




Department for Transport



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11 July 2013

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 that consideration has been given to the report of the Inspector, Mr A Mead BSc (Hons) MRTPI MIQ, on the Public Inquiry held from 29 November to 8 December 2005, following objections made to the following orders:
 - The Dee Estuary 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.
2. The DHRO, if made, would confer powers on Natural Resources Wales, 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 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 is enclosed. 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.

Summary of the Secretary of State's Considerations

7. The Secretary of State, for the reasons given in this letter, is 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 this letter, is 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 considers 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 MAIB report, is set out at paragraphs 44-56 in this letter, in as much as he considers them to be material to his conclusions.
10. In light of the substantial modification to the MHRO, the Secretary of State as required in Schedule 3 of the Harbours Act 1964 is informing the applicants and other relevant bodies through this letter of what he is minded to decide and that he proposes 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.
11. As well as being sent to the representatives of the applicant bodies, copies of this letter have been sent to those parties that objected to either the DHRO or the MHRO or made a representation on either or both.
12. Anyone who wishes to comment on the rationale for the Secretary of State's proposed decision about, and proposals for, each order should send these comments to

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Such comments need to be made by **20 August 2013**.

Summary of the Inspector's Conclusions

13. The Inspector's conclusions are set out in Chapter 11 of his report. The Inspector concludes that the two Orders as presented are incompatible, as some elements of each Order overlap. The Inspector found, however, that there is no dispute as to the proposed extension of pilotage powers by Mostyn Docks Ltd and recommends that Mostyn Docks Ltd assume jurisdiction as the Competent Harbour Authority under the terms of the Pilotage Act 1987 over the extended area defined in Article 4 of the draft MHRO [11.4].
14. The Inspector concludes in his paragraph [11.33] that while each of the tests set out in section 14 of the Harbours Act 1964 for making a Harbour Revision Order could be met by either of the Orders applied for, the test for meeting the interests of recreational use aside, the DHRO would meet more of them and with greater confidence.
15. The Inspector did not consider, in his paragraph [11.29], that confirming the MHRO as drafted would improve the efficient running of the estuary.

Background to Cases

16. The case for the Environment Agency (EA), the Applicant for the DHRO, is set out in Chapter 5 of the Inspector's Report. The EA holds the Dee Conservancy under the Dee Conservancy Act 1889, and as such is the statutory harbour authority and local lighthouse authority for the Dee Estuary between Wilcox Point near Chester and an imagined straight line between the Point of Ayr and Hilbre Point.
17. The DHRO is promoted for the purpose of updating the EA's powers and duties within the Dee Estuary relevant to its role as conservancy and local lighthouse authority. To this end the Order would repeal the Dee Conservancy Act 1889. It would also confer powers to make byelaws, and to give general and special directions to vessels, amongst other matters. These powers are also sought in order that the EA as a conservancy/harbour authority may better comply with requirements of the Department for Transport's Port Marine Safety Code.
18. The cases of the Objectors to the DHRO are set out in Chapter 6 of the Inspector's report. The Objectors' cases comprise those of the Applicant for the MHRO, and of the Chamber of Shipping, Mr D P Shillington and Mr S Rogers. Other objectors to the DHRO had withdrawn their objections by the time of the inquiry. Chapter 7 of the Inspector's report sets out the Environment Agency's response to the points made by the objectors.
19. The case for Mostyn Docks Ltd, the Applicant for the MHRO, is set out in Chapter 8 of the Inspector's Report. Mostyn Docks Ltd is the Statutory Harbour Authority for the Port of Mostyn and is the Competent Harbour Authority for the purposes of Part 1 of the Pilotage Act 1987 for the Port of Mostyn (under the Mostyn Docks Harbour

Empowerment Order 1988¹) and for the Dee Estuary (under the Mostyn Docks (Pilotage) Harbour Revision Order 1989²).

20. The cases of the Objectors to the MHRO, are set out in Chapter 9. The Objectors' cases comprise those of the Applicants for the DHRO, and of the Mersey Docks and Harbour Company, the Countryside Council for Wales, Wirral Metropolitan Borough Council, the Royal Society for the Protection of Birds and the Dee Estuary Conservation Group. The Royal Yachting Association was also an objector, but has reached agreement for protection of its members' interests with the promoters of the MHRO as well as of the DHRO. Chapter 10 of the of the Inspector's report sets out the response of the Port of Mostyn to the points made in the objections.
21. Representations on one or both Orders were made at the inquiry by Trinity House, Engineer K Armstrong-Braun and Councillor Heesom.

