



Department
for Transport

Guidance on Harbour Closure Orders and Pilotage Function Removal Orders

**Statutory Guidance on the circumstances in which a harbour closure order
maybe made under section 17A of the Harbours Act 1964 and additional
Guidance on the process for applying for a pilotage function removal order
under section 1(4A) of the Pilotage Act 1987.**

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HARBOUR CLOSURE ORDERS AND PILOTAGE FUNCTION REMOVAL ORDERS

EXECUTIVE SUMMARY

1. Harbour authorities are responsible for managing and running safe and efficient harbours. They have particular responsibilities in relation to the safety of vessels and people within the harbour, efficient navigation and the protection of the port environment.
2. Under the *Port Marine Safety Code* (PMSC) co-produced by industry and the Department, harbour authorities are encouraged to keep their powers under review and take action as necessary to ensure they are appropriate. In some cases this will mean relinquishing powers that are no longer necessary for the safe and economic operation of the harbour.
3. The Marine Navigation Act 2013 (“2013 Act”) created two new processes allowing the relevant administration in England, Wales and Scotland to make an order revoking a harbour authority’s status as either a statutory harbour authority (SHA) under the Harbours Act 1964 (“1964 Act”), where the term actually used is simply “harbour authority” or a competent harbour authority (CHA) for the purposes of the Pilotage Act 1987 (“1987 Act”). This guidance does not apply in the Scottish context.
4. The harbour closure order guidance in Part A is statutory guidance issued under section 17A(2) of the 1964 Act which requires the Secretary of State to publish guidance

about the circumstances in which a closure order will be made and which requires the Secretary of State to have regard to the underlying purpose. Such a closure order may be sought for the underlying purpose of permitting or requiring harbour authorities to cease to maintain harbours which are no longer commercially viable or necessary: essentially it is a question of financial and commercial sustainability.

5. This guidance sets out how the requirement that the Secretary of State has regard to the underlying purpose of a harbour closure order will be implemented in practice and the information required to be provided.
6. This document also provides in Part B non-statutory guidance on the process that will be followed for an Order to remove a harbour authority from the list of designated CHAs for pilotage purposes under the 1987 Act.

Devolution

7. Port legislation other than in relation to security is a devolved matter. The Secretary of State in England will assess applications for ports in England and non-fishery ports in Wales.
8. In the case of a fishery harbour in Wales the harbour authority should liaise with the Welsh Government.
9. In the case of a harbour in Scotland they should contact the Scottish Government.
10. The 2013 legislation does not apply to SHAs in Northern Ireland.

How to apply to the Department

11. Expressions of interest or applications to have either statutory harbour or pilotage functions removed should be submitted to the Department (as the relevant authority for SHAs in England and non-fishery SHAs in Wales) by e-mail to: ports@dft.gsi.gov.uk
12. Fishery ports in Wales should apply to the Welsh Government at: fisheriesmailbox@wales.gsi.gov.uk.
13. This advice note applies to England and all ports in Wales as agreed by the Welsh Government. Transport Scotland will publish its own guidance, and SHAs in Scotland should refer to that.

PART A: HARBOUR CLOSURE ORDERS

1. Background

The legislation

1.1 Section 6 of the 2013 Act inserted new sections 17A-17F into the 1964 Act which came into force in October 2013. Section 17A empowers the Secretary of State to make a harbour closure order in respect of a harbour. Hitherto, the 1964 Act did not provide for complete closure of a harbour, only partial closure through a harbour revision order under section 14 of the Act. Harbour closure orders may be made:

- (a) on the application of the harbour authority;
- (b) with the consent of the harbour authority; or
- (c) if the Secretary of State has consulted the harbour authority and is satisfied that they are unlikely to object.

What is the impact of a harbour closure order?

1.2 This means that an SHA would be relieved of some or all of its statutory functions and in the latter case would no longer be classed as an SHA, that is to say a harbour authority as defined in the 1964 Act. It does not necessarily mean that the actual port, harbour or area would cease to exist, although the way people use the area may have to change.

1.3 The order must include transitional provisions about the cessation of the SHA functions. It may also include

other provisions, for example those which permit or require the SHA or Secretary of State to carry out works in respect of the harbour.

What is a statutory harbour authority (SHA)?

