



# Report to the Secretary of State for Transport

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## HARBOURS ACT 1964

Harbour Revision Orders

Promoted by

(A) Environment Agency (Wales)

at  
the Dee Estuary

&

(B) Mostyn Docks Ltd

at  
Mostyn Harbour

Inquiry held on 29<sup>th</sup> – 30<sup>th</sup> November; 1<sup>st</sup>, 6<sup>th</sup>, 8<sup>th</sup> December 2005

File Ref: DPI/17/32 /LI A6835



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## Order A

**File Ref: DPI/17/32 /LI A6835**

### The Dee Estuary

- The Order would be made under Section 14 of the Harbours Act 1964
- The promoter is the Environment Agency (EA)
- The Order would facilitate the implementation of the Port Marine Safety Code, modernise the Agency's conservancy functions and enable ships dues to be collected [see paras 5.53 – 5.61 below].
- The number of objectors at the close of the inquiry was four.

**Summary of Recommendation: To confirm subject to amendments as proposed by the EA.**

## Order B

**File Ref: DPI/17/32 /LI A6835**

### Mostyn Harbour, Flintshire

- The Order would be made under Section 14 of the Harbours Act 1964
- The promoter is Mostyn Docks Limited (Mostyn)
- The Order would 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 jurisdiction.
- The number of objectors at the close of the inquiry was six.

**Summary of Recommendation: To confirm, but only so far as pilotage is concerned.**

## 1.0 Procedural Matters

- 1.1. There are two promoters, the Environment Agency (Wales) (EA) and Mostyn Docks Limited (Mostyn), each promoting its own Harbour Revision Order, respectively known as the Dee Estuary Harbour Revision Order (DHRO) and the Mostyn Docks Harbour Revision Order (MHRO).
- 1.2. The EA is the conservancy authority for the River Dee estuary, or the Dee Conservancy, as defined in the 1889 Act. The Dee Conservancy stretches from Wilcox Point in Chester to an imaginary line across the mouth of the estuary linking the Point of Ayr, Flintshire to Hilbre Point in the Wirral, Cheshire.
- 1.3. Mostyn is the statutory harbour authority (SHA)<sup>1</sup> for the area immediately around the Port of Mostyn, as defined by the Harbour Empowerment Order 1988. Mostyn is also the competent harbour authority (CHA)<sup>2</sup> for pilotage in the estuary, as defined by The Mostyn Docks (Pilotage) Harbour Revision Order 1989.
- 1.4. Both HROs are being promoted under Section 14 of the Harbours Act 1964. The test which each Order must pass under the Harbours Act is that the Secretary of State must be 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 economic transport of goods or passengers by sea or in the interests of the recreational use of sea-going ships”.

## 2.0 The Site and Surroundings

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<sup>1</sup> Statutory Harbour Authority. Any person or persons in whom are vested by an Act or Order, powers and duties of improving, maintaining or managing a harbour.

<sup>2</sup> Competent Harbour Authority. A class of harbour authority described in Section 1 of the Pilotage Act 1987, having primary responsibility for the provision of a pilotage service. A statutory harbour authority may not necessarily be a competent harbour authority.

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- 2.1. Both the DHRO and the MHRO would have effect in the estuary of the River Dee in and off the coast of Flintshire and Cheshire. The Dee Estuary extends to an area of over 14,000ha and is one of the largest estuaries in the UK. The River Dee drains an area of about 2088km<sup>2</sup> and flows from Snowdonia to the Cheshire Plain. The estuary has an exceptionally high tidal range with a mean spring tidal range of 7.7m at the mouth.
  - 2.2. Following the retreat of Pleistocene glaciation, alluvial deposits of mud, silt and sand were laid down on the valley floor. This siltation now covers the bedrock to a depth of about 40m. The estuary continues to receive suspended sediment from both the river and the sea. The sea is the most important source of material which is carried into the estuary due to long shore drift acting in an easterly direction along the North Wales coast, as well as by sea bed currents.
  - 2.3. The estuary tends to act as a sink for the sediment reaching it due to a number of reasons. The alignment of the estuary to the prevailing wind means that waves within the estuary tend to be constructive and not destructive. The flood currents are stronger than the ebb currents. Saltmarsh vegetation within the estuary tends to trap sediment. Mudflats and sandflats currently dominate the intertidal area with the remainder being largely saltmarsh. The 2,480ha of saltmarsh represents about 7% of the total saltmarsh of the UK. At low water spring tides, over 90% of the estuary dries out. The extensive intertidal flats of the Dee Estuary form the fifth largest such area within an estuary in the UK. This habitat supports an abundance of invertebrates that is an important source of food for fish and especially water birds.
  - 2.4. The Dee Estuary is the subject of multiple nature conservation designations. It is a Special Protection Area (SPA) for the purposes of Council Directive 79/409/EEC on the conservation of wild birds (“the Wild Birds Directive”), a proposed Special Area of Conservation (pSAC) for the purposes of Council Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna (“the Habitats Directive”), a Ramsar site under the 1971 Convention on Wetlands of international importance particularly as waterfowl habitat (“the Ramsar Convention”) and a Site of Special Scientific Interest (SSSI) under the Wildlife and Countryside Act 1981. Accordingly, the estuary is a European site for the purposes of the Conservation (Natural Habitats, etc) Regulations 1994.
  - 2.5. Sea defences now enclose much of the estuary, protecting industrial complexes, farmland, railway lines and residential areas built on reclaimed land. Historic industrial activity has also left a legacy of contaminated land, especially along the Welsh shore. The Dee Estuary is a commercial waterway providing access to the Port of Mostyn, Shotton and Broughton. The estuary has a range of industries along its coast, including power stations, paper mills, steel mills and chemical plants. It also supports a large cockle fishery of economic importance as well as smaller fisheries for shrimp and fin fish. Much of the former cockle and fishing activities are evident from the small quays or cuts along the Welsh shoreline either abandoned or little used.

### **3.0 History**

- 3.1. The history of navigation in the Dee Estuary is comprehensively described in Sections 3.1 and 3.2 of Doc EA P1 <sup>3</sup> Paragraphs 3.1 to 3.4 of Doc MOS P3 <sup>4</sup> describe the history of the Port of Mostyn.

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<sup>3</sup> Proof of evidence of Captain C H J Allister

<sup>4</sup> Proof of evidence of Mr J P O’Toole

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- 3.2. The Mostyn Operational Area (MOA) is a term used for the purpose of the Dee Conservancy Safety Management System to broadly define an area of the Dee Conservancy in which Mostyn Docks Ltd undertake marine operations in accordance with procedures and arrangements jointly agreed with the EA.[EA/C6] This is the part of the Dee Conservancy through which vessels navigating to and from the Port of Mostyn pass. It extends from the present outer limit of the jurisdiction of Mostyn Docks Ltd to the seaward boundary of the Dee Conservancy and includes the full extent of the inner dredged channel, marked and maintained by Mostyn Docks Ltd.

#### **4.0 Statement of Common Ground**

- 4.1. A Statement of Common Ground (SoCG) was agreed between the Environment Agency and Mostyn Docks Limited during the inquiry, the key points from which include the following statements.[CD26]
- 4.2. Each HRO is intended to facilitate its promoter's implementation of the Port Marine Safety Code (PMSC). The MHRO is also intended to extend the powers of Mostyn in respect of Aids to Navigation and wreck removal.<sup>5</sup>
- 4.3. Neither HRO requires strategic environmental assessment under the Environmental Assessment of Plans and Programmes Regulations 2004, although the management plan proposed under article 4(3) of the DHRO would be subject to strategic environmental assessment when being developed.
- 4.4. The DHRO would not change the jurisdictions of either the EA or Mostyn. It would repeal the EAs's functions under the 1889 Act and earlier local legislation and replace them with modern powers and duties. The MHRO would extend Mostyn's jurisdiction as SHA to the Defined Channel and remove the EA's jurisdiction as conservancy authority over that part of the Defined Channel within the Dee Conservancy. It would also extend Mostyn's jurisdiction as CHA to the parts of the Defined Channel that are outside its current pilotage jurisdiction.
- 4.5. Both the EA and Mostyn are competent authorities for the purposes of nature conservation legislation, and must comply with the Wildlife and Countryside Act 1981 and Conservation (Natural Habitats, &c.) Regulations 1994. This would remain the position under both new HROs.

#### *Controls over dredging*

- 4.6. Neither HRO would authorise dredging in the estuary without further approvals.
- 4.7. At present, the following approvals are required for dredging in the Dee Conservancy:
- (a) consent from the Department for Transport (DfT) under section 34 of the Coast Protection Act 1949;
  - (b) a licence from either the Welsh Assembly Government or the Department for Environment, Food and Rural Affairs (DEFRA) under section 5 of the Food and Environmental Protection Act 1985;

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<sup>5</sup> Aids to Navigation: a device or system external to a vessel that is designed and operated to enhance the safe and efficient navigation of vessels. May be land based such as a lighthouse, light beacon, leading marks or unlit perch, or floating such as a light vessel, lighted or unlit buoy.

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(c) except in relation to dredging by Mostyn within Mostyn's SHA Area, land drainage approval from the EA under the Welsh Water Authority Byelaws, made under section 34 of the Land Drainage Act 1976; and

(d) assent from either English Nature or the Countryside Council for Wales under the Wildlife and Countryside Act 1981.[CD26(b)(i)(ii)]

- 4.8. At present, the approvals set out in (a) and (b) are required for dredging in the Extended Conservancy Area. The assent set out in (d) is also required where dredging in the Extended Conservancy Area would damage the special features of the SSSIs near to that Area.
- 4.9. The consenting authorities must also comply with the requirements of the Natural Habitats (Conservation, &c.) Regulations 1994.
- 4.10. If the DHRO is made, consent (a) under the Coast Protection Act will not be needed for dredging within the Dee Conservancy, but an equivalent approval from the DfT will be required under proposed article 31.
- 4.11. If the MHRO is made, approval (c) from the EA will not be needed for dredging anywhere within the Defined Channel.

*Extension of Mostyn's pilotage jurisdiction*

- 4.12. It is agreed that the MHRO should be made so far as it extends Mostyn's CHA jurisdiction. That is, proposed article 4 of the MHRO should be made.

*Modernisation of the EA's conservancy functions*

- 4.13. It is agreed that the DHRO should be made so far as it relates to areas of the Dee Conservancy outside the Defined Channel and Mostyn's SHA Area.
- 4.14. It is further agreed that this would allow the Agency to levy ship, passenger and goods dues on vessels travelling between the Port of Mostyn and the parts of the estuary outside the Defined Channel and Mostyn's SHA Area.
- 4.15. If the DHRO is made as applied for by the EA, so that the EA retains its conservancy jurisdiction over that part of the Defined Channel within the Dee Conservancy, it is agreed that the EA should not levy passenger or goods dues on vessels travelling between Port of Mostyn and the Irish Sea.

*Issues in dispute*

- 4.16. The following issues remain in dispute between the Promoters.

(i) Extension of Mostyn's jurisdiction

- 4.17. The Promoters disagree over the issue of whether Mostyn should be the SHA for the Defined Channel and whether the EA should remain the conservancy authority for that part of the Defined Channel within the Dee Conservancy. The EA therefore does not agree with Mostyn that article 3 of the MHRO should be made. This disagreement can be broken down into the two following discrete issues:

- (a) Whether Mostyn or the EA is an appropriate body to have jurisdiction over the Defined Channel within the Dee Conservancy; and

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(b) Whether Mostyn should have SHA jurisdiction over the Extended Conservancy Area.

- 4.18. The EA considers that Mostyn is an inappropriate body to have jurisdiction over the Defined Channel because Mostyn would put commercial concerns ahead of safety, conservation and other environmental concerns, and other stakeholders. Mostyn disagrees.
- 4.19. Mostyn considers that the EA is an inappropriate body to have jurisdiction over the Defined Channel within the Dee Conservancy because the EA would disregard commercial interests. The EA disagrees.
- 4.20. The Promoters disagree over the issue of whether Mostyn is required to seek SHA jurisdiction over the Extended Conservancy Area by the conditions of the consent given to Mostyn under section 34 of the Coast Protection Act 1949 on 4 September 2001.

(ii) Ship dues

- 4.21. Whilst it is agreed that any ship dues levied by the Agency on vessels travelling between Port of Mostyn and the Irish Sea should be set by the Agency in accordance with the “user pays” principle, the Promoters do not agree on the interpretation of that principle.

**Order A**

**5.0 The Case for the Environment Agency (EA)**

- 5.1. The EA was established by the Environment Act 1995 (“the 1995 Act”), which sets out a number of general duties that the EA must comply with in the exercise of its functions. It also has particular duties that apply to its nature conservation and recreation functions, which are especially relevant to navigation. The EA’s principal aim in discharging its functions is set out in section 4(1) of the 1995 Act, which requires it to carry out its functions in such a way that it will protect or enhance the environment in a manner that will contribute towards attaining the objective of achieving sustainable development. The precise contribution that the EA’s protection or enhancement of the environment is required to make was set out by ministerial guidance given in 2002 (in England) and 2003 (in Wales). Ministers and the National Assembly for Wales may also give the EA guidance under s.4(2) as to objectives that the EA should pursue in carrying out its functions.
- 5.2. Under s. 6(1), the EA is under a duty to promote:—
- (a) the conservation and enhancement of the natural beauty and amenity of inland and coastal waters and of land associated with such waters;
  - (b) the conservation of flora and fauna which are dependent on an aquatic environment; and
  - (c) the use of such waters and land for recreational purposes.
- 5.3. Under s. 7(4) the EA is required to take steps for securing that it exercises its rights over waters and land in such a way as to ensure that the water or land is made available for recreational purposes. These steps must be (a) reasonable practicable and (b) consistent with the purposes of the enactments relating to the EA’s functions. Furthermore, the EA requires the consent of a navigation, harbour or conservancy authority before doing anything which obstructs or interferes with navigation.

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- 5.4. The Secretary of State and the National Assembly for Wales may approve codes of practice giving the EA guidance in relation to its conservation, access and recreation duties under ss. 6, 7 and 8. Two codes currently apply in the Estuary. In the Welsh part of the Estuary, the EA is bound by the Code that was approved by the Secretary of State for Wales, the Secretary of State for the Environment and the Minister for Agriculture, Fisheries and Food in 1996. In the English part, the EA is bound by the Code that was approved by the Secretary of State for the Environment, Transport and the Regions and the Minister for Agriculture, Fisheries and Food in February 2000.
- 5.5. In addition, under the Sea Fisheries Regulation Act 1966 and the North Western and North Wales Sea Fisheries District Order 1999 the Agency is the local sea fisheries committee for the estuary. In this capacity the EA is required to regulate the shell fisheries within the estuary, including the commercially significant cockle fishery. The cockle fishery also affects the Agency's exercise of its navigation functions, as the EA's Harbour Master advises on the safety of vessels navigated by cocklers.
- 5.6. The EA's proposed Order is intended to update the EA's powers and duties within the Dee Estuary relevant to its role as conservancy and local lighthouse authority. The EA submitted its formal application to the Secretary of State for Transport for the EA's proposed Order under the procedure set out in Schedule 3 to the Harbours Act 1964, on 20 January 2005. The formal objection period to the proposed Order started on 26 January 2005. By the deadline of 9 March 2005, seven formal objections to and eight representations on the EA's proposed Order (which included a number of representations in support of the proposed Order) had been received.
- 5.7. One of the objections was from Mostyn Docks Limited, which is promoting its own harbour revision order, Mostyn's proposed Order, the inquiry into which is being held concurrently with the inquiry into the Agency's proposed Order. There is a clear conflict between the terms of the EA's proposed Order and Mostyn's proposed Order.