Secretary of State's consideration

22. The Secretary of State has considered the report of the Inspector.
23. The Secretary of State agrees with the statement of common ground recorded at paragraph 4.3 of the Inspector's report that neither Order requires a Strategic Environmental Assessment, not being a programme or a plan [4.3, 5.48 – 5.52, 8.8].
24. The Secretary of State agrees with the Inspector that the two Orders in their draft and filled-up forms are incompatible and that cannot both be made as drafted [11.2, 11.25].
25. He notes, however, that there is no disagreement between the parties over the proposed extension of jurisdiction for pilotage powers by Mostyn Docks Ltd and he agrees with the Inspector that Article 4 of the MHRO should be confirmed to extend Mostyn's jurisdiction accordingly as a Competent Harbour Authority under part 1 of the Pilotage Act 1987 [11.3, 11.25].
26. The Secretary of State notes also the agreement between the parties over the proposed power for the Agency to charge ship dues outside the defined navigation channel and the Mostyn Statutory Harbour Authority area. He agrees with the Inspector that this proposed power should be confirmed [11.4]. He considers the matter of dues further below.
27. The Secretary of State considers that it is reasonable to expect that the procedures established for the Mostyn Operational Area, in accordance with the Port Marine Safety Code, should continue, noting that they have been found to work well in general to the benefit of safety and navigation [11.7].
28. He notes the Inspector's finding that there was not an effective communication system in place for monitoring with confidence the possible arrival times of incoming vessels, in order to avoid conflicts of berthing needs and to ensure that discharges, turnaround and transport of goods away from the port were at their most efficient. The Secretary of State expects the applicants for both Orders to co-operate as necessary in accordance with established procedures to ensure that such an effective communication system exists [11.5, 11.28].

¹ The Mostyn Docks Harbour Empowerment Order 1988 (SI 1988/1677)

² The Mostyn Docks (Pilotage) Harbour Revision Order 1989 (SI 1989/86)

29. The Secretary of State notes the Inspector's finding that the inner channel is volatile with a complex morphology. He agrees with the Inspector that the defined inner channel may change over time, particularly given the high sediment flow into and out of the estuary. He also agrees with the Inspector that if the MHRO were confirmed, not only would the extended Mostyn Statutory Harbour Authority (SHA) area bisect the Dee Conservancy, but there would be the possibility of the channel shifting so that it moved from the control of Mostyn to that of the EA and back again. Furthermore, there would be the possibility of material moving on the sea bed from one jurisdiction to another. The Secretary of State agrees therefore with the Inspector that confirmation of the MHRO with regard to extension of SHA status would be likely to lead to confusion and reduce safety of navigation in this regard [11.6]. The Secretary of State also notes in this regard the Inspector's recording of the EA's statement of the likelihood of a vessel potentially running into difficulties near, or indeed passing into, the EA's jurisdiction in the course of an incident occurring in an area over which the EA would have no control [9.6].
30. The Secretary of State notes that the Inspector did not consider that either Mostyn Docks Ltd or the Environment Agency had been deficient in not providing for a safety net for the various incidents which have been referred to during the inquiry, nor their reaction to them. The Secretary of State agrees with the Inspector that consideration of the Orders before him should be made with regard to longer term considerations, which he considers include the long term future of the estuary. He does not consider that the individual incidents which were in contention between the parties at the inquiry [11.9, 11.27], or more recent incidents which have occurred since indicate that safety would be adversely affected by the regime to be introduced by the two orders as proposed were to be made.
31. The Secretary of State agrees with the Inspector that it would be possible for Mostyn Docks Ltd to use existing powers under the Merchant Shipping Act 1995 and the Harbours, Docks and Piers Clauses Act 1847 to deal with any vessel sunk, stranded or abandoned either within, or near any approach to, any harbour or tidal water under the control of a harbour authority or conservancy authority, and that an extension of powers sought by Mostyn in this regard through the MHRO is not necessary [11.11].
32. The Secretary of State does not agree that Mostyn Docks Ltd was required to seek jurisdiction over the extended conservancy area by virtue of the consent on 4 September 2001 granted under section 34 of the Coast Protection Act 1949. The Secretary of State expected at the time that an HRO should be promoted to provide a solution for the entire estuary and its approaches but did not specify that it should necessarily be promoted by Mostyn Docks Ltd [11.31].
33. The Secretary of State notes that the ability to light and mark the channel is already enabled by Condition No.2 of the consent under section 34 of the Coast Protection Act 1949 granted in 2001 which gives Mostyn permanent powers to maintain the works permitted by the consent.
34. The Secretary of State agrees with the Inspector that there is no need for the extension of the Dee Conservancy into the outer channel [11.13] or for an extension there of the EA's proposed power to give general directions. The Secretary of State considers that the powers sought in Article 13 of the draft DHRO would be sufficient for the purposes of safety of navigation and in providing greater certainty over the

