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Your ref:  
PXT/ENB/Y061104

Our ref:

Date:  
24 June 2011

Dear Angus,

## **HARBOURS ACT 1964 – SCRABSTER (DEEP INNER BERTH) HARBOUR REVISION ORDER**

1. I refer to the application submitted on behalf of your client, Scrabster Harbour Trust ("the Trust") on 23 March 2010 for the making of the **Scrabster (Deep Inner Berth) Harbour Revision Order** ("the HRO") under section 14 of the Harbours Act 1964 ("the 1964 Act"). This letter conveys the Scottish Ministers' decision on this application.

### **Purpose of HRO**

2. The purpose of the HRO is to authorise the Trust to construct and maintain works in Scrabster Harbour. This would involve:-

- the construction of a new quay by reclamation, infilling, levelling and surfacing
- dredging of 3 areas of the harbour including demolition of parts of the existing quays.

### **Pre-application Consideration of Environmental Impact**

3. Having been advised of the intention to make an application, Ministers consulted with the Trust, Scottish Natural Heritage ("SNH"), Scottish Environment Protection Agency ("SEPA") and Highland Council ("the Council") to determine whether the proposed order would authorise a project which falls within Annex I or II of Directive 85/337/EEC as amended by 97/11/EC and 2003/35/EC and if so whether it was a relevant project in terms of paragraph 4 of schedule 3 to the 1964 Act.

4. Following that consultation Ministers concluded that the works were a project falling within Annex II but that it was not a relevant project by virtue of its size. In accordance with paragraph 5 of schedule 3 they advised the Trust accordingly on 30 September 2009.

## **The Application**

5. The Trust, as the authority engaged in improving, maintaining and managing the Harbour, submitted an application for an HRO to Scottish Ministers on 23 March 2010.

6. Notice of the application was advertised in the John O’Groats Journal on 26 March and 2 April 2010, and in the Edinburgh Gazette on 26 March 2010. Scottish Ministers received seven objections within the 42 day statutory notice period provided for in Schedule 3 to the 1964 Act, which ended on 7 May 2010.

## **Consultation**

7. Before Ministers determined the application they consulted with, SNH, SEPA, the Council, the Royal Yachting Association (“RYA”) and the Chamber of Shipping (“CoS”) as their statutory consultees. RYA and CoS responded with no objection or comment. The Council responded that the local plan supported the upgrade of the harbour and they made no further comment.

8. SNH’s response referred to earlier correspondence with the Trust’s consultants which they stated was still applicable and this indicated that there was likely to be a significant effect on the qualifying interest of the River Thurso Special Area of Conservation (“the SAC”), namely Atlantic salmon. They advised that studies would be required to identify mitigation to reduce these impacts to an acceptable level. They also highlighted potential impacts on European Protected Species (“EPS”), namely cetaceans, and advised that mitigation would be required to prevent disturbance which would avoid the need to apply for an EPS licence from Scottish Ministers. This response confirmed that Scottish Ministers were required to carry out an appropriate assessment under regulation 48 of the Conservation (Natural Habitats) Regulations 1994 (“the Habitats Regulations”) to determine whether the works would adversely affect the integrity of the SAC.

9. SEPA submitted a conditional objection requiring the inclusion in the order of a provision requiring the development of an Environmental Management Plan to assess and control the risk of pollution from the works. This plan must be agreed with them and approved by Ministers prior to the commencement of the works.

## **Objections**

10. In addition to SEPA (objector 3), six other objections were received from: two charter boat operators (objectors 4 and 5) who complained of lack of consultation about disruption to their current berthing arrangements; an angler who used these charter boats (objector 1); a local angling club who complained of exclusion of charter fishing boats (objector 7), and a local yacht club (objector 2) who complained of lack of consultation and potential reduction in available berths for leisure craft. The final objection was from a local resident (objector 6) who felt the charter boats would be excluded from the harbour and there would be a loss of visitors to the area as a result.

11. The Trust sought to engage with the objectors to allay their concerns and as a result objectors 2, 6 and 7 withdrew their objections. The Trust agreed to the conditions proposed by SEPA and on the basis of the inclusion of article 18 in the order SEPA agreed to withdraw their objection.

## **Written Representations**

12. In terms of the 1964 Act, as amended by the Transport (Scotland) Act 2005, where there are unresolved objections, it is open for Scottish Ministers to cause a public inquiry or a hearing

to be held, although this is not a requirement. Ministers were of the opinion that the objectors' points were capable of resolution by written representations and that neither a public inquiry nor a hearing was required in relation to this Order. A timetable for the process based on the objection procedure set out under the Transport and Works (Scotland) Act 2007 (Applications and Objections Procedure) Rules 2007 was used for the exchanges, as there is no specified procedure within the 1964 Act.

