG arrangements

which will be formed by the accredited Dart Harbour advisory bodies under Article 14 of the Dart Harbour and Navigation Harbour Revision Order 2002/2730, one representing leisure users of the harbour (the Association of Dart River Users Clubs (ADRUC) the first listed local respondent above) and the other representing commercial users of the harbour. The third local respondent, a Parish Council, urged that a third accredited advisory body, the “Non-Beneficiaries” group currently in abeyance, and on which it had been represented, should be revived by the harbour authority and former participants and allowed representation on the PUG. The RYA had sought clarification of RYA representation on the PUG and was advised of the composition of ADRUC which included several RYA-affiliated clubs and provided with their contact details to put its case for a local RYA representative to join ADRUC.

Falmouth Docks: Falmouth Docks and Engineering Company’s (FDEC) had originally intended that the existing Falmouth Estuary Marine Safety Committee (FEMSC) would serve as their PUG. The RYA commented that the FEMSC is not a Committee of harbour users and FDEC are now in the process of setting up a PUG in line with the Harbour Directions Code of Conduct representing port users, including the RYA as many recreational craft transit the FDEC’s seaward area of jurisdiction.

Falmouth Harbour: Falmouth Harbour Commissioners (FHC) intend their existing Consultative Committee whose membership covers the interests of the different categories of users of Falmouth Harbour as their PUG. FHC are currently considering RYA’s request to have direct membership on the PUG in conjunction with the local yacht clubs.

Fowey: The two local respondents (a Parish Council and residents association in respect of one of the quays) were content with the proposed PUG arrangements, which were that the existing stakeholder consultation group would form the basis of the club. The RYA said that it would be content if the membership of this group was extended to include broader representation of the various recreational boating interests and users’ organisations in the harbour (including the RYA and the two RYA-affiliated yacht and sailing clubs located in the port). This request was referred on to Fowey Harbour Commissioners who were content to agree to it.

Hayle: The 3 local respondents (the Hayle Harbour Advisory Committee, a town council and a person responding as an individual) were content with the proposed PUG arrangements that the Hayle Harbour Advisory Committee (HHAC) would be the PUG and the Hayle Harbour Users Association (HHUA) chair was represented on it and would present HHUA views on proposed harbour directions at the HHAC. The RYA’s request for representation on the PUG was agreed to by Hayle Harbour Authority (HHA) and the RYA are now following this up with HHA directly.

Mostyn Docks: Natural Resources Wales (in its capacity as the SHA for the Dee Conservancy) expressed support of the proposed PUG arrangements at Mostyn Docks. Mostyn Docks Ltd, the SHA, advised that their existing Port Security and Health and Safety Committee would act as its PUG whose membership consisted of its port tenants. The RYA acknowledged that there was not a great deal of recreational boating at Mostyn Docks but Mostyn Docks Ltd invited them to nominate a representative. The RYA considered that the level of recreational sailing at Mostyn Docks was not sufficient to warrant a direct RYA representative but instead suggested that Mostyn Docks Ltd should invite a representative of an RYA recognised training centre that operates in local waters to join the PUG. The RYA are now content with the PUG arrangements.

Peel Ports – Heysham: The RYA, in its response, acknowledged that Heysham Port Ltd (HPL) does not offer facilities to recreational craft though it does have jurisdiction over waters that are navigated by recreational craft. The RYA queried if HPL had an existing PUG, and what its composition was. Peel Ports advised that there was an existing PUG which currently comprised commercial users of the port and Peel Ports Group representatives who facilitate the meetings. The Peel Ports Group Harbour Master invited the RYA to nominate a representative. He had previously advised that as the Heysham PUG was facilitated by Peel Ports, he had asked them to set up a Working Group specifically for Harbour Directions consultations so as to provide separation between harbour users and the SHA.

Peel Ports – Manchester: The RYA were content with the Manchester Ship Canal Company's existing PUG arrangements.