- 1.4 An SHA is a harbour authority, which has been given a range of statutory powers or duties for the purpose of improving, maintaining or managing a harbour. The statutory powers or duties are set out by Acts of Parliament that are specific to each authority in the form of local Acts, or in some cases harbour revision or empowerment orders made under the 1964 Act.

Why would a statutory harbour authority apply for an Order?

- 1.5 An SHA may wish to be relieved of some or all of its statutory functions, where the harbour is no longer viable or necessary, commercially-speaking. For an order to be granted the evidence justifying the order has to meet the underlying purpose to be considered by the Secretary of State.

What is the underlying purpose that must be considered by the Secretary of State?

- 1.6 In accordance with section 17A(2) of the 1964 Act the Secretary of State must have regard to the “underlying purpose”, as defined in section 17A(3) in determining whether or not to make a harbour closure order. The underlying purpose is defined as “the purpose of permitting or requiring SHAs to cease to maintain harbours which are no longer commercially viable or necessary”. In practice, this means that the Secretary

of State will consider matters relating to whether the harbour is still viable or necessary, commercially-speaking, which may include (but is not limited to) the following factors:

- a change in the local economic area, reducing demand for the use of the harbour
- physical restrictions in terms of the size of vessels that can access its facilities making ongoing usage unviable;
- a decline in the number of vessels using the area; or,
- a change in the type of vessels using the area.

1.7 If a harbour is not viable then the SHA may not be able to fulfil the duties and costs imposed on it by its statutory functions. This may cause dis-benefits to the SHA and those using or considering using the harbour. Accordingly, the Secretary of State may form the view that the underlying purpose test is met and that the harbour should be closed.

What should a statutory harbour authority consider before applying?

1.8 The first step for the harbour authority is to ensure that it is familiar with its powers and duties set out in its local legislation and the policies, systems and procedures it has in place. This is to ensure that nothing is removed unintentionally. The SHA should check its local legislation to see what has been incorporated.

1.9 Although the functions of SHAs vary, an authority's legislation is likely to incorporate provisions from the Harbours, Docks and Piers Clauses Act 1847 ("1847 Act") which contains a number of provisions suitable to be included in local harbour acts. Any provisions incorporated in the local legislation need to be checked. The 1847 Act can be found online at:

<http://www.legislation.gov.uk/ukpga/Vict/10-11/27/contents>

1.10 The 1847 Act contains a fairly comprehensive code of operational powers which includes powers for the SHA's harbour master to regulate a number of matters including the movement and mooring of vessels, the loading and unloading of goods, provisions to levy harbour dues and powers (in section 83) to make byelaws.

1.11 In more recent times many SHAs have augmented and updated their powers for example obtaining powers of general and special direction. Frequently, these powers have been acquired through a harbour revision order (HRO) or harbour empowerment order (HEO) under sections 14 to 16 of the 1964 Act. Such Orders form part of an SHA's local legislation. The purposes for which an HRO may be made are set out in Schedule 2 to the Act:

<http://www.legislation.gov.uk/ukpga/1964/40/schedule/2>

2. Reasons for and Content of Order

Statement of Reasons

2.1 Whilst not required by legislation it is strongly advised that the SHA, when applying for a closure order, includes a statement of reasons that states:

- a) why there is a need for a closure order
- b) whether it is proposed to remove all the statutory functions or only specified ones;
- c) the need for any transitional provisions;
- d) the proposals for transfer of property, rights or liabilities;
- e) its current and future compliance with the Port Marine Safety Code.
- f) how they have ensured appropriate compliance with environmental legislation.

and includes:

- g) a summary of the outcome of the pre-application informal consultation recommended to be carried out, including who was consulted.
- h) an assessment of likely costs and benefits of its proposals (including, but not limited to, the impact on harbour users and others with an interest in the harbour or who may be affected by harbour closure).

2.2 The statement of reasons will need to explain the basis for each provision the SHA requires in the draft Order.

Port Marine Safety Code

2.3 The PMSC establishes a national standard for every aspect of port marine safety and, though it is not mandatory, it is strongly recommended that all marine facilities apply its principles, not only SHAs. An SHA should consider very carefully the implications for PMSC adherence when assessing whether to apply for an HCO.