### *Background*

- 5.8. The principal Act governing the EA's responsibilities as the conservancy authority for the estuary is the Dee Conservancy Act 1889 ("the 1889 Act") which incorporates a number of the provisions of earlier local Acts, passed in 1700, 1732, 1743, 1753, 1776, 1851 and 1868, all of which conferred functions relating to navigation on the estuary on the EA's predecessors. Many of these functions remain extant. In general terms, the earlier Acts introduced powers for the EA's predecessor(s) to keep the river navigable from Chester to the sea (including to remove impediments in the estuary), to protect particular banks from the sea, and to maintain access for vessels to and from ports or piers on the Flintshire side of the channel.

### *The 1889 Act*

- 5.9. The 1889 Act, as amended, defines the limits of the conservancy authority from Wilcox Point in Chester to an imaginary line linking Point of Ayr and Hilbre Point. Part II of the Act transferred to the Conservancy Board all the powers and functions of the Dee Company in relation to the conservancy and navigation of the Estuary, including maintenance of training walls, groynes or other works and all other functions relating or ancillary to navigation or the navigable channel of the Estuary. These functions now vest in and may be exercised by the EA.
- 5.10. Part III of the 1889 Act concerns tolls, rates and duties. The EA is entitled to demand ship dues once the Secretary of State has certified that the depth of the navigable channel



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prescribed in the local Acts has been achieved. However, no dues may be charged in respect of vessels clearing the river, or discharging cargo or passengers at certain named wharves. These include Llanerch-y-môr Wharf, Mostyn Wharf and Dock and Point of Ayr Wharf. The costs of carrying out the EA's functions under the 1889 Act and earlier Acts must therefore be met from the Agency's own budget through grant in aid payments.

- 5.11. Part IV of the 1889 Act deals with the EA's financial powers and duties relating to its conservancy functions, so far as these are still applicable.

*Since 1889*

- 5.12. In 1922, the Dee Conservancy Board became responsible for pilotage in the estuary under the Pilotage Orders Confirmation (No.2) Act 1922.
- 5.13. The responsibility for conservancy within the estuary has passed through several organisations, including more recently the Dee and Clwyd River Authority, the Welsh National Water Development Authority, the Welsh Water Authority, the National Rivers Authority and, from 1996, the Agency. The EA's functions as conservancy authority are still governed by the 1889 Act, which sets tight limits on the dues which the EA can raise from estuary users to fund its conservancy activities.
- 5.14. Historically, Trinity House was the lighthouse authority for the estuary. The Ports Act 1991 transferred certain local lighthouse responsibilities to local harbour authorities, and so shortly afterwards the National Rivers Authority became the local lighthouse authority. The EA is therefore the current local lighthouse authority for the estuary.
- 5.15. The responsibility for pilotage, however, pursuant to the Pilotage Act 1987, has been the Port of Mostyn's since 1989. Competent harbour authority status ("competent harbour authorities" are those port and harbour authorities that have responsibility for pilotage) was conferred on Mostyn shortly after it became the statutory harbour authority for a small area surrounding its docks, quays, land and premises pursuant to the Mostyn Harbour Empowerment Order 1988: the Mostyn Docks (Pilotage) Harbour Revision Order 1989 gave the Port of Mostyn pilotage responsibilities over the entire estuary and most of its approaches.

*The EA's current jurisdiction, roles and duties in the Dee Estuary*

- 5.16. The EA has conservancy and local lighthouse authority jurisdiction between Wilcox Point (just downstream of the Chester Weir) and the seaward boundary of the estuary (an imaginary line between the Point of Ayr and Hilbre Point).
- 5.17. As conservancy and local lighthouse authority for the Estuary, the EA is under a duty to take reasonable steps to conserve the estuary and to mark or light it so that it is reasonably safe for navigating vessels. The EA's responsibilities as conservancy and local lighthouse authority are found in general common law duties and public general legislation. Further responsibilities are to be found under local legislation, particularly the 1889 Act. In summary, the EA's conservancy responsibilities include installing and maintaining aids to navigation, such as buoys and beacons, maintaining the estuary's training walls, and disseminating accurate sounding and other information for estuary users.
- 5.18. Many of the EA's functions as conservancy authority are still governed by the 1889 Act, which sets tight limits on the dues which the EA can raise from estuary users to fund its

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conservancy activities. While some dues can be levied by the EA, there are several significant exemptions, resulting in a situation where the EA is unable to levy dues on the vast majority of commercial users of the estuary, regardless of whether they benefit from the conservancy and local lighthouse services provided by the EA. The costs of providing these services must therefore be met from the EA's budget through grant in aid. Section 26 of the Harbours Act 1964 ("the 1964 Act) confers a general power for conservancy authorities to charge dues, but this power does not override any restrictions contained in local legislation.

- 5.19. As explained above, the EA does not have responsibility for pilotage services in the estuary. Mostyn's jurisdiction over pilotage currently extends over a very similar geographical area to the EA's conservancy and local lighthouse authority jurisdiction.
- 5.20. The EA's conservancy and local lighthouse authority functions are in addition to its general functions relating to the Dee estuary pursuant to the Environment Act 1995 and other public general legislation.

#### *The Port Marine Safety Code (PMSC)*

- 5.21. In July 1998 the Government published its Review of the Pilotage Act 1987, which proposed in particular that a code for marine safety in ports should be developed. In March 2000, following widespread consultation with the ports industry, the Port Marine Safety Code was published.[EA/D2] The aim of the PMSC is to promote best practice in the ports industry, and so while it is not legislation, it applies to all harbour authorities and the Government states that compliance with it is not voluntary. A Guide to Good Practice for Port Marine Operations was also developed and published in March 2002.[EAD/2] This guide was intended to assist harbour authorities in implementing the requirements of the code.
- 5.22. The PMSC introduced a national standard for every aspect of port marine safety. It established a measure by which harbour authorities can be held accountable for the legal powers and duties which they have to discharge. The PMSC relies upon the principle that duties and powers in relation to marine operations in ports should be discharged in accordance with a Safety Management System (SMS). That system should be informed by and based on a formal risk assessment.
- 5.23. A harbour authority has to assess what accidents might happen, take reasonable precautions to prevent them from happening and keep appropriate records. The PMSC requires that a harbour authority must take a proactive role in managing safety. This proactive management of risks must be recorded and must be subject to continual review.
- 5.24. The PMSC also requires the SMS to be audited and that those accountable for the harbour authority are kept informed about compliance with the Code and with the operation of the SMS. The PMSC directs that harbour authorities should engage in full consultation with all those who have an interest in management of the harbour. The development of the PMSC initiated the MARICO review described above.

#### *MARICO Review*

- 5.25. In 2000, the EA commissioned a company called Marine and Risk Consultants Limited ("MARICO") to undertake a Review of the River Dee Conservancy ("the Review"). The need for the Review was driven by the introduction of the PMSC in March 2000 (see

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below), which led the EA to review the way in which it discharged its duties as conservancy and local lighthouse authority.

- 5.26. The primary objective of the Review was to provide the EA with an independent and informed opinion about the steps it should take as conservancy and local lighthouse authority to ensure the safety of navigation in the estuary for the next 20 – 50 years. The Review took into account the EA’s conservancy and local lighthouse duties under legislation and common law.
- 5.27. The findings of the Review were published in the *Report of the River Dee Conservancy Review* in February 2001.[EA C/3] It made the following relevant recommendations:
- 5.28. The best arrangement for navigational safety on the Dee Estuary would be a unitary conservancy and pilotage jurisdiction. This unitary authority should be a trust port. In the interim, a non-statutory Navigation Advisory Committee should be introduced. The EA should take immediate steps to obtain the necessary marine competency to address the changing needs of the Dee Conservancy and appoint a harbour master. A harbour revision order should be promoted to allow the EA to charge dues to vessels transiting the conservancy jurisdiction. As the adjacent navigational authority to the development (at Mostyn Docks), the EA was the appropriate regulator to set General Directions for use of the channel. In the longer term, an extension of both pilotage and conservancy limits was recommended.
- 5.29. The EA should take powers of General Direction. Improvements to navigational information in the estuary were recommended on the basis of existing traffic levels. The proposed increases in movement size and frequency, resulting from the new channel development, made this a matter of priority. The EA and Mostyn should jointly implement the PMSC. This should include joint systems, such as navigational criteria, incident reporting, investigation and recording. A business plan for an enlarged conservancy system should be prepared, including charge levels, scope of charges, and the conservancy economic viability, and the provision of a small charge to mooring holders.
- 5.30. In summary, the resulting report recommended that the responsibilities for navigation in the estuary should be updated, giving the EA a modern set of powers and duties. The report also recommended that in the longer term the EA should transfer its conservancy and local lighthouse responsibilities to a bespoke body. The viability of this is in the course of being considered.
- 5.31. Two significant immediate consequences arose out the Review. The first was the commissioning of a thorough risk assessment of the EA’s functions as conservancy and local lighthouse authority. The second was the appointment, by the EA, of a harbour master for the Dee Conservancy.

#### *Trust Ports Review*

- 5.32. Following the outcome of the MARICO review, the EA conducted a public consultation on the future of the Dee Conservancy between April and July 2001, on the basis of four distinct options for the longer term management responsibilities for the Dee Estuary:
  - (i) transfer of jurisdiction to a trust port;
  - (ii) transfer of jurisdiction to Mostyn;
  - (iii) transfer of jurisdiction to the local authorities; and

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(iv) transfer of jurisdiction to a private body other than Mostyn.

- 5.33. By far the majority of the respondents to this consultation supported transfer to a trust port that would have jurisdiction over navigation in the whole of the estuary, rather than any transfer of the Dee Conservancy functions to Mostyn, local authorities or another private body. The only respondents who favoured a transfer of jurisdiction to Mostyn were Mostyn itself and its then customer, P&O Ferries.
- 5.34. A trust port is an independent statutory body, governed by its own local legislation and controlled by an independent board. As trusts, there are no shareholders or owners. Any surplus is reinvested in the port/estuary concerned for the benefit of the “stakeholders” of the trust. The stakeholders are all those with an interest (not necessarily pecuniary) in the operation of the port/management of the estuary concerned.
- 5.35. In 1998, the Ports Division of the Department for Environment, Transport and the Regions (“the DETR”) (now, the DfT) undertook a review of trust ports. Following this review, on 10 January 2000, it published *Modernising Trust Ports: A Guide to Good Governance* (“the Guide”).[EA D/4] It involved a detailed scrutiny of the trust port sector with specific regard to the standards of corporate governance and accountability of its operation. The review concluded that “the concept of a trust port has stood the test of time and continues to perform a valuable role in support of the local, regional and national economy”, but it also highlighted a need for general improvement in the openness and accountability with which trusts conducted their business.
- 5.36. The Guide set out guidance about the good governance of trust ports, which all existing trust ports within England and Wales were expected to adopt. The Guide also contained important advice, some of which is applicable to the management of a harbour, conservancy or port undertaking, regardless of whether it has trust status. This advice was taken into account when reviewing the Dee Conservancy.
- 5.37. In November 2000, the DETR published *Modern Ports: A UK Policy*, which sets out the Government’s broad policy aims in relation to all ports, whether private, municipally owned, or trust. In relation to the management of trust ports, the paper endorsed the view taken in the Guide.[EA D/5]
- 5.38. There have been no major changes in government policy since the publication of the Guide in 2000 and trust ports remain a viable option for the management and regulation of a harbour/conservancy, subject to complying with the Guide and provided they are constituted on a modern, transparent and accountable basis.

#### *Environment Agency policies*

- 5.39. The Financial, Management and Policy Review (“FMPR”) of the EA, by the Department for Environment, Food and Rural Affairs (“DEFRA”), in partnership with the Welsh Assembly Government in 2001, included a review of the Agency’s navigation functions (including its conservancy functions). The review of navigation particularly focussed on the Agency’s relationship with British Waterways, which had expressed an interest in taking over the management of navigation on the estuary and on various rivers and other waterways in England.[EA/C5]
- 5.40. The principal findings of the FMPR relevant to the Dee were:

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- (i) stakeholders were substantially in support of the EA retaining its navigation responsibilities;
  - (ii) there was no good case for the EA taking on additional navigation responsibilities; and:
  - (iii) the EA should address its commitment to navigation and the management structure associated with the activity.
- 5.41. The Government concluded in November 2001 that the EA should retain its navigation responsibilities. On direction from Government, the EA and British Waterways continued to have further discussions on areas of possible collaboration and joint working. This contributed to the delay in the EA bringing forward its proposed Order.
- 5.42. Following this conclusion, the EA's board agreed a paper in January 2002 setting out its navigation priorities. The EA's current navigation strategy provides for the sustainable development of our navigable rivers to meet Government expectations. Guidance issued by the Secretary of State and Welsh Assembly Government under section 4 of the Environment Act 1995 requires the EA to maximise the social, economic, environmental and heritage benefits of the waterways for which the EA is the navigation authority and to work with other navigation authorities and others to create an enhanced and integrated inland waterway system and in particular to maintain its assets in a condition which ensures the safe use of its waterways to promote urban and rural regeneration.
- 5.43. In February 2001, the EA considered the progress of the Review, the proposed appointment of a Harbour Master, and the implementation of the PMSC; agreed that it would not be appropriate for the EA to retain in the long term its functions as conservancy and local lighthouse authority; and approved a public consultation exercise on the long-term options for the estuary. This consultation exercise took place between 12 April and 13 July 2001.[EA C4]
- 5.44. In January 2003, the EA agreed that its conservancy and local lighthouse functions should not, in principle, be transferred to the Port of Mostyn and that Mostyn's proposed Order should be opposed. The EA also agreed in January 2003 to develop a proposal for the promotion of a harbour revision order to enable costs to be recovered and provide modern powers to manage navigation in the estuary.
- 5.45. The EA also agreed that its project manager should also develop a proposal for a project to review whether the EA should divest its jurisdiction to another body and to examine the viability of a trust port assuming conservancy and pilotage jurisdiction over the entire estuary and its approaches (taking into account its nature conservation status).
- 5.46. In December 2003, following further consultation with key stakeholders on the details of a draft Order, the EA again considered the way forward for the Dee Conservancy. The EA considered the consultation responses, endorsed its opposition to Mostyn's proposed Order, and authorised the application for its own proposed Order, modified as appropriate following the consultation exercise. The EA also confirmed that its long-term policy was to seek to divest the conservancy and related responsibilities to a bespoke body, and to continue to consider the feasibility and nature of a trust port for the estuary.
- 5.47. The DHRO therefore complies fully with the EA's policy on the Dee estuary, as it has evolved since 2000.