South Hams District Council – Salcombe: The one local respondent, a boat club, and the RYA both approved of the proposed PUG arrangements – the Council has 5 recognised Harbour Community Fora which together cover the different categories of users of Salcombe Harbour.

Sutton (Plymouth): As was the case with Cattewater, the RYA's request that the port user group (PUG) should be a sub-committee of the Port of Plymouth Liaison Committee had already been taken on board following the earlier informal consultation undertaken by the Sutton Harbour Company leaving no outstanding issues.

Associated British Ports (ABP) – Barrow, Goole, Grimsby, Hull, Immingham, Ipswich, Kings Lynn, Lowestoft Newport (South Wales) and Silloth: The RYA said that provided that the existing stakeholder or user groups form the basis of the PUGs and continue to include representation of recreational boating interests then they would be content with the proposed PUG arrangements at these ABP harbours. ABP has confirmed that this is the case. There was 1 local response in respect of ABP Lowestoft, a joint response from Suffolk Coastal and Waveney District Councils who approved the proposed PUG arrangements at the harbour.

ABP – Barry, Cardiff, Fleetwood, Garston, Plymouth(Mill Bay), Teignmouth Quays, Port Talbot and Swansea: the RYA were not aware of established port user or stakeholder groups at these ABP harbours and the Department is seeking clarification from ABP as to the PUG arrangements at these harbours.

National level respondents other than the RYA

UK Chamber of Shipping (UK CoS)

The UK CoS had no objections to the proposed PUG arrangements at the applicant harbours.

Marine Management Organisation (MMO)

The MMO gave a nil return.

Trinity House (TH)

TH did not respond to Q2

Natural England (NE)

NE, the Government's adviser on the natural environment, responded to the consultation with respect to the English applicant Harbours and Mostyn Docks in so far as it affects English waters and environmental interests and were content with the PUG arrangements at these harbours.

Question 3

Do you have any further comments about designating the statutory harbour authorities for the harbours for which applications have been made with the power to give harbour directions not covered in Questions 1 and 2?

Natural England, responding to Q3 regarding English harbours and Mostyn Docks in so far as it affects English waters and environmental interests, commented on SHAs' duties under various environmental legislation and the need to consult Natural England (and other statutory nature conservation bodies) where new harbour

directions have the potential to affect the environment, particularly statutory nature conservation sites. They advised that these harbours:

“are within or close to national, European and international designated statutory nature conservation sites including:

- *sites of special scientific interest (SSSI),*
- *marine conservation zones (MCZ),*
- *special areas of conservation, (SAC),*
- *special protection areas (SPA)*
- *and Ramsar sites.*

These sites are designated and afforded protection by a suite of legislation including the Wildlife and Countryside Act 1981 (as amended), the Conservation of Habitats and Species Regulations 2010 (as amended) and the Marine and Coastal Access Act 2009. Consequently Harbour Authorities have a duty to have regard for, and conserve statutory nature conservation sites when undertaking activities or authorising others to undertake activities within their jurisdiction.

Harbour Authorities also have a general duty to exercise their functions with regard to nature conservation and other related environmental considerations, under the Harbours Act 1964; alongside a further duty to have regard for biodiversity in undertaking their activities under the Natural Environment and Rural Communities Act 2006.

We advise that where harbour authorities are afforded the power to give harbour directions, those proposing to give a new harbour direction consider the potential implications for the environment. Where appropriate under Section 40B(2)[of the Harbours Act 1964] include the relevant statutory nature conservation bodies (Natural England, Natural Resources Wales, Scottish Natural Heritage) in any consultation prior to giving harbour directions.”

Subject to SHAs being made aware of their environmental obligations, Natural England said they had no objections to their being designated with the power to give harbour directions.