2.4 The SHA should include a statement on their current compliance with the PMSC and what measures are planned to mitigate the risk of non-compliance should the Order be made. Where appropriate, this statement should include the name of the organisation or party which will assume the role of applying the principles of the PMSC within the harbour area. In some cases the mitigation may be the complete cessation of port marine operations, thus removing the risk in its entirety.

Full or partial closure

2.5 An SHA must specify whether it wishes to be relieved of all its powers or only specified ones and the reasons for this. It would also be possible in some cases to provide for transfer of SHA functions to a specified body (with the body's consent). The partial closure of a commercially viable harbour, perhaps as part of reorganisation, is a matter not for a closure order under new section 17A of the 1964 Act, but for an HRO (see paragraph 1.11 above).

Transitional and other Provisions

- 2.6 The SHA needs to identify what transitional provisions will be required in relation to the cessation of its SHA functions. In addition, the Order may include provisions which are needed for works to be carried out in respect of the harbour before the authority can be relieved of its statutory functions, may specify who should carry out the works (either the SHA or Secretary of State) and may provide for whether it is proposed that the SHA will pay for the work if carried out by the Secretary of State.
- 2.7 A closure order may confer on the SHA or the Secretary of State power to acquire (whether by agreement or compulsorily) land described in the order as the site of works in respect of the harbour to be carried out by the SHA or the Secretary of State.

Transfer of property, rights and liabilities

- 2.8 An SHA has many statutory functions and the statement of reasons needs to explain how the provisions in the order will deal with the functions i.e. if the functions are to be transferred to another body (as mentioned above) or will cease to exist.
- 2.9 Specific provisions relating to property may include, but are not limited to provisions that will deal with:
- (a) transferring assets that would otherwise not be capable of being transferred;
 - (b) creating interests, rights or liabilities in relation to assets transferred or in connection with a transfer;

- (c) enforcement of rights or liabilities (whether transferred or created by the order);
- (d) the transfer of rights and liabilities in relation to employment (including provisions for deemed continuity);
- (e) pension schemes (including provision for amending schemes, winding them up, transferring their administration, and saving rights existing before a transfer takes effect);
- (f) terminating appointments;
- (g) compensation for loss of employment (or office);
- (h) extinguishing liabilities to the Secretary of State;
- (i) winding up of the SHA's affairs;
- (j) winding up of any company wholly owned by the SHA;
- (k) the dissolution of the SHA;
- (l) making a provision transferring property, rights or liability subject to a condition (such as the grant of an interest in favour of a third party) and the effect of failure to comply with that condition;
- (m) conferring a function on the Secretary of State; and
- (n) incidental, consequential, transitional or saving provisions, in particular amending, repealing or revoking an enactment of local application or disapplying or modifying the application of any other enactment.

2.10 An SHA will need to state which of its roles will need to continue and, for those which do, who will take over their role in various matters. A few examples include:

Lighting and buoying responsibilities – under Part VIII of the Merchant Shipping Act 1995 each SHA is the local lighthouse authority for its area (section 193, as amended) and under section 199 of that Act a local lighthouse authority may be directed by the general lighthouse authority (Trinity House in England and Wales) to lay down buoys, or alter lighthouses, buoys and beacons in its area. An SHA should consult Trinity House on whether there will be a continuing need for lighting and buoying as a result of harbour closure and, if so, who should undertake those responsibilities.

Wrecks – section 252 of the Merchant Shipping Act 1995 provides each SHA with powers to act where it is of the opinion that a vessel sunk, stranded or abandoned in or near to the approaches of their harbour is, or is likely to become, a danger to navigation. These powers include the marking, removal, and sale or destruction of such vessels. An SHA should consider whether such powers would remain relevant and, if so, who should exercise them.

Pensions – harbour authorities should explicitly explain what is going to happen with their pension liabilities.

Environmental - Harbour authorities should consider who will exercise their responsibilities under environmental legislation, including Conservation of Habitats and Species Regulations, Wildlife and

Countryside Act 1981 (as amended) and the Marine and Coastal Access Act 2009.