present statutory position. There would be power to issue directions for the approaches to the estuary and provision therefore is made within Article 13(1).

35. The Secretary of State notes the Inspector's conclusions with regard to the difference of emphasis he found between the Environment Agency and Mostyn Docks Ltd with regard to navigation, safety and environmental concerns. [11.14].
36. The Secretary of State agrees with the Inspector that the Consultative Committee, comprising a variety of stakeholders as proposed under the DHRO, would not jeopardise the economic benefits of the Port of Mostyn to this area of North Wales. He notes that the proposed Committee is preceded by the advisory committees established for many trust ports. On the other hand there is no equivalent body under the MHRO [11.15].
37. The Secretary of State agrees with the Inspector that it is reasonable that the principle of user pays should be applied to the payment of ship dues. He notes that in this regard it is proposed that the Consultative Committee provided for in the DHRO would be consulted over ship dues, although it would not have power to determine their level. He considers, in agreement with the Inspector, that it is likely that dues would not be set so high that the financial viability of the port's trade would be harmed. He further agrees with the Inspector that the possibility of an objection under section 31 of the Harbours Act 1964 would provide an added safeguard against excessive dues [11.16 -11.17].
38. He agrees with the Inspector that it would be reasonable that there should be some offset for commercial users such as the Port of Mostyn where it carries out relevant work and that there should be proportionality of payment of dues according to the distance a vessel goes upstream, and the use made of navigation aids [11.32]. He notes that ship dues would be levied not only on merchant vessels but all vessels not otherwise exempted.
39. The Secretary of State agrees with the Inspector that objections to the DHRO with regard to the EA's handling of procedures for dredging consents and its claimed indifference towards the needs of the region's business, including the Airbus project, cannot be upheld and do not invalidate the case for making the DHRO [11.18 – 11.22].

Statutory powers and duties

40. The Secretary of State has considered whether the provisions in each draft Order under consideration would be conducive to securing port and navigational safety and whether they are compatible with the Port Marine Safety Code, a stated objective of each Order. He notes that the DHRO contains powers to give general directions to vessels for promoting the safety of navigation in the estuary, consistent with similar provisions found in other harbour orders. He notes on the other hand that there are no provisions for general directions in the MHRO and concludes that the Port of Mostyn is content with its powers to make byelaws and to give special directions contained in the 1988 Harbour Empowerment Order³.
41. The Secretary of State notes that, were the DHRO to be made, the division of statutory responsibilities between the Environment Agency and the Port of Mostyn

³ SI 1988/1677

would remain broadly as at present. The EA nonetheless would secure modernisation of its powers to enable it to carry out its duties more effectively.

42. While a division of pilotage authority and statutory harbour authority responsibilities over the defined channel is not ideal, the Secretary of State does not consider that the present statutory division of responsibilities, which is supplemented by non-statutory working arrangements, is deleterious to the functioning of navigation in the estuary. The Port of Mostyn exercises Competent Harbour Authority jurisdiction over the wide area of the estuary for which the EA is the conservancy authority. The Secretary of State sees some merit in the point made by some parties that it would be preferable to have one statutory authority for the estuary and its approaches, but notes that whichever Order is to be preferred to the disadvantage of the other, some division of statutory responsibilities would nevertheless remain. He further notes that the existence of more than one statutory harbour jurisdiction within an estuary in England and Wales is precedented and that *modi operandi* are found between the different harbour authorities to ensure the safety of navigation across different jurisdictions.
43. Moreover, as indicated earlier above, the Secretary of State accepts the EA's argument that given the shifting nature of the inner channel, a vessel may run into difficulties near, or indeed pass into, the EA's jurisdiction in the course of an incident which would have occurred in an area over which the EA would have no control if the MHRO were made in full as its promoters propose. There remains also the possibility that the channel would in time shift in and out of Mostyn's SHA area if the MHRO were made.

