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28 MAY 2012

Dear Sirs

**HARBOURS ACT 1964**  
**APPLICATION FOR THE PROPOSED POOLE HARBOUR REVISION ORDER**

1. I am authorised by the Secretary of State to inform you that consideration has been given to the application you submitted on behalf of your clients, the Poole Harbour Commissioners ("the Commissioners") on 9 September 2004 for the making of the Poole Harbour Revision Order ("the Order") under Section 14 of the Harbours Act 1964.
2. The Order, if made, would replace existing local legislation governing the functions of the Commissioners in their management of Poole Harbour.

**Summary of the Secretary of State's decision**

3. The Secretary of State has authorised the making of the Order, with modifications not substantially affecting the character of the Order which appear to her to be necessary or appropriate.

**Application Procedure**

4. An application dated 9 September 2004 was received by the Secretary of State on 12 September 2004.
5. For the purposes of paragraph 5 of Schedule 3 to the Harbours Act 1964, the Secretary of State determined that the Order did not directly or indirectly authorise a project and that no Environmental Statement would therefore be required to accompany the application. The Secretary of State wrote to the Commissioners confirming this view. The Secretary of State did not consider it necessary to consult specifically with any person in relation to the Order by reason of their environmental responsibilities for the purposes of paragraph 15 of Schedule 3.
6. Notice of the application for the Order was advertised in the London Gazette of 9 September 2004 and in The Poole Advertiser and the Bournemouth Daily Echo of 9 and 16 September 2004.

7. The Secretary of State received one objection to the Order within the statutory period of forty-two days set out in the above notices pursuant to paragraph 10(2)(f) of Schedule 3 to the Harbours Act 1964. This objection was made by the Environment Agency and has subsequently been withdrawn.
8. The Secretary of State also received a written representation objecting to the Order from the Royal Yachting Association, outside the statutory period.
9. The Secretary of State further received written representations about the Order from Parkstone Yacht Club, The National Trust, The British Marine Federation, The Crown Estate, Trinity House and The Bournemouth-Swanage Motor Road & Ferry Company. As detailed below, these representations either did not object to the Order, or raised objections which have since been withdrawn (or are treated as having been withdrawn).

### **The Commissioners' case**

10. The primary aim of the Order is to consolidate and modernise the management powers of the Commissioners and other legislation governing the harbour. In applying for the changes the Commissioners are aiming to complete their compliance with the Department's guidance to trust ports issued in 2000<sup>1</sup>. A summary of the proposals in the Order is as follows:
  - To confer powers on the Commissioners for the management and control of Poole Harbour ("the harbour") including powers to carry out operations; to provide and maintain works and facilities and to acquire undertakings; to make provisions to regulate the movement and use of vessels; for the licensing of tugs; and powers to set apart or appropriate parts of the harbour.
  - To make provisions as to moorings; for the giving of general and special directions in respect of vessels and directions as to loading and unloading of goods; for the control of wrecks and obstructions (including provisions for the control of vehicles on land within the harbour); and provisions for the control of lights detrimental to navigation.
  - To enable the Commissioners to make byelaws for the harbour.
  - To make provisions as to the charges for the use of the harbour, and for services and facilities provided by the Commissioners in relation to the harbour.
  - To enact financial provisions, including provisions as to the Commissioners' accounts, and to empower the Commissioners to borrow money, to invest, to give guarantees and to lend money.
  - To authorise the Commissioners to provide indemnity insurance for individual Commissioners; to establish subsidiaries and to form companies; to subscribe for shares in any body corporate; and to dispose of, and to make agreements in relation to, lands forming part of the harbour.
  - To amend the provisions of the Poole Harbour Revision Order 2001 as to the constitution of the Commissioners, and to make new provisions as to the appointment and term of office of the Chairman of the Commissioners.

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<sup>1</sup> *Modernising Trust Ports – A Guide for Good Governance*. This guidance was revised and replaced in August 2009 by *Modernising Trust Ports – A Guide for Good Governance Edn 2*. The Second Edition contains no changes which impact in substance on the Order sought by the Commissioners.

- To enact provisions incidental to or consequential upon the above-mentioned purposes; and to repeal and revoke existing legislation relating to the harbour.