Secretary of State initiated Orders

2.11. The Secretary of State can make a harbour closure order without an application where he/she has the consent of the harbour authority, or if he/she has consulted the harbour authority and is satisfied that they are unlikely to object. In such cases the Department's Port Governance Branch will compile relevant information relating to the harbour to be closed, where possible with the assistance of the SHA, and consider the provisions that should be included in the Order, as well as what responsibilities are to continue and who will take on those responsibilities.

3. Application Procedure

Who to apply to

3.1 SHAs in England and non-fishery SHAs in Wales wishing to apply for a harbour closure order should apply to the Department for Transport at:

ports@dft.gsi.gov.uk

3.2 Fishery SHAs in Wales should apply to the Welsh Government at: fisheriesmailbox@wales.gsi.gov.uk

Statutory procedure

3.3 The statutory procedure for a harbour closure order is the same as for a HRO. It can be found in Schedule 3 of the Act, available at:

- 3.4 It is not expected that there would be a large number of applications for HCOs and while the procedure allows for an inquiry/hearing to be called if other means of resolving objections had been exhausted, not all applications would reach that stage. Nevertheless, in some cases the procedure may involve inquiries or hearings. SHAs should note that, depending on the time it takes to hear and consider all of the evidence put forward, a public inquiry can prove costly. The department would usually seek to recoup inquiry/hearing costs it incurred (pursuant to section 47 of the 1964 Act).
- 3.5 In the two instances where the Secretary of State initiates the closure order the same procedure would apply but with the modifications set out in section 17D(2)(a) of the 1964 Act.

Notice of intention to apply

- 3.6 An SHA intending to apply for a harbour closure order must give the Secretary of State notice of its intentions. The Secretary of State will then inform the SHA if an Environmental Impact Assessment is required in order to continue the application.

Pre-application informal consultation

- 3.7 If an SHA wishes to remove all or some of its statutory functions, the Department strongly recommends that the SHA, in advance of the formal application, should informally consult relevant local authorities, harbour users, and organisations and individuals having an

interest in the harbour, or who would be affected by any changes that would occur as a result of the closure order. It would be useful also for the harbour authority to upload any informal consultation material on to its website and include a link on the Homepage.

- 3.8 An SHA contemplating applying for a closure order should also engage at an early stage with the Department. Initial contact should be made via the ports@dft.gsi.gov.uk e-mail address

Submission of formal application

- 3.9 Once the SHA has contacted the Secretary of State and had a response it can then make its formal application. Part 1 of Schedule 3 to the 1964 requires the applicant to submit the following:

- Six copies of the draft proposed order. Drafting is the applicant's responsibility.
- Six copies of any map which, if the order is made in the form of the draft, will be annexed to it, and
- Such fee as the Secretary of State may determine. (We are currently not charging a fee for Harbour Closure Orders but retain the power to do so.)

- 3.10 Applicants should also supply an electronic copy of all application documents (electronic copies of draft orders should be in Word format).

- 3.11 The applicant should submit the statement of reasons (see paragraphs 2.1 and 2.2 above) with the formal application.

3.12 In addition to the statutory notice requirements in Part I of Schedule 3, the Department recommends an SHA publishes its intention to apply and a copy of the draft order and statement of reasons on its website. While this is not a statutory requirement, it is good practice to do so.

Departmental consultation

3.13 At the same time as the statutory notices appear in the Gazette and local newspaper(s) the Department will consult such bodies as it considers appropriate. Specific consultees will be decided upon a case by case basis depending on the interests affected by the proposal. A typical consultees list may include:

- British Ports Association
- Crown Estate
- Environment Agency
- local authorities
- local partners of the SHA
- Marine Management Organisation
- Maritime and Coastguard Agency
- Natural England
- Natural Resources Wales
- neighbouring harbour authorities
- Royal Yachting Association
- Trinity House
- UK Chamber of Shipping
- UK Harbour Masters Association
- UK Major Ports Group
- Welsh Government

- Any other body likely to have an interest owing to their environmental responsibilities.

3.14 Each consultee will be given a 42 day period in which to respond which will correspond with the 42 day period for objections and representations provided for in Part I of Schedule 3 to the 1964 Act.

Publicising harbour closure orders when made

3.15 Once a decision about the order is made, the Department also recommends that an SHA publishes the decision and (if made) a copy of the harbour closure order and any annexed documents on its website to publicise the making of an order. While this is not a statutory requirement, it is good practice to do so.