One of the respondents in respect of Dart Harbour and Navigation Authority’s (DHNA) application to be designated expressed concern about the possibility of heavy-handed or over-zealous application of the harbour directions power. DHNA, in response to a similar concern expressed by another respondent, reassured them that the powers *“will be used as wisely and sparingly as possible, and not without thought for the impact on the river users, and towards promoting safe river activity.....any decision*

taken to issue a direction would be for the safety and benefit of all river users as whole, and not in those of self-interest. “

All applicant SHAs have signed an assurance to abide by the Harbour Directions Code of Conduct which includes setting up a PUG, which SHAs are recommended to consult on proposed harbour directions at least 14 days before the formal consultation period of 28 days for publicising prospective directions.

One of the respondents on DHNA's application expressed concern that even the tiny vessels used by club members would qualify as ships and that breaches of harbour directions is liable to a fine up to level 4 on the standard scale (currently £2,500).

The Department replied as follows:

“Definition of “ships”

In section 57(1) of the Harbours Act 1964 a “ship” when used as a noun is defined as including “every description of vessel used in navigation, seaplanes on the surface of the water and hovercraft within the meaning of the Hovercraft Act 1968.” The meaning of the expression “vessel used in navigation” has been considered in a number of legal cases over many years. In the 2006 case of R v. Goodwin, the Court of Appeal expressed the view that “vessel used in navigation” means a vessel that is used to make ordered progression over the water from one place to another.

Examples of vessels that have been found not to be used in navigation include personal watercraft, mobile platforms and static hulks. It is not possible, therefore, to state categorically that dinghies are not “ships” – if a prosecution was brought, a court would need to consider if it was being used to make “ordered progression” as above. However, prosecution for breach of a harbour direction would generally be used as a last resort, and only after careful consideration of the circumstances of a breach (see below).

Breach of harbour directions

It is true to say that breach of a harbour direction is a criminal offence, and the applicable penalty is, as you say, up to level 4 on the standard scale (currently £2,500). However, as it says in paragraph 7.3 of the Code of Conduct, a harbour authority “will need to satisfy itself beyond reasonable doubt that an offence has been committed and that there is sufficient evidence to convict. It will also need to consider whether prosecution is proportionate and in the public interest. Relevant public interest considerations include whether the offending has been intentional, reckless, or grossly negligent, the degree of harm caused, any previous history of offending, whether there

has been repeated or protracted contravention of the harbour direction and whether the offender has been uncooperative or obstructive.”

So there can be circumstances when prosecution might serve as a justifiable deterrent. Generally speaking, however, we would expect that a harbour authority would prosecute as a last resort, having tried to resolve the situation through advice or warnings. It therefore seems improbable that minor or inadvertent breaches would result in any kind of fine.”

DHNA confirmed that this response accurately reflected its approach to enforcement and allayed the concerns of the respondent.

Trinity House responded to Q3 saying: *Trinity House does not consider it necessary for it to be represented on the National Directions Panel on the basis that Trinity House’s interests as a General Lighthouse Authority should be sufficiently protected by primary and potentially secondary legislation. We note in this connection that a harbour authority may not give a harbour direction that conflicts with an enactment.”*

1st Designation Order

14. The Department’s Minister with responsibility for maritime matters under the Coalition Government signed S.I. 2015/573 the Harbour Directions (Designation of Harbour Authorities) Order 2015 designating the SHAs of 11⁴ out of the 29 remaining applicant harbours on 5 March 2015 which came into force on 6 April 2015 (the first Common Commencement Date – CCD). Each harbour is described in the Schedule to the Order by reference to its local statutes. The Order can be found at the following link:

<http://www.legislation.gov.uk/uksi/2015/573/made>

Designation of remaining SHAs

15. Designation of the SHAs for 17 out of 18 remaining harbours (16 of ABP’s harbours and Peel Ports’ Manchester Ship Canal) has been deferred pending clarification regarding the legislative provisions describing those harbours.