### **Withdrawn Objection**

11. Within the statutory time period allowed, the Secretary of State received one objection (letter dated 18 October 2004) to the proposed Order, from the Environment Agency. The grounds for objection were that the draft Order did not adequately address the need to make allowance for the proper exercise by the Agency of its statutory functions and the Agency would propose specific safeguards and protection in relation to a number of the proposed powers.
12. In a letter dated 17 May 2007 Bircham Dyson Bell on behalf of the Agency informed the Secretary of State that following discussions with the Commissioners, the Agency's objection was withdrawn on the condition that certain articles (article 6 and the whole of Part III) were to be withdrawn from the Order. The Commissioners in a letter of 6 March 2007 had already indicated that they were content with a modification that would remove Article 6, and Part III of the Order as advertised.

### **Representations**

13. The Secretary of State received representations from seven bodies, namely Crown Estate, Parkstone Yacht Club, Trinity House, The National Trust, British Marine Federation, the Royal Yachting Association and the Bournemouth-Swanage Motor Road and Ferry Company. The latter three were received after the expiry of the statutory period for the receipt of objections. Although received outside the statutory period, the Secretary of State has considered and taken into account these representations (and associated correspondence) in determining the Commissioners' application.

### **Withdrawn Representations**

#### *Parkstone Yacht Club*

14. Parkstone Yacht Club in their letter of 12 October 2004 were concerned about the wording of a number of articles. In a letter from Martin Simms, General Manager of Parkstone Yacht Club, dated 24 January 2005, stated that following assurances given to them by the Harbour Master they were content to support the Order.

#### *The Crown Estate*

15. The Crown Estate in an e-mail of 12 October 2004 requested the rewording of Article 10 (now 8) to remove ambiguity. In an email dated 20 June 2005, from Martin Jacobsen, they stated that, after discussions with the Commissioners they were content with the Order.

#### *Trinity House*

16. Trinity House in an e-mail dated 21 October 2004 requested that a definition of Trinity House be included in the Order. The Commissioners were content with this modification to the Order at Article 2.

### *The National Trust*

17. The National Trust in a letter dated 5 October 2004, from David Jenkins, Area Manager, set out a number of concerns mainly in relation to dredging in Article 6 and Part III (version as advertised), which have subsequently been withdrawn in response to the concerns of the Environment Agency (see paragraph 11 above). The National Trust also noted that there was nothing in the harbour revision order relating to the rights of the islands within the harbour area for access, landing, repairs and maintenance. The National Trust also suggested that the area of the harbour authority should be extended to include more of Studland Bay. The Commissioners in a letter to the Department dated 20 June 2007 stated that they had written to the Trust giving explanations and assurances in response and having not received replies to the most recent of their letters the Commissioners had concluded that the Trust were now content with the Order.
18. The Department, in a letter from Colin Morris dated 22 August 2007 to the Trust, following a conversation with Mr Kendall-Carpenter sought to establish whether the Trust were indeed content. This too has not received a reply and the Secretary of State has concluded that the Trust's concerns have been met.

### *The British Marine Federation (BMF)*

19. The BMF in a letter dated 25 October 2004 raised a point about the intention of the Poole Harbour Commissioners in respect of Harbour Dues. The BMF withdrew their representation on 1 February 2005.

### *The Bournemouth-Swanage Motor Road and Ferry Company (The Company)*

20. The Company in a letter dated 1 October 2004 but received by the Secretary of State on 4 November 2004 set out a range of points in opposition to the Order. In a letter dated 8 January 2009 Bircham Dyson Bell, on behalf of the Company, confirmed they were withdrawing in full its representations following agreement on the issues with the Commissioners.

## **Outstanding Representation**

### *The Royal Yachting Association (RYA)*

21. The RYA made representations on the Order by way of an e-mail from Edmund Whelan of 26 October 2004. The representation was sent and received after the 42-day deadline specified in the notices published to advertise the application. The representation is therefore not an objection which, if not withdrawn, requires the Secretary of State to cause a public inquiry. The Secretary of State considered that as it was by then the only outstanding objection to the Order and that it had been made outside the statutory time limit, it would be appropriate to deal with the objection by way of written representations rather than a public inquiry. The RYA and the Commissioners subsequently submitted written representations, summarised in detail in Annex 1.
22. The RYA objection concerned Articles 10 (power to appropriate parts of harbour) and 14 (powers of general directions) of the Order as advertised (Articles 8 and 12 of the Order as made)<sup>2</sup>.