PART B: PILOTAGE FUNCTION REMOVAL ORDERS

Background

- 4.1 A Competent Harbour Authority (CHA) is an SHA with statutory powers in relation to the regulation of shipping movements and the safety of navigation within its harbour. It has duties to assess the need for pilotage and powers to provide the appropriate pilotage services and impose pilotage directions as necessary to secure safety.
- 4.2 A CHA is responsible for all pilotage matters at its facilities, including the authorisation of pilots and the grant of Pilotage Exemption Certificates. In some cases, the geographic area for which a CHA is responsible for pilotage will be larger than that for which it is an SHA.
- 4.3 A CHA is obliged to keep pilotage services for its geographic area under review and to consider what pilotage services are needed and whether any should be mandatory. A CHA must arrange for such pilotage as they consider necessary and may be held responsible for failure to maintain an adequate service
- 4.4 The discharge of such functions by a CHA, even if it concludes that no pilotage is needed in its area, involves a level of responsibility on the part of the CHA with related costs in terms of money and time. Consequently a CHA for an area where pilotage is not needed may wish to be relieved of the functions.

- 4.5 The removal of pilotage functions from harbour authorities would relieve them of their powers and duties relating to pilotage under the 1987 Act. A harbour authority from which such functions were removed would cease to be a CHA, but would continue to be an SHA.
- 4.6 Provisions enabling this to be done are provided by section 1 of the 2013 Act which amends section 1 of the 1987 Act to provide the Secretary of State with powers to specify by Order that a harbour authority in England or Wales is not a CHA. There is no procedure set out in legislation for pilotage function removal orders. Paragraphs 4.8 to 4.11 below set out the intended process to be followed for such orders.

Pre-application consultation

- 4.8 The Department encourages any CHA wishing to relinquish its pilotage functions to consult relevant organisations and persons likely to be affected by the proposal prior to making a formal application. It would be useful also for the harbour authority to upload any informal consultation material on to its website and include a link on the Homepage.

Formal application

- 4.9 A harbour authority in England or Wales wishing to be relieved of its CHA status should apply to the Department for Transport stating:
- its reasons for believing that neither pilotage nor a regular assessment of the need for pilotage provision

is required in its area (supported by a navigational risk assessment if appropriate);

- an assessment of likely costs and benefits arising from relinquishing CHA status (including, but not limited to, the impact on the harbour authority, any pilots authorised by the CHA, harbour users, and the environment);
- the opinions received through any pre-application consultation undertaken; and
- any consequential provisions that may be required in the order.

4.10 The Department will consider the application and may seek further advice from the CHA if required. If it is minded to proceed with the Order, it may publish a public consultation on the proposal. The views of appropriate national and local bodies will usually be sought (such as those listed at paragraph 3.13 plus the UK Maritime Pilots Association).

4.11 After considering the consultation responses, the Secretary of State will then decide whether or not to make the Order and, if not, may agree to consider alternative proposals submitted by the applicant.

PART C: CONTACTS AND LEGISLATIVE REFERENCES

Contacts

- 5.1 Enquiries about this guidance or making an application for a harbour closure order or a pilotage function removal order should be sent to: ports@dft.gsi.gov.uk.
- 5.2 Enquiries about fishery ports in Wales and applications should be sent to: fisheriesmailbox@wales.gsi.gov.uk
- 5.3 Enquiries about the guidance produced by Transport Scotland and any applications from ports in Scotland should be sent to: harbourorders@scotland.gsi.gov.uk

Legislative References

- Harbours, Docks and Piers Clauses Act 1847 (“1847 Act”)
<http://www.legislation.gov.uk/ukpga/Vict/10-11/27>
- Harbours Act 1964 (“1964 Act”)
<http://www.legislation.gov.uk/ukpga/1964/40>
- Pilotage Act 1987 (“1987 Act”)
<http://www.legislation.gov.uk/ukpga/1987/21>
- Merchant Shipping Act 1995 (“1995 Act”)
<http://www.legislation.gov.uk/ukpga/1995/21>
- Marine Navigation Act 2013 (“2013 Act”)
<http://www.legislation.gov.uk/ukpga/2013/23>