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- 5.48. Consideration also needs to be given at this stage to the potential requirement for a strategic environmental assessment of the proposed Order, as this was a matter raised at the pre-inquiries meeting. Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (“the SEA Directive”) and its implementing regulations require that certain plans and programmes that “are required by legislative, regulatory or administrative provisions” be subject to an environmental assessment.
- 5.49. The Guidance issued by the European Commission indicates that the plans covered by the SEA Directive are documents “which [set] out how it is proposed to carry out or implement a scheme or a policy” and that programmes are “the plan[s] covering a set of projects in a given area”. The matters provided for in the DHRO do not have any of the characteristics of such a plan or programme. The DHRO amends and modernises the EA’s powers of conservancy management and regulation, but does not outline any plan or programme in relation to the Dee. The DHRO does not set out an intended course of action for the Dee, nor provide guidance on how to implement any scheme or policy for the Dee – rather, the proposed Order merely updates the EA’s duties and powers in order to enable the EA comprehensively to fulfil its duties as conservancy and local lighthouse authority. Moreover, whilst the DHRO does contain a provision that may give rise to plans or programmes for the Dee, namely the requirement for the EA to formulate and publish a management plan in relation to its conservancy, but the establishment of such a duty to prepare a plan does not itself constitute a plan or programme.
- 5.50. It is further noted that the DHRO is fundamentally different in nature to the documents contained in the ODPM’s indicative list of plans and programmes subject to the SEA Directive, which includes documents such as Structure Plans, National Park Plans and River Basin Management Plans.
- 5.51. In addition to not having the fundamental characteristics of a plan or programme, the DHRO does not in any event meet the criteria required for plans and programmes to be subject to the Directive. Although the Order is prepared by an authority for adoption through a legislative procedure, it is not “required by legislative, regulatory or administrative provisions”. The EA has applied for the Order, among other reasons, in order to modernise the management of navigation on the Dee estuary and thereby ensure that navigation on the estuary is safe and complies fully with the PMSC, but the EA is not under any direct legislative, regulatory or administrative obligation to have done so.
- 5.52. The DHRO clearly falls outside the scope of the SEA Directive and accordingly a strategic environmental assessment of it is not required in this case.

## ***Proposals***

### *Estuary management*

- 5.53. The DHRO would enable the EA to provide:
- (i) for the maintenance, operation, management and improvement of the estuary, any harbour premises and the facilities (including recreational facilities) afforded in, or in connection with, the estuary; and
  - (ii) for the conservation of the estuary’s flora, fauna and geological and physiological features of special interest.
- 5.54. The proposed Order would also require the EA:

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- (i) from time to time to formulate and publish a management plan in relation to its conservancy undertaking; and
  - (ii) to establish and maintain arrangements for a consultative committee which it must consult (except in a case of special urgency) on all matters substantially affecting the conservancy, protection, regulation, operation, management and improvement of the estuary and its navigation.

5.55. The proposed Order would confer powers on the EA with respect to:

- (i) the erection or placing of aids to navigation;
- (ii) removal of obstructions other than vessels;
- (iii) the provision of moorings;
- (iv) repair of landing places.
- (v) dredging;
- (vi) disposal of wrecks;
- (vii) the making of byelaws; and
- (viii) the giving of general and special directions to vessels.

*Power to charge dues*

5.56. The DHRO would allow the EA to charge dues for the services and facilities provided by the EA within the estuary in the discharge of its duties as conservancy and local lighthouse authority. As the PMSC does not accept lack of funding as a reason for non-compliance, the EA's conservancy undertaking currently operates at a loss, which has to be subsidised by the taxpayer through the EA's grant-in-aid (as explained above) The EA wishes to address this situation by obtaining the standard power to demand ship, passenger and goods dues under section 26 of the Harbours Act 1964, although modifications to this power in its application to the Dee estuary, to address particular concerns of the Port of Mostyn, will be proposed.

5.57. There are a number of standard exemptions to this proposed power, including for small vessels, set out in the DHRO.

*Control of works and dredging in the estuary*

5.58. The DHRO would provide for:

- (i) the restriction of works and dredging without a licence;
- (ii) the licensing of works and dredging; and
- (iii) appeals in respect of works and dredging licences.

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5.59. These provisions enable the EA to charge a reasonable fee in respect of the expenses of dealing with applications. At present the EA may only charge a nominal fee. In any event, there is currently no requirement to obtain any such licences, if they are not already required under non-conservancy legislation. The nominal fee does not cover its costs which therefore have to be met from its budget through grant in aid.

*Byelaws*

5.60. The DHRO would immediately enact the following byelaws:

- (i) regulating the navigation, berthing and mooring of vessels in the estuary;
- (ii) requiring inspection facilities on a vessel to be made available to the EA's harbourmaster;
- (iii) prohibiting the fumigation of vessels without permission and the discharge of matter into the estuary;
- (iv) requiring fishermen to comply with directions given by the EA's harbourmaster;
- (v) prohibiting the dragging or grappling of any material or article from the bed of the estuary without permission;
- (vi) requiring a vessel to be marked with its name or other form of identification;
- (vii) prohibiting the abandonment of vessels;
- (viii) regulating water-skiing, aquaplaning, parakiting, parascending, diving, underwater swimming, regattas, races and similar activities and events;
- (ix) requiring the master of a vessel to give reasonable assistance to the emergency services and to take reasonable precautions for the prevention of accidental fire;
- (x) prohibiting the intentional obstruction of officers of the EA;
- (xi) prohibiting the use of firearms and airguns without consent; and
- (xii) requiring the use of apparatus to minimise noise emanating from vessels powered by an internal combustion engine.

*Miscellaneous provisions*

5.61. The DHRO would also:

- (i) provide for the protection of the neighbouring harbour authorities, Mostyn Docks Limited and the Mersey Docks and Harbours Company;
- (ii) incorporate certain provisions of the Harbours, Docks and Piers Clauses Act 1847;
- (iii) repeal the 1889 Act; and



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- (iv) make provision for such other matters as may be incidental, consequential or supplementary to any of the Order's principal purposes

5.62. The key "drivers" behind the DHRO are as follows.

*Modernisation*

- 5.63. The first key driver behind the DHRO is the need to modernise the local legislation governing navigation of the estuary and the regulation of that navigation, so improving further the safety regime in the estuary and thus protecting all those working and/or living in and around estuary and the local environment.
- 5.64. As discussed above, the MARICO report recommended that the responsibilities for navigation in the estuary should be updated, giving the EA a modern set of powers and duties as conservancy and local lighthouse authority.

*Compliance with the PMSC*

- 5.65. The second key driver behind the DHRO is to allow the EA fully to comply with the PMSC. Unlike the Port of Mostyn, the safety reports of the harbourmaster were submitted to audit, albeit from a colleague from his own company. Other than Byelaws 6 and 7, which have been agreed by the EA to be either removed or modified, there has been no direct challenge to detailed provisions of the Order and the view that they are necessary to ensure the safety of navigation.

*Other UK ports and harbours*

- 5.66. The third key driver behind the DHRO is the need to bring the estuary in line with other estuaries and ports and harbours throughout the UK, in terms of powers available to regulate those navigating in the estuary. The vast majority of UK ports and harbours are managed with the benefit of modern local legislation in a form similar to the DHRO.

*Funding*

- 5.67. The final key driver behind the DHRO is to enable the EA to levy dues on the vessels navigating in the estuary, in order to contribute to the cost of the EA's performance of its functions as conservancy and local lighthouse authority.
- 5.68. A key finding of the MARICO review was to promote an HRO to allow the agency to charge dues to vessels transiting the conservancy jurisdiction. The current exemption from dues contained in the 1889 Act is anomalous and contrary to Government policy that users should pay.
- 5.69. Except in relation to the inner channel and the Mostyn interface there has been no material challenge to the DHRO. All objections in other respects have been resolved. Even Mostyn accepted that the DHRO should be made for the areas outside the inner channel. Neither has there been any challenge to the principle of the EA seeking one unitary port for the entire estuary and its approaches. The ability to charge dues and the modern management powers are seen as crucial stepping stones to establish a business case for a trust port. The MHRO would prejudice the realisation of that long term aim by making arrangements more complicated.
- 5.70. Mostyn attempted to discredit the evidence of the EA by claiming that there is a lack of peer review of the reports of the harbour master, even though there is a rigorous audit by the company of which the harbour master is part. By contrast, there is no evidence of

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any kind of peer review operated by Mostyn in relation to its own reports of incidents. Although the harbour master had written to West Kirby SC criticising the MHRO, the RYA had objected to it earlier and, indeed, the sailing club had actually submitted an objection to the DHRO, since withdrawn.

- 5.71. Mostyn had an inability to acknowledge and understand what was required to produce a meaningful risk assessment for the safety management systems within the MOA, despite the imminent commencement of ferry services to Ireland, now ceased. Two ferry groundings were known to have occurred by vessels navigating the inner dredged channel.
- 5.72. There have been 9 incidents or hazardous events in the MOA since July 2001, all of which have been investigated by the EA harbour master and 6 incidents in the Mostyn Docks SHA. The EA harbour master has questioned the competence of Mostyn to provide for the safety of marine operations and has had to point out the inadequacy of measures which have been adopted.[EA E/4]
- 5.73. The concept of the safety management system required by the PMSC is that it is informed by a robust risk assessment. Changes in the use of a port should therefore be examined and a risk assessment conducted to determine the implications of that change of use. Difficulty was experienced in getting Mostyn to recognise the need for such an approach.
- 5.74. One example of this was the grounding of the ferry “European Envoy” in December 2001 when endeavouring to navigate the recently established inner dredged channel. The EA believes that the incident was caused by Mostyn’s failure to properly design and establish the inner dredged channel and associated aids to navigation and to develop and implement robust operational procedures based on a thorough risk assessment to ensure safe navigation of the MOA and its approaches.

## **6.0 The Cases for Objectors to Order A**

### ***(i) Port of Mostyn***

#### *Conservancy Jurisdiction*

- 6.1. The charts clearly demonstrate that, if the DHRO is confirmed, legal responsibility for conservancy functions in respect of vessels using the Port of Mostyn (the only Harbour on the Estuary) would continue to be divided.[CD26b(i)(ii)]
- 6.2. Vessels wishing to access the Port would therefore pass through three conservancy jurisdictions whilst passing through the navigation channel and into the Harbour. This is likely to cause confusion as to which body is responsible for navigation aids for such vessels, particularly as the Pilotage function would be entirely in the hands of MDL.

#### *Provision of Navigation Aids*

- 6.3. As noted above, Mostyn is already responsible for providing all but one of the navigation buoys for ships using the Port, including the SHA itself and Outer Channel. This is by virtue of its powers as statutory harbour authority, the MOA Agreement and the actual provision of navigation aids in the outer channel with the knowledge and approval of Trinity House.

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- 6.4. The EA has in the past shown itself unwilling to provide essential navigation aids for the estuary as part of its conservancy functions or has done so on the basis that aids are maintained by Mostyn.
  - 6.5. The EA has only provided one marker buoy in the estuary since it took over the conservancy function. On taking over this function it also shut down the Mostyn Maintenance Depot and sold assets such as a ship, cranes and ancillary equipment necessary for buoy maintenance.
  - 6.6. Confirmation of the DHRO could therefore lead to a situation where the de facto conservancy functions could no longer be carried out by Mostyn (except within the SHA) and the risk to vessels within the estuary would increase if the EA did not carry out the work currently being undertaken by Mostyn.

#### *Dredging*

- 6.7. One of the conservancy duties of a harbour authority is to conserve the Harbour so that it is reasonably fit for use as a Port. It also has a duty of reasonable care to see that the Harbour is in a fit condition for a vessel to resort to and use it.
- 6.8. This duty may involve carrying out maintenance dredging of the Harbour and its approaches so that the ability of vessels to use the Harbour is conserved (see for example the PMSC Section 2.3).
- 6.9. Despite the EA having been made aware in 2001 in the context of a dredging consent that annual maintenance dredging would be required to keep the approaches to the Port open, since 2002 it has refused to grant consent for necessary maintenance dredging. This resulted in many larger ships being unable to access the Port except at high tide periods and sometimes not at all. It was also the main reason why the P & O ferry service was terminated with severe financial repercussions for the future of the port and the local economy.
- 6.10. Lack of action by the EA to protect the needs of commercial shipping to access the Port is in sharp contrast to the positive manner in which other Conservancy Authorities act.
- 6.11. As the reasons put forward for not giving consent to dredge relate to environmental concerns, it would appear that the EA's duties as an environmental regulator are being allowed to outweigh its duties as a Conservancy Authority. A continuation of this situation, which would be reinforced by confirmation of its HRO, would be to the detriment of the main users of the Estuary and the economy of the region.

#### *Levying of Dues*

- 6.12. The DHRO will give the EA power to levy shipping dues on ships using the Port (assuming that the DHRO is amended so that goods and passenger dues are not also levied on such vessels).
- 6.13. However, Mostyn believes that unless the DHRO is amended the burden of dues will fall disproportionately upon vessels who only use the navigation aids and other information provided by the Conservancy Authority (at present provided almost entirely by MDL) down stream of the Port, and who do not benefit from any conservancy expenditure up stream of the Port.
- 6.14. Because so little commercial traffic is able to go up stream of the Port, almost the whole of the EA's conservancy functions throughout the Estuary are likely to be funded from

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users of only a part of the Estuary, which in the view of Mostyn would be unfair, and may place the Port at a competitive disadvantage.

- 6.15. A more equitable structure of shipping dues would be that adopted by some other Ports such as on the Humber, in which the further upstream a vessel goes (and therefore the more navigation aids it uses) the more dues it is required to pay.

***(ii) The Chamber of Shipping[CD13]***

- 6.16. The interest of the Chamber of Shipping in the Dee Estuary is largely confined to the navigation channel to the Port of Mostyn, as , with the exception of the Airbus barge operation, commercial traffic upstream of Mostyn ceased some years ago and is unlikely to resume. The significance of the Airbus traffic is widely appreciated, but the port's potential use for other traffic needs to be recognised too.
- 6.17. Mostyn is the only port on the North Wales coast capable of accommodating merchant vessels. It has a large dock estate, its own railhead and easy connection to the trunk road network. Accordingly, it is well placed to compete for traffic and contribute to the Government's transport policy of encouraging freight to travel by water and/or rail rather than road. That it cannot do so now is due to the EAs continued refusal to consent to the dredging of the channel.
- 6.18. The first ground of objection to the DHRO is that it would preserve the EA's jurisdiction as conservancy and lighthouse authority over part of the navigation channel for the port of Mostyn. This would leave responsibility for safety management fragmented. Neither is the Chamber convinced that the EA has the necessary expertise to fulfil its duties as a conservancy and local lighthouse authority.
- 6.19. The proposed DHRO would also give the EA unrestricted ability to levy dues to fund its service sand facilities throughout the estuary. This is objectionable on two counts. Firstly, merchant ships, on which most of the dues would be levied, do not use the estuary above Mostyn but, nevertheless, could be required to fund activities and facilities in the upper estuary. Secondly, the EAs most notable activity has been to refuse dredging consents and so the merchant ships could be asked to fund the obstruction of their business.
- 6.20. The third ground of objection is that the EA would face a conflict of interest between its conservancy role and its role in conserving the flora, fauna and other features of the estuary. In view of the ES's refusal to grant dredging consents necessary to enable services to Mostyn to be re-established, there is no confidence in its ability to strike an equitable balance between environmental interests and the imperatives of safe navigation and efficient port operations. Nor is such a balance struck in the proposed DHRO. As proposed in the DHRO, The Dee Estuary Consultative Committee would comprise up to 19 members, none of whom would represent commercial shipping interests. In addition, the proposed DHRO includes a byelaw requiring vessels in the harbour to be fitted with a silencer. The Chamber of Shipping does not consider that it is acceptable that a vessel, which is fitted with all the equipment required for it to trade internationally, may in effect be forbidden from entering the harbour area because of a local environmental byelaw that includes a requirement for different equipment.