Post-inquiry events, report and correspondence

44. On 10 August 2006 the general cargo vessel MV Thunder grounded in the approaches of the Dee estuary. The Marine Accident Investigation Branch (MAIB) of the Department for Transport began an accident investigation. The Secretary of State, having been informed by the Marine Accident Investigation Branch (MAIB) that recommendations from its investigation and report of the grounding of the MV Thunder in the approaches to the Dee estuary could have a bearing upon consideration of the case for the two HROs, deferred a decision until the MAIB had published the report of its investigation.
45. The MAIB published its findings and recommendations concerning the MV Thunder in its report in June 2007. Having reviewed the MAIB's report, the Secretary of State by letter of 24 August 2007 drew the report to the attention of the parties to the public inquiry into the HROs. Comments were received from a number of respondents who are listed at footnote 4 below⁴. The Secretary of State has reviewed all the responses. He notes that the positions of the parties have not substantially altered from the positions taken at the public inquiry. He considers that their comments raise no new evidence nor add anything material to consideration of the cases for the Orders and has not therefore circulated them for further comment.

⁴ Messrs Bircham Dyson Bell on behalf of the Environment Agency, the Port of Mostyn Ltd, Trinity House Lighthouse Service, Wirral Metropolitan Borough Council, the Countryside Council for Wales, Mr K Armstrong-Braun and Mr D P Rogers. The Royal Yachting Association did not comment on the report, but drew attention to provisions proposed for insertion in both Orders for the benefit of local sailing clubs, with the agreement of the applicants for each Order.

46. The MAIB made a number of recommendations in its report addressed to the Port of Mostyn, the ship management company for the MV Thunder and the Maritime and Coastguard Agency. The MAIB addressed one recommendation to the Secretary of State, namely in considering the decisions that he should take into account the need to clarify the status of the Mostyn Outer Channel, such that the responsible authority had the necessary powers to ensure safety of navigation in the channel.
47. The Secretary of State considers that it would attribute too much importance to one incident in the estuary to extrapolate from the circumstances of one vessel grounding for the purposes of his decision. However, he has taken account of the recommendation of the MAIB of the need to clarify the status of the Mostyn Outer Channel such that the responsible authority has the necessary powers to ensure the safety of navigation in the channel. The Secretary of State does not consider however from reviewing the MAIB report that the lack of clarity of the status of the Outer Channel as between the powers of Mostyn Docks Ltd and the EA was a factor in the case of the grounding of MV Thunder.
48. The Secretary of State has received separately from the EA and the Port of Mostyn a risk assessment provided to show the compliance by each statutory harbour/conservancy authority with requirements of the Port Marine Safety Code in relation to marine and navigational operations. It is noted that the Dee Conservancy risk assessment covers the approaches to the estuary. The Secretary of State considers that both documents serve similar purposes aimed at demonstrating compliance with the PMSC and does not propose to comment on them in this letter or circulate them for wider comment, but will make each assessment available separately on request.
49. The Secretary of State has examined the provisions of both draft Orders for their appropriateness in seeking powers to assure the safety of navigation in the estuary and in its approaches, including the Outer Channel. The Secretary of State notes that the MAIB made specific recommendations to the Port of Mostyn concerning pilotage for the Outer Channel and estuary approaches, for which the powers sought in article 4 of the MHRO would assist, though specific actions would be required to fulfil the recommendations. The MAIB did not concern itself with vessels which would not be subject to compulsory pilotage requirements and the Secretary of State does not consider that navigation in the outer channel would be an issue for the necessarily small vessels in that category.
50. The MAIB did not elaborate on the matter of general directions in relation to the approaches or on special directions to particular vessels. Given that the Secretary of State does not consider that it has been demonstrated that Mostyn Docks Ltd should assume SHA status from the EA for the defined inner channel within the estuary, he therefore considers it would not be consistent to extend SHA status to the Outer Channel. Noting the availability to Mostyn Docks of proposed pilotage powers and directions and of powers under Coast Protection Act consent the Secretary of State considers that the status of the Outer Channel would be sufficiently clear.
51. It is a tenet of the PMSC that harbour authorities should both be able to justify the additional powers which they seek through legislation and have the ability to enforce those powers and the Secretary of State has considered the proposals of both Applicants in that light. He considers that the EA's proposed powers of general and

special direction for the estuary and its approaches, including the Outer Channel, would afford appropriate safeguards for safety of navigation.