13. Only 2 of the outstanding objectors responded during the process and nothing was received from objector 1. The grounds of the objections by objectors 4 and 5 were that there had been no consultation about the impact of the works on the current berthing arrangements for the objectors' vessels or any assurances regarding future provision. In addition objector 5 suggested that there could be a negative impact on small businesses, leisure users and the local community and that the removal of the west finger of the inner harbour would leave small vessels vulnerable to adverse weather. Objector 1's grounds of objection were that as an angler he felt that angling charters boats would be displaced from the harbour and he would no longer be able to visit the area.

14. The Trust made representations including a summary of their correspondence with the objectors and confirmed their objectives of making a positive contribution to the local community and developing partnerships with key businesses. They highlighted the enhancement of facilities by the provision of new pontoon berths for the small vessel users including sea anglers which the development would provide and confirmed that the proposed provision of such facilities exceeded current demand for berthing space. They acknowledged the development would mean changes that would affect all users and that there would be disruption during the construction.

15. Both objectors maintained in their representations and responses that they sought written assurances that safe berths would be available to them during and after the construction works. The Harbour Trust has confirmed that small vessels could safely be berthed in the outer basins on a temporary basis and that on completion of the works there would be no loss of facilities as the pontoon berths to be provided exceeded current demand.

### **Conclusion on objections**

16. Ministers considered that the demands of two objectors for written assurances of future berthing provision were not reasonable. The harbour has an obligation to be open to all but berthing must be controlled to ensure the safety of all users. The objectors had been assured that every effort would be made to accommodate them during the works and this was considered reasonable as contractors had not yet been appointed to carry out the works and their methods of work will be a major consideration in where berthing is available in the harbour during the construction period. It is considered unrealistic to expect a harbour authority to guarantee future berths in such circumstances, and while the project will mean short term disruption, in the longer term it will bring economic benefits to the area and the proposed provision of pontoons would improve facilities for harbour users.

### **Appropriate assessment**

17. Regulation 48 of the Habitats Regulations applying to European Sites provides that "where an authority concludes that a development proposal unconnected with the nature conservation management of a Natura 2000 site is likely to have a significant effect on that site, it must undertake an appropriate assessment of the implications for the conservation interests for which the area has been designated." Ministers made an assessment of the impacts of the project on the qualifying interests of the River Thurso SAC and concluded that with mitigation measures applied to the piling work the project would not have an effect on the integrity of the site. These same measures will also prevent an offence under regulation 39 of the Habitats

Regulations in respect of cetaceans as a European Protected Species. Ministers concluded that the mitigation should be included as a condition within the order.

## **Modifications**

18. During discussion with the applicant a number of modifications to the draft order were considered. Modifications to articles 3 and 4 clarify the descriptions of the works and the subsidiary work and refine the limits of deviation for the works and their positions as indicated on the deposited plans. They also update the final shape of the quay to be constructed as work number 1 based on the proposals of the preferred bidder for the construction contract to be let by the applicant. They include a restriction on the deposit of dredged material below the level of high water without approval by Scottish Ministers. Article 18, which requires the applicant to agree an Environmental Management Plan with Scottish Ministers and SEPA before construction commences, was added to allow SEPA to withdraw their objection. The addition of article 19 restricts the hours during which piling work can be undertaken to protect Atlantic Salmon and cetaceans and provides for monitoring of siltation from dredging as required by the appropriate assessment undertaken. Ministers consider these modifications to be minor and that they do not substantially affect the character of the order and did not require further consultation.

## **The Scottish Ministers' Consideration and Decision**

19. Section 14(2) (b) of the 1964 Act requires that a Harbour Revision Order shall not be made in relation to a harbour unless the appropriate Minister is 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 economical transport of goods or passengers by sea. Ministers consider that this Order meets these objectives. They have considered the objections made and not withdrawn and the written representations made by the objectors and the Trust and they have decided to make the Order with the modifications described above.

## **Right to Challenge Decision**

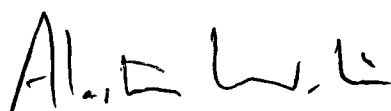
20. The foregoing decision of the Scottish Ministers is final but any person who desires to question the making of the HRO on the ground that there was no power to make the HRO or that a requirement of the 1964 Act was not complied with in relation to the HRO may, within six weeks from the date on which the HRO becomes operative, make an application for the purpose to the Court of Session as the case may be.

**A person who thinks they may have grounds for challenging the decision to make the HRO is advised to take legal advice before taking any action.**

## **Availability of Decision**

21. A copy of this letter has been sent to all those who were consulted on or objected to the Order and will be published on the Scottish Government website.

Yours sincerely



**ALASTAIR WILSON**  
Director