***(iii) Mr D P Shillington[CD12]***

- 6.21. The EA has not produced any statistics for fatalities, injuries or collisions nor any evidence of conflict between estuary users to warrant the proposed powers. There is no

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need to seek control over rowing boats or holding regattas. Although Clause 43 and Schedule 2 of the DHRO claim to give protection to Mostyn Docks, including the right to dredge, the area comprising the docks is not defined and so the proposed order is flawed. There is an intention to consult interested parties but no obligation to implement any resulting recommendations. The EA is seeking to abrogate its obligations under the Human Rights Act 1998.

***(iv) Mr Spencer Rogers[CD18, SR P1/1]***

- 6.22. Mr Spencer Rogers supported the MHRO, in effect becoming an objector to the DHRO. He was concerned at the continual delays and obstruction to dredging proposals that would ensure safe, convenient and economical transport of Airbus wings from Mostyn. He supported any Order that would promote the interests of the Mostyn Docks Company and safeguard the efficient and convenient navigation of the River Dee. He commented that the provision for maintenance, operation, management and improvement of the estuary, the harbour premises and facilities are of primary importance for Wales. Aids to navigation, docking facilities, removal of obstructions to navigation are vital. There should be no restrictive measures that would impede dredging to maintain navigation or procedures which would allow tedious appeals on “points of “law” and the like, especially to the EU.
- 6.23. The maintenance of navigation in the River is of overriding public importance to Wales and must override any “external” directives. The majority of members of any consultative committee would comprise elected members from local authorities in Wales or Assembly Members and any official and advisors from Welsh administrations. The River Authority is supposed to maintain the river to permit navigation below Connor’s Quay by any vessel having an overall height exceeding approx 3m (10ft) measured from the surface of the water. The EA should use the provisions of its proposed Order to insure the future navigation of the River Dee and of Mostyn Docks.

***Other representations***

***Trinity House Lighthouse Service[CD20, THLS W1/1]***

- 6.24. Trinity House, although not an objector, commented that they are supportive of the EA seeking to modernise its management powers over the Dee Estuary. However, the DHRO should state that the EA is the local lighthouse authority and the statutory harbour authority for the Dee Estuary.<sup>6</sup> In addition, while the draft of the DHRO provides for the repeal of the 1889 Dee Conservancy Act, it should be clearly stated that the EA’s role as a harbour authority would be retained.
- 6.25. There have also been supporting representations made about the DHRO from Engineer Klaus Armstrong-Braun and the Countryside Council for Wales (CCW).

***Engineer K Armstrong Braun[CD23, AB P1/1-2]***

- 6.26. Engineer K Armstrong-Braun supports the DHRO as it would enable the natural and built environment of the Dee Estuary to be regenerated for the benefit of wildlife in the estuary. The Dee Estuary is designated as a SPA for birds and a SAC under the Birds & Habitats Directive. The EA is a competent authority of government as notified to the EU

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<sup>6</sup> The EA, as successors to the Dee Conservancy Board and National Rivers Authority, are the local lighthouse authority for the River Dee by usage having maintained aids to navigation prior to the Merchant Shipping Act 1894; the provisions of the 1894 Act now consolidated into the Merchant Shipping Act 1995.

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to carry out such functions in its sphere of influence. The EA has to impartially consider economic and environmental aspects in its decision making whilst still meeting its legal duties under EU Directive. The EA is the most appropriate body to be allowed an HRO and this is supported. The Mostyn HRO should be declined. Mostyn Docks has no regulatory role, nor the duty to consider the natural environment of the Dee Estuary. It would place commercial considerations first.

*Countryside Council for Wales (CCW)[CD22, CCW W 1/1]*

- 6.27. The CCW supports the proposed DHRO and believes it is an important step towards an integrated and sustainable approach to management of the Dee Estuary. The Dee Estuary is a site of National, European and International Importance and the EA has a duty as a Competent Authority under The Conservation (Natural Habitats etc) Regulations 1994 and as a Section 28G authority under the Wildlife and Countryside Act 1981 as amended by the Countryside Rights of Way Act 2000. These responsibilities might be more clearly identified in the DHRO.
- 6.28. The CCW welcomes the proposal to formulate and publish a management plan for the Estuary. Any plans for the Estuary would need to be subject to Regulation 48 of the Habitats Regulations to ensure protection of the conservation interest of the Dee Estuary SPA, possible SAC and Ramsar site. Such a plan should also take account of, and integrate with, any management scheme that may become established for the estuary under Regulation 34 of the Habitats Regulations.
- 6.29. The CCW fully supports the proposals for a Consultative Committee to advise the EA on matters relating to the management of the estuary. In order to be more transparent, it would be helpful if the Committee's operating procedures were set out in more detail at an early stage, preferably in the Order itself.

*Others*

- 6.30. In addition, although not a registered objector, Cllr Heesom spoke in favour of the MHRO and so is in effect an objector to the DHRO. His case is outlined in the section on the MHRO. English Nature supports the DHRO [EN W 1/1]

## **7.0 Responses by the EA to objections to the DHRO**

*Fragmented jurisdiction*

- 7.1. One objection raised was that the DHRO would fragment jurisdiction on the estuary relating to pilotage, harbour and navigation authorities. This objection was raised by Mostyn and the Chamber of Shipping.
- 7.2. The DHRO would not "fragment" jurisdiction on the estuary. In fact, it would not change the existing jurisdiction in any way. The Port of Mostyn would remain the statutory harbour authority for the small area surrounding the Mostyn quays. The EA would remain the conservancy and local lighthouse authority for the whole of the estuary. The Port of Mostyn would remain the competent harbour (i.e. pilotage) authority for the whole estuary.
- 7.3. By way of contrast, the MHRO is far more complicated and would result in the EA being responsible for the conservancy, lighting and marking of much of the estuary, with the Port of Mostyn being responsible for the conservancy, lighting and marking of the small area around Mostyn's quays as well as the main navigation channel and 250 metres either side (cutting through the EA's area of responsibility), and for pilotage in relation

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to the whole estuary (not objected to by the EA). This arrangement would result in the EA being required to discharge its conservancy duties and ensure the safety of navigation of waters lying within its jurisdiction whilst having no control over a large stretch of water dividing its area of jurisdiction. This is unpractical. Extension of Mostyn's conservancy jurisdiction would also mean that dredging consents under the DHRO or its Land Drainage Byelaws would be necessary in some parts of the estuary but not in others. This is fragmented, is detrimental to the safe management of navigation of the estuary, and goes against the spirit of the PMSC (i.e. that all arrangements should be simplified).

- 7.4. This ground of objection therefore provides no basis for refusing the DHRO and should be rejected.

*Mostyn Operational Area (MOA) and the navigation channel*

- 7.5. Mostyn has also objected on the grounds that Mostyn is the *de facto* authority for the navigation channel due to;
- (i) the Dee Conservancy's unwillingness to fulfil its statutory duty to provide adequate aids to navigation for all users of the Conservancy area;
  - (ii) the MOA Agreement;
  - (iii) its provision of all aids to navigation, survey and tidal information from the Port to the sea, with the exception of the Conservancy's solitary channel buoy, free of charge; and
  - (iv) its view that the root of safety management problems in the MOA is that no review of the EA's conservancy functions has ever been concluded.
- 7.6. As a general matter, most of these objections arise out of the EA's conduct prior to the implementation of the PMSC and the Review in 2000. Disputes that took place several years ago relating to the provision of aids to navigation are not relevant to the present situation, as they are the product of the pre-Review system. Since 2000, the EA has taken considerable steps to improve its performance as conservancy authority and safety in the estuary, including by the appointment of a harbour master, the implementation of a formal safety management system, and the implementation of the MOA agreement, under which it monitors Mostyn's activities in the navigation channel. The EA has also provided additional aids to navigation in the parts of the estuary outside the MOA. The EA carries out all these activities at a considerable cost to the public purse.
- 7.7. Further, any poor performance by the EA or its predecessors was a direct result of the lack of funding available to it under the present Acts. Put simply, under the 1889 Act, the main estuary users do not contribute towards the expenses of carrying out EA's conservancy functions. Prior to the promulgation of the PMSC in 2000, this meant that some activities were not fully carried out. The DHRO, however, would enable the EA to raise sufficient income from dues to improve the financing of its conservancy and local lighthouse functions. A fully resourced EA would therefore be a perfectly suitable conservancy and local lighthouse authority for the MOA. However, if the DHRO not made, the EA would remain unable to fund its duties in the estuary as a whole.

*Provision of aids to navigation*

- 7.8. The EA is aware of Mostyn's view that the EA refused to replace a channel buoy because (a) it was not a good use of public money, and (b) the main beneficiary of the

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channel was commercial shipping into Mostyn, so the Port of Mostyn should take on responsibility for the buoy. Mostyn also claims that after the NRA took over responsibility for aids to navigation on inheriting the statutory duties of local lighthouse authority from Trinity House, the EA sold off unspecified assets which were “essential for the efficient and timeous performance of the function of surveying and provision of channel makings”.

- 7.9. Again, however, these situations relate to the pre-PMSC situation. The EA cannot and could not fund its conservancy functions under the existing legislation, due to the exemptions from dues for users such as Mostyn. Prior to the implementation of the PMSC, it was therefore reasonable for the Agency to request Mostyn to contribute towards the provision of a buoy that would be specifically designed to benefit Mostyn.
- 7.10. Although Mostyn does not specify in its objection letter the identity of the assets it claims that EA sold, the EA is aware that it has replaced assets that were outdated, which it inherited from Trinity House. That is: the EA replaced inherited equipment with other, more efficient means of delivering the EA’s navigation responsibilities, including new more effective equipment and contracted-in services. The EA has also ceased to use boats and buoys that have been written off (in one instance following a collision with a vessel operating from the Port of Mostyn) or have been replaced by equipment and vessels more suitable for the conditions on the Dee. On a couple of instances, superseded vessels and obsolete equipment were sold following competitive tender. However, the EA does not see that any of this behaviour represents a reason for refusing to make its proposed Order.
- 7.11. Elsewhere in the estuary, by contrast, the EA provides significant additional services to mariners, within the constraints of its antiquated powers. Should the EA’s proposed Order be made, the EA could more easily fund additional services.

#### *Status under the MOA agreement*

- 7.12. So far as the MOA Agreement is concerned, this agreement did not transfer responsibility for the Mostyn Channel area from the EA to Mostyn. Rather, the Agreement was simply an interim measure to govern the relationship between Mostyn and EA, pending a longer term solution. The fact that Mostyn provides navigation aids in this area is simply a product of the agreement, and also reflects the lack of funding available to the EA under existing legislation. The EA and its harbour master spend a great deal of time and resources assisting Mostyn in ensuring safe navigation through the channel. In particular, the EA’s Harbour Master has met with Mostyn a great many times since his appointment in July 2001 to discuss the implementation of proper safety measures in the MOA.[EA F/1] The records of these meetings show that his participation has been essential for navigation safety, and it is far from clear that Mostyn would have carried out the safety measures that it did without his participation. This would be a very real concern for the EA if Mostyn’s proposed Order were made.

#### *Safety management concerns*

- 7.13. The notion that the EA’s conservancy review has not been completed is demonstrably wrong. The review of the EA’s conservancy functions carried out in 2000 – as set out above –led (amongst other things) to the appointment of a Harbour Master, robust risk assessments and safety management procedures, and the proposed Order to modernise the EA’s powers.



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- 7.14. By contrast, the root of safety management problems in the MOA is Mostyn's repeated failure to comply with its own safety management systems – as can be seen from the extensive “encouragement” it has needed from the EA's Harbour Master, and the various incidents that have occurred over the last few years. In particular, according to the DfT, Mostyn was the last major port to implement the PMSC, by putting in place such systems, which it only did thanks to months of pressure and assistance from the EA. Even when Mostyn had safety procedures in place, these have clearly been disregarded from time to time. Where incidents occur, the EA's Harbour Master has to work extremely hard to ensure that Mostyn carries out an adequate investigation, and that it acts upon the conclusions of the investigation.
- 7.15. Should the DHRO be made, it would make it easier for the EA to ensure the safety of navigation in the estuary. However, if the MHRO were made, Mostyn would lose the benefit of the valuable work done by the EA's Harbour Master. The EA is concerned that this could lead to severe consequences for navigation safety. This ground of objection should therefore be rejected.

#### *Failure to approve dredging*

- 7.16. An objection was raised that the EA's lack of action on maintenance dredging applications (having approved capital dredging works) showed lack of interest in the commercial needs of the estuary. This objection was raised by Mostyn, The Chamber of Shipping and the individual objector, Mr Shillington.
- 7.17. The EA's response to this objection is that dredging is a complex matter involving the EA, the Secretary of State for Transport and the National Assembly for Wales (the regulators). At the time of the objections, the maintenance dredging proposals had not yet satisfied the requirements of any of the regulators, which are unrelated to the EA's interest, or perceived lack of interest, in the commercial needs of the estuary. Mostyn's dredging proposals had not been approved because Mostyn was at that time unable to demonstrate to any of the regulators – not just the EA – that there would be no adverse effects on draft conservation objectives for the features of the SPA, pSAC and Ramsar site. Furthermore, approval for maintenance dredging is entirely within the remit of the EA's Welsh Regional Flood Defence committee, which is a separate statutory body, and has no influence on the EA's exercise of its functions as conservancy authority.
- 7.18. Dredging approval has now in fact been given by the EA's Regional Flood Defence committee, and by the other regulators.

#### *Conflict between the EA's environmental and conservancy role*

- 7.19. Mostyn and The Chamber of Shipping further objected to the DHRO on the ground that an insurmountable conflict between the EA's environmental and conservancy roles would result. This conflict of roles would continue to the detriment of the major users of the Estuary and the region's economy.
- 7.20. The EA does not accept this objection because it sees no such conflict at present and the DHRO would do nothing fundamentally to change this position. The EA submits that it is best placed to act as conservancy authority as it is and will be able to balance all interests in the estuary. Not only is the EA the conservancy authority for the estuary, but the estuary is a “main river” so the EA is the flood defence authority, the estuary has a potentially valuable cockle fishery for which the EA is the local sea fisheries committee, the EA has statutory duties to further recreation which support the numerous recreational activities on the estuary, the EA has statutory conservation functions which support the

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estuary's European designations, and the EA is a substantial landowner. Mostyn, however, which represents only its own commercial interest, does not have the required expertise to act in the interests of the local community and environment, as required by the PMSC.