52. The Secretary of State sees no reason to presume that the EA is not competent to fulfil its powers and duties as a conservancy and harbour authority or that in doing so it would show prejudice against commercial interests using the estuary.
53. The Secretary of State notes that it is the view of Trinity House, as the General Lighthouse Authority for England and Wales, that there should be one lighthouse authority for the estuary and the Outer Channel.
54. The Secretary of State accepts that clarity of jurisdiction is ideal. However, whichever provisions relating to SHA jurisdiction within either the DHRO or the MHRO are preferred, each harbour authority will necessarily remain a local lighthouse authority for its own area of jurisdiction within the estuary. Moreover, the existence of different jurisdictions within an estuary is not unprecedented in England and Wales. The Secretary of State therefore considers that separate local lighthouse authority and statutory harbour authority jurisdictions will necessarily continue within the estuary.
55. As for the Outer Channel beyond the estuary there will only be one statutory authority as proposed, namely Mostyn Docks Ltd as Competent Harbour Authority. For the purposes of marking of the Outer Channel for navigational purposes, the Secretary of State considers that it would be appropriate for the Port of Mostyn as Competent Harbour Authority over an extended area as proposed in the MHRO, as well as holder of a consent under section 34 of the Coast Protection Act 1949, to provide and maintain such markers as may be necessary. The Secretary of State considers that the power to issue pilotage directions would assist the safety of navigation in the Outer Channel.

Other issues raised in post inquiry correspondence

56. In 2009 there was an exchange of correspondence between the agents acting for Mostyn Docks Ltd and the Environment Agency about the extent of the Port of Mostyn's jurisdiction under the Mostyn Docks Harbour Empowerment Order 1988 (1988 HEO). However, the Secretary of State has concluded that while the Port of Mostyn had done things, which a statutory harbour authority has the power to do, outside the area designated in its 1988 Harbour Empowerment Order, this does not make Mostyn Docks the statutory harbour authority outside that designated area. These activities were done in accordance with a Mostyn Operational Area Agreement between the Port of Mostyn and the Environment Agency as the statutory harbour authority for the Dee Estuary. The Secretary of State is satisfied that the limits of jurisdiction in the estuary are fixed by the 1988 Order as extending over so much of the Dee estuary below the high water mark as is shown coloured pink on the signed plan to the Order and that the Order does not confer power on Mostyn Docks Ltd to extend those limits simply by subsequent acquisition of title to land.

Other proposals relating to the Orders

57. The Secretary of State has also received from the Royal Yachting Association proposed modifications or agreements which he considers to be either drafting matters or in the nature of protective provisions agreed with the applicants at the

time of the inquiry for the Orders for the benefit of local sailing clubs and which he considers would not affect substantially the character of the Orders.

Conclusion

58. The Secretary of State considers on balance, having reviewed all the evidence, that the overall needs of the estuary would be best maintained by preferring continued control by the Environment Agency rather than transferring statutory responsibility for the inner channel to the Port of Mostyn. The Secretary of State agrees that in order to discharge its responsibilities more fully in present circumstances that the EA's application for the DHRO should be approved and its powers updated accordingly.
59. 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.
60. The Secretary of State concludes, for the reasons given above in this letter, that making the DHRO would satisfy the requirements of section 14(2)(b) of the Harbours Act 1964.
61. The Secretary of State agrees that making the MHRO, without the provision for extension of limits of jurisdiction as harbour authority and the transfer of functions (Article 3) but including the extension of jurisdiction as a competent harbour authority for the purposes of pilotage under part I of the Pilotage Act 1987 (Article 4), would be compatible with the requirements of section 14(2)(b) of the Harbours Act 1964.

Proposal

62. The Secretary of State proposes to make the DHRO, with the modifications agreed by the Applicant in its filled-up form and subject to any further modifications which may appear to him to be necessary but which do not affect the character of the Order.
63. The Secretary of State proposes to make the MHRO, with the modifications indicated above in this letter and subject to any further modifications which may appear to his to be necessary, but which do not affect the character of the Order.
64. Before reaching a decision in the light of those proposals, the Secretary of State invites the applicants and others to consider those proposals and to inform him of any comment they may have by the date given in paragraph 12.
65. A copy of this letter, together with the Inspector's conclusions and recommendations, is being sent to those who were entitled to appear and who did appear at the Public Inquiry and to those who requested a copy of the Secretary of State's decision.

Yours faithfully

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