16. With respect to the designation of the Hayle Harbour Authority (HHA), section 20 (Directions of harbourmaster) of the Hayle Harbour Act 1989 was found to partially overlap the new powers of harbour direction as regards mooring of vessels. There is no alternative of designation with partial powers of harbour direction under section 40A (a possibility which was not intended) and HHA need to conduct further

⁴ Cattewater, Chichester, Crouch, Dart, Falmouth Docks, Falmouth Harbour, Fowey, Heysham, Mostyn Docks, Salcombe and Sutton Pool (Plymouth).

discussions/consultation locally about the need to repeal the overlapping provision either wholly or partially (it extends to the more widely-defined “vessels”). Section 40A(7) of the Harbours Act 1964 permits the Secretary of State to include any necessary repeals in a designation order.

17. As the designation of the remaining SHAs will take place under the new Government, the exemption from final stage regulatory clearance granted under the Coalition Government (a possibility available for fast track measures providing there were no major issues arising from the consultation and the proposals did not change) has lapsed. As a consequence, final stage clearance to make the Designation Order will need to be sought from the Reducing Regulation Committee. If clearance is granted, the earliest date that any such designation could come into force would be the second CCD (1 October 2015).

Review

18. The NDP will act as focal point for issues arising from the granting and use of harbour direction powers and oversee and make recommendations on the conduct of harbour authorities exercising the power, all of whom have given written assurance that they will abide by the Harbour Directions Code of Conduct.

19. Section 5 of the Marine Navigation Act 2013 (MNA 2013) which inserted the new harbour directions provisions into the Harbours Act 1964, will, along with other provisions of the MNA 2013, be subject to post-legislative review in 2016.

Future applications

20. This consultation concerned a first wave of applications from SHAs wishing to be designated with the harbour directions power under new section 40A of the Harbours Act 1964. As further SHAs, evaluating their statutory powers, determine a need to apply to be designated with the new power, further batches of applications will be invited and considered. Any call for further expressions of interest will be widely publicised.

HARBOURS ACT 1964 – SECTION 40A:**DfT 2014-31 – CONSULTATION ON THE APPLICATIONS OF THE STATUTORY HARBOUR AUTHORITIES FOR 25 HARBOURS IN ENGLAND AND 6 NON-FISHERY HARBOURS IN WALES TO BE DESIGNATED WITH THE POWER TO GIVE HARBOUR DIRECTIONS****LIST OF RESPONDENTS (TOTAL: 23)**

NATIONAL ORGANISATIONS (5)
Natural England
Marine Management Organisation
Royal Yachting Association (RYA) ⁵
Trinity House
UK Chamber of Shipping
CHICHESTER HARBOUR (2)
RYA Members Representative on Chichester Harbour Advisory Committee
Chichester Harbour Federation
CROUCH HARBOUR (5)
Vice Chair Crouch Harbour Authority Advisory Committee
Heads of River Combined Clubs Committee (HORCC)
Roach Area Fairway Conservation Committee (RAFCC)
Crouch Area Yachting Federation (CAYF)
Port of London Authority Member of Crouch Harbour Authority Advisory Committee
DART HARBOUR (3)
Association of Dart River Users Clubs
Dittisham Parish Council
Stoke Gabriel Boating Association
FOWEY HARBOUR COMMISSIONERS (2)
Lanteglos-by-Fowey Parish Council
Mixtow Quay Residents
HAYLE HARBOUR AUTHORITY (3)
Hayle Harbour Advisory Committee
Hayle Town Council (Town Clerk)
Private individual
(ASSOCIATED BRITISH PORTS) LOWESTOFT HARBOUR (1)
Suffolk Coastal and Waveney District Councils' joint response
MOSTYN DOCKS (1)
Natural Resources Wales in its capacity as Dee Conservancy Authority
SALCOMBE HARBOUR (1)
Kingsbridge Estuary Boat Club

⁵ The RYA's letter, which commented on all 31 applications, is being treated as a single response.