- 7.21. While Mostyn says that it retains the services of organisations and individuals to deal with these matters on its behalf, such retained bodies will owe an overriding duty to Mostyn as their client, rather than to the conservation interests and other stakeholders.
- 7.22. The conservancy authority is a competent authority under the Habitats Regulations, and is legally obliged to carry out an appropriate assessment in respect of any proposals that might affect the Dee European site. Should Mostyn's proposed Order be made, not only would Mostyn be released from the requirement to seek the approval of the EA for any dredging operations within its extended area, but Mostyn itself would also become the competent authority for the extended area for conservation purposes. However, on several occasions in the past the EA has had to give the Countryside Council for Wales information about Mostyn's proposed activities in its existing jurisdiction, which Mostyn should have provided itself as the competent authority for that area. Given this record, the EA cannot see how Mostyn would be a more appropriate competent authority for the extended jurisdiction than the EA currently is.
- 7.23. Mostyn has further suggested that its commercial incentives give it a vested interest in the safety of vessels using the Port and therefore would be more likely to ensure the safety of such vessels by carrying out works both within the harbour and the navigation channel. Mostyn claims that the EA's lack of any such commercial incentive lead it to give a lower priority to the safety of navigation, as is evidenced by the very small contribution it makes to the provision of buoys within the channel at present.
- 7.24. The EA's response to this issue is that there is little evidence to date of Mostyn's "commercial incentive" to ensure safety, given the difficulty that the EA has encountered in ensuring that Mostyn formulates and then implements robust safety procedures. Further, the EA's current contribution to the provision of buoys, and other safety provisions, has been entirely appropriate and acceptable, particularly given its lack of ability to fund its activities. As discussed in detail above, the DHRO would rectify this. The EA is concerned by Mostyn's own safety record and motivation, which is far from satisfactory.
- 7.25. Furthermore, the EA contends that as the body with responsibility for sea fisheries, recreation, conservation and environmental protection in the estuary, it has an overriding interest in ensuring navigation safety in the estuary. Given the nature of the estuary, it is likely that any attempt to clean up an oil spill (or any other hazardous discharge) is likely to make matters worse, rather than better. It is therefore imperative that such incidents are prevented, as cure would be almost impossible. Given the potentially catastrophic effect that any oil spill (or indeed any hazardous discharge) resulting from a navigation incident would have on the cockle fishery, conservation features in the estuary and river, and water abstraction points on the river, the Agency therefore has a strong interest in ensuring that such incidents are minimised.
- 7.26. In its objection, The Chamber of Shipping cites the lack of commercial representation in the composition of the proposed consultative committee as a basis for its objection. The DHRO however, clearly makes provision for commercial representation, including direct representation of Mostyn. The EA has met with The Chamber of Shipping and has offered to consider revising the composition of the committee to make it clear that

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shipping interests will be adequately represented alongside all other legitimate interests. The EA has invited The Chamber of Shipping to propose revisions to the DHRO to this effect.

*Impact of the DHRO on whole estuary*

- 7.27. Mostyn also objected on the grounds that the proposed Order contains powers to raise revenue for the purposes of the entire area, but with most revenue being derived from commercial traffic. Furthermore, it asserts that it is not equitable for navigation channel users to fund the conservancy of the upper estuary if they are not able to use it. The Chamber of Shipping raised similar concerns, stating that it objected to the fact that it would presumably be the merchant ships from which dues would be levied. These merchant ships do not use the estuary above Mostyn but would nonetheless be required to fund activities and facilities in the upper estuary.
- 7.28. The EA's response to this objection is that the proposed powers sought by the EA are those exercised by virtually every other conservancy authority in the country. Furthermore, it is necessary to look at the estuary as a whole. It is also inequitable and against the public interest to separate the estuary into 2 distinct operational areas, with only one being able to generate funds and the other being left to fall into decay. The fact that most revenue would derive from the heaviest users is a perfectly appropriate example of the "user pays" principle in action, a principle which is clearly set out in the PMSC and which therefore reflects current Government policy. Furthermore, the power will not be aimed specifically at merchant ships, but at all vessels using the estuary which are not exempt. Evidence will be given on how the power to levy dues would be used in practice in order to reflect the different levels of use of different parts of the estuary.
- 7.29. Since applying for the DHRO, the EA has explained and written to Mostyn to outline how it would propose to exercise these powers. In particular the EA has confirmed that it has no intention to levy passenger or goods dues in respect of vessels travelling between Mostyn and the sea, in recognition of the "user pays" principle. The EA is prepared to promote a modification to its proposed Order to achieve this. The EA understands that Mostyn welcomes this modification. Mostyn has also confirmed that it is content for passenger, ship and goods dues to be levied on vessels travelling upstream of Mostyn.
- 7.30. The only dispute is therefore in relation to ship dues for vessels travelling between Mostyn and the sea. The EA wishes to charge these dues in relation to these vessels in order to recover its conservancy costs. However, the EA is prepared to offset against these dues the sums equivalent to the reasonable costs incurred by Mostyn in performing lighting and marking obligations under the MOA Agreement. The structure of these dues will therefore accord with the "user pays" principle in a way that should satisfy Mostyn's objection. This ground of objection should therefore be rejected.

*New Trust Port would contradict government policy*

- 7.31. Mostyn also raised the issue that it is Government policy to reduce the number of trust ports rather than to increase them. But in any event, the Dee is not a trust port and the DHRO would not create one.
- 7.32. So far as the long-term prospect of a trust port for the estuary is concerned, government policy on this issue was set out in 2000 and endorsed the view that trust ports continue to perform a valuable role. That policy contained no commitment to reducing the number

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of trust ports. Rather the Trust Ports Review was concerned to ensure that any trust ports were constituted on a modern basis.

*Trust Port would not recognise needs of commercial shipping*

- 7.33. Mostyn is also concerned that the trust port envisaged by the EA would not recognise needs of commercial shipping.
- 7.34. The EA does not accept this concern (see above) but again, in any event, the DHRO would not create a trust port.

*Selection of members of trust port*

- 7.35. Mostyn also refers to DfT guidance which says that members of trust ports should be selected on an open and competitive basis.
- 7.36. The EA agrees with this comment, and the members of any such trust for the Dee would be selected on this basis. The DHRO would not itself create a trust. The proposed consultative committee set out in article 5 of the DHRO, and discussed in more detail above, has an entirely different purpose from a trust. As also discussed above, the long term intention to create a trust port to manage navigation in the Dee estuary is still being considered by the EA.

*Lack of indemnity*

- 7.37. Mostyn has also previously raised concerns regarding the lack of indemnity from the EA for buoyage and hydrographical information provided by Mostyn.
- 7.38. The EA's position is that such an indemnity would not be appropriate, and the position is in any event now covered by the MOA.

*Lack of communication*

- 7.39. Mostyn has also objected to the DHRO on the grounds that the EA has not been willing to discuss issues of potential common ground.
- 7.40. The EA has sought a constant dialogue with Mostyn over the years. This dialogue has included all issues relating to navigation safety in the estuary. On the narrow issue of the promotion of the respective Orders, the EA has treated Mostyn in accordance with due process and the EA's obligation to act fairly in the interests of all stakeholders in the estuary. Mostyn was consulted as part of the Dee Conservancy Review, and included in the public consultation on the EA's draft proposed Order in September 2003. Once the EA had taken the decision to promote the Order, a meeting was arranged with Mostyn in 2004 to discuss particular details. This led to several rounds of correspondence between the EA and Mostyn about proposals made in that meeting. The EA then began the process of applying for its proposed Order, during which it would have been inappropriate to favour Mostyn over other equally key stakeholders.

*Cockle fisheries*

- 7.41. Mostyn has also previously raised the concern that the EA permits cockle fishing to take place on foreshore owned by Mostyn, creating a liability for Mostyn towards fishermen who might injure themselves while on Mostyn's property.
- 7.42. The EA's response to this concern is that its fishery regulation function is separate from its conservancy function. The former functions must be exercised according to the

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interests of the fishery. The EA is presently unable to prohibit the use of the foreshore for fishing by the public if the cockle banks are declared open. However, as Mostyn knows, the EA has applied for a regulating order which would give it much wider powers to regulate cockle fishing, including the ability to require fishermen to use specific access points to get to the cockle banks.

- 7.43. Mostyn also seems to recognise the synergies that potentially flow from the EA's responsibilities for fisheries. In particular, the EA's Harbour Master makes great efforts to ensure that the importance of safe navigation is drawn to the attention of cocklers when their permits are issued. This would be replicated under the proposed regulating order.

### **Individual objections**

#### *Lack of statistics and evidence*

- 7.44. Mr Shillington has objected to the DHRO on the grounds that the EA has not produced any statistics for fatalities, injuries or collisions, nor has it produced any evidence of conflict between the users of the estuary to warrant the powers contained within the DHRO.
- 7.45. The EA's evidence gave details of the numerous accidents and hazardous incidents that have been reported since its Harbour Master's appointment in 2001.

#### *Obsessive Government intervention and interference with the Human Rights Act*

- 7.46. Mr Shillington has objected on the ground that the DHRO would represent "obsessive Government intervention" and that the Government does not require, for example, control over rowing boats or the holding of regattas. He further cited interference with article 8(2) of the Human Rights Act 1998 (no interference by a public authority in the right to private and family life unless in accordance with law or necessary in a democratic society).
- 7.47. The EA's response to this objection is, first, that it is already the conservancy authority with responsibility for navigation in the estuary. The DHRO is merely a tool for updating its antiquated powers in relation to the management and regulation of this important estuary. The DHRO therefore does not represent any new intervention by the Government. Secondly, the Human Rights Act 1998 does not apply to this situation, as the DHRO would have no impact on the right to a private and family life. So far as the DHRO would affect individual yacht clubs, the EA is seeking to modify the Order to meet their concerns, explained above.

#### *Lack of appropriate definition of the Mostyn Docks area*

- 7.48. Mr Shillington also objected on the ground that the area comprising Mostyn Docks is not defined in the DHRO. In fact "the port" is defined in article 2(1) of the DHRO as the area described in article 4 of the Mostyn Docks Harbour Empowerment Order 1988.

#### *Consultation requirements*

- 7.49. Mr Shillington further objected on the ground that the requirement in the DHRO to consult does not include a requirement to take account of or implement representations received. The EA's response to this is that a duty to take account of recommendations is implicit in any duty to consult. The EA will always take into account all relevant representations before a decision is made following consultation. The consulter in any

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consultation is best placed to evaluate which of the representations received are appropriate to that particular circumstance.

### *Representations*

- 7.50. Mr Armstrong-Braun, the Countryside Council for Wales (“CCW”), the Metropolitan Borough of Wirral and the Dee Estuary Conservation Group all made representations supporting the DHRO. The EA welcomes this support and notes in particular that the Countryside Council for Wales and the Metropolitan Borough of Wirral are statutory bodies with several important functions on the estuary, both of which have objected to Mostyn’s proposed Order.
- 7.51. So far as specific representations are concerned, the EA agrees with CCW that any management plan it makes under article 4(3) of its proposed Order may be subject to an appropriate assessment and potentially strategic environmental assessment, in order to safeguard the conservation features and other environmental interests of the estuary.
- 7.52. Mr Spencer Rogers expressed his distress at delays to Mostyn’s dredging proposals and queried the relative effect of the Flintshire County Council (Higher Ferry Saltney Footbridge) Act 1965 and “European Communities Directive 92/42 EEC”. The EA anticipates that Mr Rogers intended to refer to Directive 92/43/EEC, which is the Habitats Directive. The EA is of course bound by both European and domestic legislation, and must comply with both. The provision of the 1965 Act to which Mr Rogers refers has in fact been repealed and replaced by section 10 of Clwyd County Council Act 1985, which requires a clearance of 3.05 metres (equivalent to 10 feet) to be maintained at Saltney Footbridge. The EA sees no inconsistency in complying with this requirement and the requirements of the Habitats Directives and Habitats Regulations. The circumstances surrounding Mostyn’s dredging applications and their determination by the three regulators are set out in 6.6.2 and 6.6.3 above.
- 7.53. Trinity House Lighthouse Service question whether the DHRO is intended to affect the EA’s status as local lighthouse authority. Trinity House’s assumption is that this is not the case, and they are correct: the DHRO would be made under the Harbours Act 1964 and would confer powers and duties of improving, maintaining and managing the estuary, which means that the EA would be the “harbour authority” for the purposes of the Harbours Act 1964, therefore the “statutory harbour authority” within the definition given by section 313 of the Merchant Shipping Act 1995 and so, by virtue of section 193(2) of the Merchant Shipping Act 1995, would continue to be the local lighthouse authority.
- 7.54. The EA has proposed amendments to the proposed DHRO to take into account representations made before and during the inquiry. [CD2 – 3, CD26a, EA/A32]

## **ORDER B**

### **8.0 The Case for Mostyn Docks Limited (MDL)**

- 8.1. The Port of Mostyn is the only commercial Harbour on the Dee Estuary, and MDL is a Statutory Harbour Authority for the purpose of the Harbours’ Act 1964 in respect of that Port. It has specific statutory powers under the following statutory instruments:
- 8.2. *The Mostyn Docks Harbour Empowerment Order 1988* The area of jurisdiction relating to this Order is referred to as The Mostyn Statutory Harbour Area.[MOS45]

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- 8.3. *The Mostyn Docks (Pilotage) Harbour Revision Order 1989*. This extended the limits within which MDL has jurisdiction for the purposes of pilotage under the Pilotage Act 1987 to an area which extends from the Dee Buoy, positioned off the Point of Ayr, up stream to the Weir immediately below the Old Dee Bridge at Chester. MDL is therefore the competent harbour authority for pilotage for the River Dee Pilotage District.
- 8.4. The Dee Conservancy is the conservancy authority and the local lighthouse authority under Dee Conservancy Act 1889. As such, it holds responsibility for the provision of aids to navigation, such as marker buoys and landmarks, tide gauges and hydrographic surveys for the Dee Estuary. Its area of jurisdiction is the whole of the Dee Estuary with the exception of the Mostyn Statutory Harbour Area.
- 8.5. The Environment Agency (Wales) (EA) has assumed the role of the Dee Conservancy.
- 8.6. On 11 April 2003 Mostyn submitted a draft Harbour Revision Order (HRO) to The Secretary of State for Transport for approval and this was advertised in accordance with the statutory requirements. Within the statutory period objections were received from the following bodies:- The Environment Agency (Wales) [CD/6], The Countryside Council for Wales (CCW) [CD/7], Mersey Docks and Harbour Company [CD/8], Wirral Metropolitan Borough Council [CD/4], RSPB [CD/5], Dee Estuary Conservation Group [CD/10], Royal Yachting Association [CD/9]. Trinity House did not object, but made certain observations. [CD/11]
- 8.7. In January 2005 the EA submitted its own draft HRO to the Secretary of State for Transport. During the statutory objection period objections were received from, amongst others, Mostyn.
- 8.8. Mostyn has also considered whether its HRO needs to comply with the requirements of the Environmental Assessment of Plans and Programmes Regulations 2004 and concluded that it does not need to do so because: it does not set a framework for future development consents or require an appropriate assessment, and its formal preparation began before 21 July 2004.
- 8.9. The need for the placing of additional navigation aids in the part of the approach channel to The Port of Mostyn which is down stream of and beyond the jurisdiction of the Dee Conservancy (the outer channel) became apparent following discussions and correspondence with Trinity House in 2000/2001. The responsibility for navigation aids in this area rests with Trinity House, but as they indicated that they were not willing to provide or maintain additional navigation aids in this area the only party who was prepared to provide navigation aids was Mostyn.
- 8.10. The Port Marine Safety Code (“PMSC”) was introduced in response to the Sea Empress incident at Milford Haven in 1997. A subsequent review of the Pilotage Act 1987, published in July 1998 led to the PMSC being drawn up as one of the review’s recommendations.[EA D/2] It requires Harbour Authorities to put in place safety management systems for the control of navigation of vessels within their jurisdiction. Paragraph 1.2.4 of the PMSC lists the conservancy duties of a harbour authority, which includes a duty to survey and re-survey and find the best navigational channel or channels, to place and maintain navigation marks where they will be of the best advantage to navigation and to keep a vigilant watch for any changes in the sea or river bed affecting the channel or channels and move or renew sea navigation marks as appropriate.

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- 8.11. Paragraph 1.2.10 advises each harbour authority to keep its powers and extent of jurisdiction under review and to promote changes where necessary. Paragraph 1.3.29 of the PMSC requires the maintenance of all aids to navigation to be in accordance with certain criteria, and to be subject to periodic review. Paragraph 1.4.4 of the PMSC notes that a HRO may be made to alter (either for all purposes or for limited purposes) the limits of jurisdiction of a Harbour Authority as previously settled, and can also be used where it is considered necessary to extend controls into the approaches of the harbour.
- 8.12. The need for Mostyn to obtain such further statutory powers was made clear when it applied to The Secretary of State for Transport for consent under Section 34 of the Coast Protection Act 1949 to place the necessary navigation aids within the Outer Channel. This consent was granted on the 4 September 2001, and although the obtaining of a HRO was not made a condition of the consent, conditions 1 and 2 of that consent made it clear that Mostyn was required to put in place measures to control vessel movements and to take responsibility for wreck marking and removal on a non-statutory basis until such time as a HRO is promoted to provide a solution for the entire estuary and its approaches. The entire situation would be reviewed by the Department if a HRO has not been obtained within two years of the application being made.
- 8.13. The expectation that Mostyn would promote its own HRO for this purpose has been underlined in earlier correspondence with Trinity House. Mostyn had in mind the advice in para 1.4.4 of the PMSC already referred to that a HRO could be made to extend existing limits of jurisdiction where it is considered necessary to extend control into the approaches of a harbour. It was also aware that although under an Agreement made between Mostyn and the EA dated the 8 July 2003 made it clear that within the area of the EA's jurisdiction as conservancy authority down stream of the Port, in the MOA, it is the responsibility of Mostyn to provide navigation aids, this does not extend to providing such aids within the outer channel because EA is not the Conservancy Authority for that part of the estuary.
- 8.14. In the above circumstances Mostyn sought in its HRO to obtain the necessary authority to provide and maintain navigation aids within a 500 metre wide corridor in the outer channel and (because it already maintained such aids within the SHA) also a 500 metre wide corridor between the outer channel and the SHA within the MOA. The draft HRO does this by extending the SHA to the 500 metre wide corridor within which is the navigation channel used by vessels to access the Port. The draft HRO also extended the pilotage jurisdiction of Mostyn to the outer channel.

## **9.0 The Cases for Objectors to Order B (MHRO)**

### ***(i) The Environment Agency***

- 9.1. Mostyn Docks Limited applied for a harbour revision order ("Mostyn's proposed Order")(MHRO) on 17 April 2003. The MHRO would extend the jurisdiction of Mostyn as statutory harbour authority to the area which lies within 250 metres on either side of the main navigation channel to and from Mostyn's quays which extends almost as far as the North Rhyl buoy outside the estuary. Mostyn's pilotage jurisdiction would be extended to cover this area. Mostyn's proposed Order would remove the EA's underlying jurisdiction as conservancy and local lighthouse authority within Mostyn's existing area of jurisdiction as statutory harbour authority and the EA's same jurisdiction over approximately one-quarter of that extended area (the remaining three-quarters of that extended area currently being outside the jurisdiction of either the EA or Mostyn). The EA would retain its jurisdiction as conservancy and local lighthouse authority for the



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remainder of the Dee estuary, by far the majority of the estuary. This jurisdiction extends as far as the city of Chester.

- 9.2. The EA objected to the MHRO on 29 May 2003. Its principal objections are summarised in the following paragraphs.

*Legality of removal of EA's functions*

- 9.3. The EA queries the ability of local legislation, in this case a harbour revision order, lawfully to remove part of one of the EA's functions vested in it pursuant to the Environment Act 1995, a public general Act of Parliament.

*Complication of jurisdiction*

- 9.4. The MHRO would further complicate the current statutory arrangements which entail a split responsibility for the safety of navigation within the Dee Estuary. The EA would be responsible for the conservancy, lighting and marking of most of the Estuary. Mostyn would be responsible for those and related harbour authority-type issues not only in relation to a small area adjacent to its quays (i.e. the current area of its jurisdiction as statutory harbour authority) but also within an area leading to and from its quays which cuts straight through what is probably the principal part of the EA's area of responsibility as conservancy and local lighthouse authority. The EA would have no control over what happens in the channel (which it monitors closely under existing arrangements) yet it would be responsible for what happens in its areas of jurisdiction on both sides of it; and
- 9.5. In addition, Mostyn would remain the "competent harbour authority" (and so be responsible for pilotage services) in relation to the area summarised in (b) above and in relation to broadly the same area as the EA's remaining conservancy and local lighthouse authority jurisdiction, and Mostyn would become the competent harbour authority in relation to the outer navigation channel out to the North Rhyl buoy.
- 9.6. The EA considers that such an arrangement of conservancy and related jurisdiction would make it extremely difficult for the EA to discharge its duty to ensure the safety of navigation of waters lying within its jurisdiction, particularly those waters adjoining and divided by Mostyn's proposed area of jurisdiction as statutory harbour authority. The EA also considers that the proposed further division of responsibility could create an unacceptable level of risk to vessels using the Estuary and would be unworkable from an operational point of view. In particular, the shifting nature of the channel, and the narrowness of Mostyn's proposed area of jurisdiction mean that it is highly likely that the navigable channel would move closer to the EA's jurisdiction than is proposed. It is therefore more likely that a vessel may run into difficulties near, or indeed pass into, the EA's jurisdiction in the course of an incident that occurs in an area over which the EA would have no control.
- 9.7. The MHRO also appears to give no thought to the position of users of the estuary other than its own customers. Many recreational users traverse Mostyn's proposed area of jurisdiction, and if Mostyn's proposed Order were made, they would be in the position of travelling from the EA's jurisdiction, through Mostyn's, then back into the EA's, simply in the course of crossing one estuary. The EA is highly sceptical that Mostyn – who propose no consultative committee or other such body in their Order – would pay much if any credence to the interests of these users relative to its own commercial interests and those of its customers.

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- 9.8. By way of contrast, if the DHRO is made, the division of jurisdiction would remain as it currently is, with Mostyn responsible for its existing area, and the EA responsible for the rest of the estuary. Mostyn would remain responsible for pilotage for the whole estuary, with the extension to cover the outer channel.
- 9.9. The EA notes that Trinity House Lighthouse Service objected to the MHRO on 2 June 2003 citing their concerns about the possibility of their being two local lighthouse authorities in Mostyn's proposed area of jurisdiction as statutory harbour authority. [EA/26, THLS W1/1]

*Mostyn's commercial role conflicts with safety requirements*

- 9.10. The EA questions whether Mostyn would be able to reconcile satisfactorily its commercial role as the owner and operator of Mostyn Docks with its position as a body having functions to exercise in the public interest. Harbour and similar authorities have a duty to ensure that users of waters within their area of jurisdiction are able to navigate them safely. The grounding and stranding of the ferry *European Envoy* in the inner approach channel to the Port of Mostyn in December 2001 and the subsequent grounding of the ferry *European Seafarer* in a similar position later that month, amplified the EA's concern that safety considerations do not appear always to be given primacy by Mostyn over its commercial interests. These incidents occurred despite the EA having expressed, before ferry services commenced, its deep concern that Mostyn's safety measures and procedures were not sufficient for the introduction of ferry services in the Dee Estuary. Despite this warning, the ferry services were introduced before proper risk assessments had been carried out. [EA E/4, MOS30, MOS31]
- 9.11. Indeed, the way in which the ferry services were introduced is in the EA's view, symptomatic of Mostyn's difficulties in giving adequate attention to safety issues: the EA, through whose conservancy area the ferries were to travel, was given barely any notice of their introduction. There was insufficient time to carry out adequate risk assessments and insufficient will on Mostyn's part to implement their findings thoroughly.
- 9.12. Although Mostyn has since developed documented safety procedures, following considerable pressure from the EA, they were clearly disregarded when, in December 2002, without reference to the EA, Mostyn decided to sink a 900-metre length of dredging pipeline on the bed of the Estuary. This was placed in an area used by small fishing vessels when trawling and in the EA's view presented a serious hazard to their safety. Again, the EA was the conservancy authority for this area and was not notified by Mostyn. It is in this very same part of the Estuary that Mostyn is now proposing to assume jurisdiction as statutory harbour authority and so to be responsible for the safety of navigation in the waters concerned.
- 9.13. The EA's and Mostyn's Harbour Masters have held regular meetings to discuss navigation safety since 16 November 2001, at the instigation of the EA's Harbour Master. His experience of these meetings is that despite the fact that the EA is conservancy authority for the estuary through which Mostyn's customers travel, Mostyn's Harbour Master provides only limited information on a "need to know" basis, and is regularly less than open with the EA's Harbour Master. Despite these constraints, the EA and its Harbour Master have exerted consistent pressure on Mostyn to implement proper safety management procedures. The EA considers it highly unlikely that Mostyn would have taken the steps that it has taken without this pressure. As the MHRO would remove the EA's role as conservancy authority, the EA is highly sceptical that Mostyn

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would respond to such pressure from the EA in the future. The EA is concerned that this would present a substantial risk to navigation safety in the estuary.

- 9.14. In addition to the issue of risk identification and management, the EA is concerned that Mostyn might also fail to take due account of its other public duties as harbour authority over the extended area. The PMSC says at paragraph 1.6

*“The public interest is wider than that of harbour users, however, including the local community and environment; and there are duties to ensure that these too are protected in the management of the harbour undertaking.”*

- 9.15. One such important duty with regard to the environment is Mostyn’s duty, as a competent authority under the Conservation (Natural Habitats &c.) Regulations 1994, to identify the effects of its activities on the features of the European Site which the Dee estuary comprises. The EA is unconvinced that Mostyn has the expertise, experience, resources or motivation to comply with those broader duties. As stated above, the EA’s experience is that Mostyn regularly fails to provide the relevant nature conservation body – the Countryside Council for Wales – with information about operations that might affect the conservation features of the estuary, despite its duty to do so as a competent authority under the 1994 Regulations. The EA considers that Mostyn is highly unlikely to improve its performance when responsible for a wider jurisdiction.
- 9.16. In particular, the EA has been concerned to note the general paucity of information supplied with Mostyn’s successive dredging applications dating back to the mid 1990s. Indeed the fact that each dredge turns out to be insufficient for the intended purposes and invariably needs to be supplemented within a couple of years has made it difficult for environmental regulators adequately to assess the dredges’ cumulative impacts. The EA is concerned that given the fixed nature of Mostyn’s proposed extended jurisdiction and its purported relationship to a navigation channel that is naturally transient, Mostyn will be compelled to seek further dredging approvals in order to maintain its jurisdiction. The EA is not convinced from past performance that Mostyn is a suitable body to have this extended jurisdiction in these circumstances.
- 9.17. Beyond these particular difficulties that exist in relation to Mostyn’s proposal, which centre on what the EA perceives to be a conflict of interests, the EA considers that in the long term the responsibility for the safety of navigation on the Estuary should not be divided between two bodies, as it currently is. The EA does not consider this to conform to the policies underlying the PMSC or to be a sustainable solution generally, particularly given the increased use of the estuary recently by commercial vessels.
- 9.18. The consent issued to Mostyn on 4 September 2001 under the Coast Protection Act 1949 appears to concur with this view, requiring Mostyn to put in place on a non-statutory basis measures to control vessel movements and to take responsibility for wreck marking and removal in respect of the three-quarters of the navigation channel mentioned above currently outwith the jurisdiction of either the EA or Mostyn, until such time as “*a Harbour Revision Order is promoted to provide a solution for the entire estuary and its approaches.*” (emphasis added).

#### *EA’s need to charge dues*

- 9.19. The EA’s need to fund its conservancy and local lighthouse authority functions from estuary users by levying dues would be severely restricted in practice, if the Mostyn’s proposed Order were made, given that the EA would not be able to levy ship dues on

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those vessels navigating to and from Mostyn Docks. The EA would be left with a large part of the Estuary within its control as conservancy and local lighthouse authority but with a very limited ability to fund the performance of its functions by levying dues on estuary users. In consequence, the EA would have to continue to depend almost entirely on public funds to allow it to discharge its conservancy and local lighthouse authority functions, which it does not consider to be in accordance with current “users pay” government policy.

- 9.20. The DHRO would provide a modern and appropriate power to levy dues. Further to discussions with Mostyn, the EA is prepared to modify this power so that it may not levy passenger or goods dues in respect of vessels navigating between Mostyn and the sea. While it would seek to levy ship dues in respect of these vessels, these would be discounted by an amount equivalent to the reasonable expenditure made by Mostyn toward conservancy and local lighthouse functions under the MOA agreement. This would fairly meet the “user pays” principle in a way that satisfies Mostyn’s concerns.
- 9.21. The EA notes that other parties have objected to the MHRO and comments on them are set out below.

*Mersey Docks and Harbours Company*

- 9.22. MDHC’s main objections is that Mostyn’s proposed Order would be “another example of the piecemeal development of the Port of Mostyn”, the cumulative impact of which “have not been adequately considered or investigated”. MDHC gives specific examples of perceived inadequacies in Mostyn’s 1995, 2001 and 2002 dredging applications, the illegal deposit of materials in Liverpool Bay, and inadequate assessments of matters such as noise assessments.
- 9.23. The EA is sympathetic with MDHC’s concerns, which reflect the concerns that it has expressed above. As one of the regulators from whom Mostyn has sought approvals for dredging, the EA has had frequent concerns about the adequacy of the supporting information presented by Mostyn. If the MHRO is made, the EA would lose this approval role, and it is naturally concerned at the prospect of further dredging taking place outside its control. The EA is also concerned that the transient nature of the navigable channel may require regular dredging if it is to remain within Mostyn’s proposed expanded jurisdiction. No environmental statement or appropriate assessment of this dredging has been provided to support the MHRO. By way of contrast, the DHRO would require no specific works or dredging. Any works or dredging that did take place under the DHRO would require a licence from the EA, as is the case in many other conservancy authority jurisdictions.

*Countryside Council for Wales (CCW)*

- 9.24. CCW objects to the MHRO on several grounds. These include the increased risk to vessels, and consequent damage to conservation features, arising from the complication of responsibility for navigation safety; the likelihood of additional maintenance dredging that might have an adverse impact on the conservation features of the estuary; Mostyn’s difficulty in reconciling the conflict between its commercial interests and its conservation obligations; and Mostyn’s failure to demonstrate the necessary standards of management of port marine and shipping operations. Furthermore, CCW expressed a preference for the EA to retain the conservancy jurisdiction. The EA shares all these concerns and has referred to them in detail above. English Nature supports the objections of the CCW. [EN W1/1]

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*Wirral Metropolitan Borough Council*

9.25. The EA supports the concerns of Wirral MBC, many of which it has expressed itself.

***Support of extension of Mostyn’s limits of jurisdiction for the purposes of pilotage***

- 9.26. Mostyn conducted a risk assessment of the channel now the subject of this application in August 2001. That assessment concluded that compulsory pilotage in that area was necessary to manage and control the assessed risks. Similarly the Coast Protection Act consent mentioned earlier states that “*The Port of Mostyn must ensure that satisfactory arrangements for pilotage or pilotage exemption are in place prior to the commencement of the commercial service.*”.
- 9.27. The EA therefore supports the extension of Mostyn’s jurisdiction for the purposes of pilotage, as envisaged by the MHRO, indeed, believes that Mostyn’s application is overdue having regard to its duties in the Pilotage Act 1987.
- 9.28. The EA also believes that the extension of Mostyn’s pilotage jurisdiction in this manner should satisfy the concerns of Trinity House expressed in their objection letter and subsequent email. [TSLs W1/1] As pilotage authority, Mostyn would be able to control vessel movements in the outer channel as required by Trinity House. Mostyn would also be able to maintain aids to navigation in that clause under the existing non-statutory arrangements. However as (in accordance with the EA’s objection) only their pilotage jurisdiction and not their statutory harbour authority jurisdiction would be extended, there would be no possibility of there being two local lighthouse authorities within the estuary, which would clearly be undesirable.
- 9.29. The safety and environmental concerns that the EA has raised above in respect of the extension of Mostyn’s harbour authority (so including conservancy and local lighthouse authority) jurisdiction do not apply in the same way to its pilotage jurisdiction. An extension of Mostyn’s pilotage jurisdiction would not remove the Agency’s conservancy role, so the EA would be able to continue to ensure the safety of navigation, aided by its modernised powers and funding. Nor would an extension of the pilotage jurisdiction have an environmental impact, as it would not carry with it extended dredging requirements or powers or an extended jurisdiction as a “competent authority” for conservation purposes.

***(ii) Wirral Metropolitan Borough Council***

9.30. Wirral MB is also concerned that Mostyn’s proposed Order would split responsibilities for navigation on the estuary, whereas Wirral’s preference is for a single body to manage navigation in the interests of all users. Wirral are also concerned that Mostyn’s proposed Order would remove certain controls on Mostyn’s own dredging activities, that it would impair the Agency’s ability to regulate the recreational navigation in the estuary outside Mostyn’s proposed area of jurisdiction, and that additional dredging would be likely to have an adverse impact on conservation features and the cockle fishery. Were the Order to be granted, it may become more difficult to assess, monitor and control the impact of dredging carried out within the navigable channel and its effect on the wider Estuary, in particular on fisheries and nature conservation interests.

***(iii) The Mersey Docks and Harbours Company (MDHC)***

9.31. MDHC’s main objections is that the MHRO would be “another example of the piecemeal development of the Port of Mostyn”, the cumulative impact of which “have

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not been adequately considered or investigated”. MDHC gives specific examples of perceived inadequacies in Mostyn’s 1995, 2001 and 2002 dredging applications, the illegal deposit of materials in Liverpool Bay, and inadequate assessments of matters such as noise assessments.

- 9.32. The EA is sympathetic with MDHC’s concerns, which reflect the concerns that it has expressed above. As one of the regulators from whom Mostyn has sought approvals for dredging, the EA has had frequent concerns about the adequacy of the supporting information presented by Mostyn. If the MHRO is made, the EA would lose this approval role, and it is naturally concerned at the prospect of further dredging taking place outside its control. The EA is also concerned that the transient nature of the navigable channel may require regular dredging if it is to remain within Mostyn’s proposed expanded jurisdiction. No environmental statement or appropriate assessment of this dredging has been provided to support the MHRO. By way of contrast, the DHRO would require no specific works or dredging. Any works or dredging that did take place under the DHRO would require a licence from the EA, as is the case in many other conservancy authority jurisdictions.

*(iv) Countryside Council for Wales (CCW)*

- 9.33. It is important that the Dee Estuary is managed in a way that will ensure the long term sustainability of the estuary and the wildlife it supports. The proposed MHRO would result in a complication of the arrangements for the responsibilities for the management of the Estuary. This would result in an unacceptable level of risk to vessels using the Estuary and to the wildlife the Estuary supports should a pollution incident result from vessel grounding or collision. Any HRO should, as far as possible, provide for the integrated management of the port and navigation operations throughout the estuary
- 9.34. Maintenance dredging of the navigational channel to the port of Mostyn is already a contentious issue between Mostyn and the regulators. The proposed MHRO, if approved, would lead to Mostyn seeking to carry out further dredging operations. It has not yet been ascertained that Mostyn’s existing dredging proposals, if implemented, would not have an adverse effect on the integrity of the Estuary and the wildlife it supports. Further dredging would exacerbate these effects.
- 9.35. Mostyn has not satisfactorily reconciled its commercial role as owner and operator of Mostyn Docks with its responsibilities as a competent authority under the Conservation (Natural Habitats Regs) 1994 and a public body within the meaning of Section 28G of the Wildlife and Countryside Act 1981 as substituted by the Countryside & Rights of Way Act 2000, or its environmental duties as a harbour authority under Section 48 of the Harbours Act, as amended. CCW is concerned about the way in which Mostyn has approached the need to balance operational requirements (particularly maintenance dredging and disposal) and environmental responsibilities. Meanwhile the proposed MHRO would extend the area within which Mostyn could carry out dredging and other operations without obtaining the consent of the regulatory authorities.
- 9.36. Mostyn has not demonstrated the expertise, resources, transparency consistency or commitment necessary to comply with its environmental duties and it would, therefore, be inappropriate to extend Mostyn’s statutory powers as envisaged by the MHRO. Transferring responsibility from the EA to Mostyn for parts of the estuary would be a retrograde step which would reduce the effectiveness with which existing regulatory controls can be applied to Mostyn’s activities and increase the risk of damage to the wildlife interest of the estuary.

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**(v) RSPB**

9.37. The extension of the limits of jurisdiction may have an effect of reducing the ability of statutory authorities to control activities which may have an adverse impact on the integrity of the Dee Estuary SSSI, SPA and RAMSAR site. The EA should continue to be the Conservancy Authority for the entire estuary in order to ensure an integrated approach to management for wildlife.

**(vi) Dee Estuary Conservancy Group**

9.38. The Dee Estuary Group is an assemblage of 25 local and national non-statutory bodies which have an interest in conserving the wildlife of the Dee Estuary. The extension of the limits of jurisdiction may have an effect of reducing the ability of statutory authorities to control activities which may have an adverse impact on the integrity of the Dee Estuary SSSI, SPA and RAMSAR site. The EA should continue to be the Conservancy Authority for the entire estuary in order to ensure an integrated approach to management for wildlife.

9.39. Mostyn does not have the expertise to carry out the function of “competent authority” under the Habitats Directive (or a “public body” within the meaning of the Wildlife and Countryside Act 1981 and CROW Act 2000). The EA is an appropriate body to carry out these statutory functions.

**Other representation**

9.40. Cllr Heesom supported the MHRO and referred to his presence on the Dee and Clwed Area Flood Defence Committee and his impression that the issues concerning dredging were unreasonably drawn out. It was believed that the regulators in the case were acting under the advice of the EA. In addition, the policies of the Assembly are committed to the provision of a viable and investment assured port at Mostyn and its commercial development. The use of the port of Mostyn by Airbus cannot be put at risk. The EA has failed to show any understanding of commercial interest in the past.

**10.0 Response by Port of Mostyn to objections to the MHRO**

*Conservancy Jurisdiction*

10.1. It will be clear from charts showing the existing areas of Conservancy jurisdiction within the Dee Estuary and the changes which would occur if either of the HROs were to be implemented, that the Conservancy jurisdiction within the estuary is currently split between Mostyn and EA. This would continue if either HRO were to be implemented. However, implementation of the MHRO would mean that the main navigation channel into the Port (which carries the most traffic and therefore imposes the greatest risks to vessels and the environment) would be under the control of one body, which would also be the Pilotage Authority for the same area.

10.2. If the DHRO were to be implemented, this would not secure that navigation aids are provided for the outer channel and would mean that Conservancy Jurisdiction for the main navigation channel into the Port would continue to be split between Mostyn and the EA, with a further split around Mostyn’s Statutory Harbour Area.

10.3. Mostyn currently provides and maintains almost all navigation aids within the main navigation channel by default, because it is providing navigation aids within the outer channel in lieu of Trinity House, it is providing and maintaining aids within the MOA under the Agreement of July 2003, and because it has power to do so within the SHA.

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Mostyn also provides hydrographic survey information, tidal predictions and tidal and meteorological data to other bodies and users of the estuary.

*Reduction of Controls over Dredging*

- 10.4. Dredging work within the SHA is currently subject to the following controls:
- (a) Consent from the Secretary of State for Transport under Section 34 Coast Protection Act 1949;
  - (b) A Licence under Part II of the Food and Environmental Protection Act 1985 to deposit any dredgings in the sea;
  - (c) Compliance with the requirements of Section 28 G of the Wildlife and Countryside Act 1981 to obtain the assent of the Countryside Council for Wales;
  - (d) An obligation to carry out an “appropriate assessment” under Regulation 48 of the Habitats Regulations 1994;
  - (e) A Statutory Duty under Section 48A of the Harbours Act 1964 to have regard to certain conservation matters when considering any proposals relating to the exercise of Mostyn’s functions.
- 10.5. The above controls require an assessment of the environmental affects of the proposed dredging operations to be carried out before consent or approval can be given, or the dredging is carried out. Therefore, the environmental affects of any proposed dredging would be fully taken into account by Mostyn and other parties before any dredging operations could begin.
- 10.6. The only form of control which does not apply within the SHA is consent by the EA to dredging operations under the Water Bylaws made under the Land Drainage Act. The only effect of the proposed HRO so far as dredging operations are concerned would be to remove the need for consent under the Water Bylaws from the 500 - metre wide corridor to accommodate a navigation channel, so far as this is within the jurisdiction of the EA as the Conservancy Authority. In view of the controls set out above which would remain, it is not clear why the additional control in the form of consent under the Water Bylaws would add anything significant to the controls which are already in place.

*Lack of resources/expertise to carry out duties*

- 10.7. It can be seen from above that by virtue of the provision of navigation aids and hydrographic surveys by Mostyn, in practice it is already carrying out conservancy duties within the SHA and the main navigation channel. These duties include providing hydrographic survey information, tidal predictions and tidal and meteorological data all Estuary users. It is therefore clear that MDL already has the resources to carry out these duties at the present time.
- 10.8. Where necessary, Mostyn has in the past engaged outside Consultants to advise on specific issues such as hydrology and nature conservation. Appropriate assessments have been prepared and submitted in support of applications for various consents under the legalisations set out above.



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- 10.9. If objectors are concerned that Mostyn does not have the resources and expertise to carry out conservancy duties, it is not understood why, eg, the EA gave Mostyn a responsibility for carrying out such duties under the agreement covering the MOA.
- 10.10. In contrast, the EA has not provided any surveys for the purposes of navigation in the estuary since it took over responsibility for conservancy functions.

#### *Mostyn's Safety Record*

- 10.11. Mostyn has demonstrated that it operates safely and responsibly. In respect of the incidents referred to by objectors there are explanations which do not call into questions its safety record.

#### *Funding of EA Conservancy Duties*

- 10.12. Mostyn agrees and accepts that in respect of dues collected from vessels using the Estuary, the "user pays" principle should apply, ie those vessels which benefit from the use of the navigation aids and hydrogeological surveys should contribute to the cost of their provision in those parts of the Estuary to which they can gain access.

#### *Wirral MBC*

- 10.13. Mostyn has referred the conduct of Wirral MBC to the Local Government Ombudsman and has declined to comment on the objections.

#### *Countryside Council for Wales (CCW)*

- 10.14. Mostyn reject the assertion by CCW that the MHRO would lead to an increase in dredging. In any event, whichever HRO is accepted, dredging would be required to maintain or improve the channel. The MHRO would result in a less complicated management arrangement. No evidence has been supplied that Mostyn has not carried out its environmental responsibilities. Indeed, a vast quantity of information has been collected and supplied to the regulators which has increased their understanding of estuary behaviour. The CCW version of the pipeline incident is biased. Mostyn gave priority to immediate practical necessity over the lesser priority of administrative procedures.
- 10.15. The delay in gaining PMSC compliance was due to the Dee Conservancy finding it difficult to accept the work of marine consultants employed by Mostyn. There is no evidence to suggest that Mostyn lacks the expertise or commitment to implement the PMSC.
- 10.16. The MHRO would not fragment areas of jurisdiction. In fact, the MHRO would provide one continuous navigation channel between the sea and the port under one jurisdiction unlike the DHRO. There has never been an oil spill incident and there is no reason to suggest that shipping lines who use Mostyn would be any less responsible than when using other ports. CCW has been heavily involved in the process of Mostyn obtaining consent for all proposals and has been notified where required by certain operations.
- 10.17. In relation to the recent prosecution for dredging deposits in 2001, the Court found that the reasons for this incident were due to a misunderstanding of both appropriate consent conditions and that there had been inadvertence by both Mostyn and DEFRA.[MOS28]
- 10.18. CCW infer that there are concerns about future dredging to both the inner and outer channels. However, CCW has been provided with regular monitoring reports which have

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all shown that there has been no adverse impact on the designated sites of either the Dee Estuary or Gronant. Indeed, Mostyn carried out beach nourishment works at Gronant with sand dredged from the inner channel in association with the local authority concerned. There is no evidence that Mostyn has disregarded its dredging responsibilities.

- 10.19. CCW fails to acknowledge that Mostyn already undertakes responsibilities for aids to navigation from the port to the outer channel and has pilotage responsibilities for the entire estuary. CCW asks that, in the event of the MHRO being successful, an additional condition be included requiring Mostyn to “further” the conservation and enhancement of flora and fauna, but this would be inequitable because such conditions are not applied to ports elsewhere in the UK.

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## 11.0 Conclusions Numbers in subscript refer to paragraph references in the report

- 11.1. The EA is promoting the Dee Estuary HRO (DHRO). Mostyn Docks Ltd is promoting the Mostyn Docks HRO (MHRO). The Order areas overlap. Therefore, I shall conclude on the objections of the rival promoters before commenting on other objections which have not been subsumed in the primary conclusions. 1.1 – 1.4
- 11.2. Each promoter is objecting to the other's Order and there is no dispute that the Orders are incompatible in their draft and filled state. Nevertheless, there is a measure of agreement between the rival promoters on the extent to which some aspects of each Order could be accommodated. 4.12 – 4.15
- 11.3. The EA does not object to the enlargement of Mostyn's **pilotage** so that Mostyn should have its limits of jurisdiction as competent harbour authority extended as sought in the MHRO. Therefore, proposed Article 4 of the MHRO is without challenge. 4.12
- 11.4. Similarly, Mostyn does not object to the DHRO **outside the defined channel** and the Mostyn SHA area. Accordingly, the EA would be able to collect dues from vessels travelling between the port of Mostyn and the parts of the defined channel and the Mostyn SHA area. 4.13 - 4.15
- 11.5. **The inner channel** of the Dee Estuary includes the area of the jointly agreed procedures at the Mostyn Operational area (MOA) which have been developed between the EA and Mostyn. This is recognised practice required by the Port Marine Safety Code (PMSC). There have been few significant areas of disagreement between the EA and Mostyn on the implementation of the MOA. One such incident was the unannounced arrival of the vessel carrying the section of pipeline which was then placed in the main channel. But it seems to me that the responsibility for timely arrival rests with the incoming vessel, rather than the destination port and therefore I do not consider that the Mostyn can be criticised for the actions they took. Nevertheless, I am surprised that there is 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 would be at its most efficient. 3.12, 5.71 – 5.72, 7.5 – 7.7, 7.12, 7.14
- 11.6. The defined inner channel may currently be tightly delineated on the ground, but this may change, particularly as there is no dispute that there is a high sediment flow into and out of the estuary. The channel is volatile with a complex morphology. Consequently, if the MHRO was confirmed, not only would the extended Mostyn SHA 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. I consider that it would be likely to lead to confusion and reduce safety of navigation. This view is given added weight by the MARICO report and the Dee Conservancy Risk Assessment which illustrate the systematic methodology the EA has brought to the HRO process. 5.21 – 5.24
- 11.7. The MOA requires Mostyn to take all reasonable steps to comply with the PMSC, the Mostyn Safety Management Procedures and the Joint Safety Management Procedures. I have no doubt that Mostyn discharges its duties diligently. Yet the MOA has been brought about by the current respective roles of the EA and the Mostyn within the inner channel and so despite the possible perception of overlapping responsibilities, a

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consequence has been the establishment of jointly operated procedures which benefit safety and navigation in the channel. 6.3, 7.5 – 7.6, 7.12, 8.13

- 11.8. Vessel movements in the estuary outside the defined channel mostly comprise recreational craft, fishing boats and the Dee River Craft navigating between Mostyn and Broughton. In my opinion, the twice yearly regatta traffic heading towards Anglesey is a relatively minor occurrence of little significance to the issue of the overall control of safety and navigation in the estuary. There will be more interaction between the vessels heading to the port and other recreational and fishing vessels in the estuary. However, there is no evidence to suggest that the MHRO would cause a harmful impact on any of those. Nevertheless, quite understandably, Mostyn evidently hopes to attract more trade. Therefore, it would be unwise to assume that traffic in the estuary will not increase. 9.7, 9.8
- 11.9. So far as the Risk Assessments are concerned, the characteristics of the estuary activities are governed by the interaction of natural phenomena with human behaviour which inevitably results in events which are unpredictable. Accordingly, I do not find that Mostyn or the EA are 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, notwithstanding the efforts made by each party to criticise the other. I believe the desirability or not of the HROs should be judged on longer term considerations at least as much as the day to day operations within the MOA, or outside it. 5.35 – 5.38, 5.71 – 5.74, 9.10 – 9.11, 10.11
- 11.10. The operational conflicts between the EA and Mostyn may be symptomatic of an uncomfortable working relationship between the two organisations but, to a certain extent, this is a result of the different cultures within them. Mostyn is a commercial concern where it would be expected that business needs are paramount. The EA has a broader regulatory role. Should either organisation require further expertise to fulfil the functions required under the respective HROs, they may seek it either from outside consultants or acquiring in house expertise. Neither option would present insuperable difficulties. 10.7 – 10.9
- 11.11. There have been no incidents reported in the **outer channel**. Nevertheless, Mostyn argued that control was required over the outer channel in order to deal with possible wrecks. However, the EA pointed out that there are already 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, within or near any approach to, any harbour or tidal water under the control of a harbour authority or conservancy authority. Therefore, as indicated in the Guide to Good Practice for Port Marine Operations, Mostyn can already remove a wreck or obstruction in the outer channel. 5.55, 7.18, 8.12
- 11.12. Furthermore, the ability to light and mark the channel is already enabled by Condition No.2 of the Coast Protection Act consent granted in 2002 which gives Mostyn permanent powers to maintain the works permitted by the consent. Fishing vessels less than 47.5m long and other vessels less than 20m long would not be subject to compulsory pilotage in the outer channel. But there was no substantive evidence submitted to the inquiry of problems caused by such lack of pilotage.
- 11.13. The evidence suggests that there has not been any systematic analysis by Mostyn, such as a Risk Assessment, to provide a basis for seeking powers of an extension to the SHA, implying that Mostyn has not complied with the Port Marine Safety Code (PMSC) in promoting the MHRO for the outer channel. Furthermore, I do not accept that there is a need for the Dee Conservancy to be extended into the outer channel. The EA submitted

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that an extension of its proposed power to give general directions would be within the scope of Schedule 2 of the Harbours Act 1964 and so could be provided for in the DHRO. There is no evidence to indicate that this would be necessary. However, the EA supports the principle of Mostyn becoming the CHA for the outer channel. 6.3, 6.24, 7.1 – 7.4, 8.14, 10.1

- 11.14. Generally, I agree with the EA that there is a difference of emphasis between the two promoters. Mostyn appears to concentrate on buoys, dredging, hydrographic surveys and tidal information. But this is understandable given the need to move vessels safely in and out of the Port. There seems to be relatively less effort dedicated to risk assessment and safety management systems, although this is required under the PMSC. The EA was also concerned that Mostyn would be less attentive to environmental concerns than it should be. I agree. An indication of this is the assumption that the permission to capital dredge carried with it an implied power to maintenance dredge and I accept that these indicators erode confidence in the commitment of Mostyn to environmental issues and other conservancy duties which would be required in the extended SHA. Conversely, I am not convinced that the evidence supports the assertion by Mostyn that the EA have a poor record as a Conservancy Authority. 6.7 – 6.11, 6.20, 6.22, 7.16 - 7.18, 9.16, 9.32, 10.17
- 11.15. Mostyn accepted that the **Consultative Committee** proposed in the DHRO was not unorthodox or unusual. The Committee would not have any executive powers and the EA stated that more weight would be given to those stakeholders with a higher burden of costs. There is no equivalent committee proposed in the MHRO. I do not consider that the business users who would sit on the Committee would have their views diminished due to possible superiority in numbers of other non business representatives. It would be contrary to common sense for the non business users of the estuary to seek to place economic constraints on the private sector stakeholders such that there would be danger of being those interests being fatally damaged from a financial point of view. The economic benefits brought about by the use of the port of Mostyn are of significant public interest to this part of North Wales. In my opinion, those benefits would not be jeopardised by the Consultative Committee proposed under the DHRO. 5.54, 6.20 - 6.21, 6.23, 6.29, 7.49
- 11.16. The two HROs treat the collection of **dues** from ships differently. The MHRO, which would transfer the inner channel to Mostyn, would not provide power to collect dues. The DHRO would enable the EA to collect dues from ships which travel to the port and from other vessels in the estuary. The EA indicated at the inquiry that dues structure would be likely to be based on two main zones: the Irish Sea to Mostyn and from Mostyn to Wilcox Point. In my view, the collection of dues, on a “user pays” principle, would be an equitable means of funding the costs of the Conservancy, whether this would amount to recovery of the full cost or merely a proportionate contribution with the deficit funded from other sources within the EA as it is now. Under the DHRO, the Consultative Committee would be involved in setting the dues, although it would not be the final arbiter. 4.14, 4.21, 5.56, 5.67 – 5.68, 6.12 – 6.15, 6.19, 9.19 – 9.20, 10.12
- 11.17. Although Mostyn has suggested that the dues bill would be excessive, the rates have not been set and, in my opinion, it would be very unlikely that the dues would be so expensive that the financial viability of the port trade would be harmed. The facility to appeal to the Secretary of State under Section 31 of Harbours Act would be an added safeguard to challenge the structure and level of dues. There is also the ability to challenge the dues by judicial review, although this seems the least likely route to solve

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any dispute. Therefore, all in all, I see no reason to uphold the objection by Mostyn to the dues element of the DHRO.

- 11.18. There is no reason to conclude that the EA dealt with the recent dredging applications and the appropriate assessment in an overly protracted manner, particularly as there were two other regulators in the case, the Department for Transport and the Welsh Assembly. Accordingly, I do not accept that the continued ability of the EA to be a regulator of the inner channel would prejudice the future of the port. Neither is there any reason to suspect the EA would prioritise its other functions ahead of maintenance, dredging and aids to navigation in the estuary. 5.53 – 5.61, 6.3 – 6.11, 7.8 – 7.11, 7.23 – 7.25

### ***The Chamber of Shipping***

- 11.19. The objections of the Chamber of Shipping align closely with those of Mostyn and for the same reasons I do not consider that they are sufficient to reject the DHRO and prefer the MHRO. The DHRO would not result in the fragmentation of the responsibility of the safety of the channel. Under the DHRO, the EA would collect dues on a “user pays” principle, which is reasonable and proper. There is an assumption in the objection that the EA refuse to grant the dredging consents that are necessary for the operation of the Port. There is no evidence to support this assertion. Neither is there evidence to suggest that the EA cannot balance its responsibilities for safe navigation and port operations with its nature conservation and recreation interests. The objection by the Chamber to the Consultative Committee has been dealt with in the filled up Order. Accordingly, I do not support the objections of the Chamber of Shipping. 6.16 – 6.20, 7.19 – 7.26

### ***Mr Shillington***

- 11.20. Despite the objections by Mr Shillington, I consider that the evidence submitted indicates that the safety of navigation in the estuary would be improved by the adoption of the DHRO and the partial adoption of the MHRO so far as pilotage is concerned. Moreover, there is no reason to conclude that the DHRO would threaten the viability of the Airbus A380 project. Therefore, in addition to the reasons outlined in Chapter 11 above, I conclude that the objections from Mr Shillington should be dismissed. 6.21, 7.44 – 7.49

### ***Mr Spencer Rogers***

- 11.21. I recognise the points made by Mr Spencer Rogers about the importance of the estuary and Mostyn harbour. However, I believe that the maintenance of the aids to navigation and the dredging regime would not be harmed by the confirmation of the DHRO as proposed to be modified by the EA. The A380 Airbus wings export project would not be prejudiced. The Consultative Committee as provided for by the DHRO would incorporate the views of all estuary users as opposed to the MHRO which did not include measures for any similar consultation. Accordingly, I do not support the objection of Mr Spencer Rogers. 6.22 – 6.23, 7.52

### ***Councillor Heesom***

- 11.22. The support by Cllr Heesom for the MHRO brings him into direct opposition to the DHRO. Nevertheless, Cllr Heesom accepted that the approach by the EA to complex issues involved in the previous dredging applications had been robust and that the EA had facilitated the economic interest of Deeside. Although I note the support by Cllr Heesom for the DHRO, none of the points he brought forward suggested that the DHRO should not be confirmed. 6.30, 9.40

### ***Trinity House***

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11.23. Trinity House made representations on both HROs. Their main concerns that each area of jurisdiction should only have one conservancy authority, one local lighthouse authority and one harbour authority have been met in changes proposed in the filled up draft Order. Trinity House has also agreed to the paper of modifications to both HROs in the event that the Mostyn HRO is approved in the form which allows the Port to extend its SHA area. 5.14, 6.3, 6.24, 7.53 8.9, 8.13, 9.9, 9.28, 10.3, 11,24

### ***Others***

11.24. Objections and representations made to the DHRO from the Acting Conservator of the River Mersey, the Mersey Docks and Harbour Company, the Inland Waterways Association, West Kirby Sailing Club and the Dee Sailing Club have been withdrawn. The DHRO is supported by, amongst others, the Wirral MBC, the Mersey Docks and Harbour Company, the Countryside Commission for Wales and the RYA.

### **Overall conclusions**

- 11.25. The two HROS are mutually exclusive in their draft form, but there is no dispute that Mostyn should become the CHA for the estuary, so extending the pilotage jurisdiction of the port.
- 11.26. Although Mostyn and other objectors to the DHRO consider that the EA would be an inappropriate body to have jurisdiction over the defined channel of the estuary, there was no evidence to indicate a conflict of interest or that marine safety would be imperilled, other than the incidents referred to above. Mostyn fears that the commercial uses of the estuary would be subordinate to the other functions of the Conservancy. However, I consider that it would be most unlikely that the EA would wish to prejudice the economic activities of the area by acting as an unreasonable constraint on the viability of the port, subject to the duties of the Conservancy not being undermined.
- 11.27. The EA and other objectors to the MHRO consider that Mostyn would place commercial interests ahead of its other responsibilities in an extended SHA area. I recognise this as a genuine concern and the apparent confusion of the depth of maintenance dredging permitted does little to allay it. Mostyn has the practical expertise to maintain the channel and other specialist advice could be sought if necessary but there is a danger that commercial considerations would be paramount and that conservation and other environmental concerns would be neglected. I do not accept that safety would be adversely affected. The various safety incidents which were brought to my attention in the inquiry were not necessarily evidence of neglect by either party.
- 11.28. Mostyn and the EA dovetail their current responsibilities by using the MOA agreement. In my opinion, whereas there is an element of duplication, the overseeing role of the EA and the cooperation between the two main parties serves to ensure that there is a higher standard of maintenance of aids to navigation and the channel than otherwise might be the case if there was just one body dealing with the issues. I consider that the erosion of the MOA agreement by the confirmation of the MHRO would be a retrograde step. It is in the interests of both the EA and Mostyn to cooperate to ensure the operations to maintain navigation in the channel are effective and there appears to be no sound reason that both parties cannot work together for the common good of the efficient running of the estuary. Nevertheless, I would encourage the EA to conduct its involvement in the MOA with a “light touch” whilst ensuring that its interests as the Conservancy authority are not prejudiced.

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- 11.29. The EA and Mostyn would have to cooperate if the MHRO was confirmed as drafted, because the inner channel would slice through Conservancy jurisdiction. Therefore, it seems that the cooperation can also extend to working together, as is the practice now, if the EA retains its current Conservancy functions in the inner channel. I do not accept that confirming the MHRO as drafted would improve the efficient running of estuary.
- 11.30. So far as the outer channel is concerned, if the proposed extension of the SHA jurisdiction by Mostyn in the inner channel is not confirmed, it would be wholly illogical to enable the port authority to have Conservancy control in the outer channel due to the confusion of boundaries at the mouth of the estuary. In addition, even if the MHRO were to be confirmed for the inner channel, it does not follow that the proposals in the Order for the outer channel should also be confirmed. The lack of a risk assessment, as advised by the PMSC, does not assist Mostyn's case. There was no sound evidence of difficulties in the outer channel. Nevertheless, as advanced by the EA, there is no reason not to enable Mostyn to become the CHA for the outer channel.
- 11.31. I have no comment on whether Mostyn was required to seek SHA jurisdiction over the extended conservancy area by the consent granted on 4<sup>th</sup> September 2001 under Section 34 of the Coast Protection Act other than think it unlikely that one consent would be predicated on a subsequent consent being obtained, when the first could be implemented prior to the second being allowed. For example, the proposed HRO to give effect to the extended SHA area might prove to be unacceptable.
- 11.32. I agree that it is reasonable for ships dues to be charged and that it should be based on the "user pays" principle. However, there should be some offset for commercial estuary users such as Mostyn where it carries out work and that there should be proportionality of payment so that the further upstream a vessel goes, the more duty should be paid. This would be a matter for discussion by the Consultative Committee.
- 11.33. It seems to me that each of the tests set out in Section 14 of the Harbours Act could be met by both Orders to a greater or lesser extent, with the exception of the reference to the interests of the recreational use of sea going ships, which only the DHRO would address. However, the tests are in the alternate, and given that I consider that the DHRO would meet more of them with and with greater confidence, I shall recommend the direction advocated by the EA. This should ensure that the interests of nature conservation are not subordinate to commercial considerations whilst taking account of the business needs of the port.

### **Recommendation**

- 11.34. I recommend that Order A (DHRO) be confirmed as filled; that only the proposed Article 4 of Order B (MHRO) be confirmed, which would have the effect of extending the Mostyn CHA jurisdiction and that the details as proposed by the EA be incorporated in Order A.

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