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<sup>2</sup> There was an additional objection to the notice period in Article 23(4), which was withdrawn when the Commissioners indicated they were content for the Order to be modified to provide a longer notice period.

23. In respect of Article 10, the concerns raised were:
- The RYA consider that the Order should provide that, where the power to appropriate parts of the harbour is exercised, any disputed decisions should be referred to an independent person for consideration;
  - The RYA consider that parts of the harbour should only be appropriated using this power where “necessary” to do so; and
  - The RYA consider that paragraph (2) should be omitted as the power to issue special directions is a sufficient alternative power capable of serving the purpose.
24. In respect of Article 14, the concerns raised were:
- The RYA consider that paragraph (1)(b) should be omitted, as it is not appropriate to take a power of general direction in respect of environmental matters; and
  - The RYA consider that it is not necessary for small vessels to be within scope of the power as regards paragraph (2)(b), (d) and (f), and such vessels should be exempted accordingly.
25. The Commissioners do not agree with the above points and maintain that the Order should be made substantially in the form applied for in respect of these issues.

### **The Secretary of State's Consideration of the Outstanding Representation**

26. The Secretary of State has considered the representations of the RYA and the Commissioners.
27. The Secretary of State notes that powers of the type contained in the relevant Articles are capable of being desirable for the purposes set out in section 14(2)(b) of the Harbours Act 1964, and that the Commissioners (who under statute are the body primarily responsible for the maintenance and management of Poole Harbour) consider such powers to be appropriate in respect of Poole Harbour.
28. Subsequent to the receipt of the written representations from the RYA and applicants, the Department for Transport made a statement in respect of general powers of direction and possible adjudication processes. It did so in the document “*Summary of Responses to the Consultation on the Draft Marine Navigation Bill*” that was published in October 2008 which read:
- "There is little evidence that harbour authorities which already have the power to give general direction do so unreasonably. Harbour authorities have the statutory duty to manage their harbours and the Government considers it appropriate that operational decisions such as this are primarily matters for them alone. The Government considers that the requirements to consult harbour users and to publicise a harbour direction before the direction is given, and publicise the fact that it has been given, with the option for judicial review of their actions where appropriate, are sufficient procedural protections". [page 10, paragraph 6]
29. The Secretary of State considers that the policy described above applies equally as regards a power of general direction as it does to a power to appropriate parts of a harbour for specific purposes (ie to both of the powers objected to by the RYA in the present case).

30. The Secretary of State's policy does not preclude voluntary adoption of an adjudication process by a harbour authority if it should believe it in their best interests to do so. Nor does it preclude, in respect of any particular application, proper consideration of an argument for the introduction of such a process against the wishes of the Commissioners.
31. In the case of the present application it is clear that the Commissioners do not believe the process desired by the RYA would be to the benefit of the harbour. The Secretary of State is satisfied that the Commissioners have given due consideration to the RYA's proposal. She has therefore looked at whether the RYA's arguments are sufficiently compelling to justify departing from the Department's stated policy and the Commissioners' own conclusions.
32. The Secretary of State notes that a number of the RYA's arguments are aimed at persuading the Commissioners that it would be in their own interests to adopt the suggested adjudication process. These arguments are clearly worth consideration but equally clearly the Commissioners are not persuaded and have pointed to existing procedures and alternative proposals as being sufficient.
33. The Secretary of State notes the Commissioners' statement that they intend to use their existing stakeholder consultation procedures before exercising the powers in question, while recognising that this is a voluntary commitment rather than a requirement in the Order. The Secretary of State further notes that the RYA do not argue that such procedures do not currently operate satisfactorily in practice, rather that they are not appropriate to the additional powers being taken. The Secretary of State notes that no other users of the harbour have objected to the powers proposed. The Secretary of State notes that while the procedural arrangements proposed for the General Direction power are not the same as those for the byelaw making power, but further notes that this is common in local harbour legislation.
34. On balance, the Secretary of State has concluded that the RYA have not made a case sufficiently compelling for the Secretary of State to override the wishes of the Commissioners and previously stated policy on this issue. The Secretary of State is satisfied that the powers sought are desirable for the purposes of section 14(2)(b) of the Harbours Act 1964. The Secretary of State considers it unnecessary to specify in the Order that the Commissioners must observe existing stakeholder consultation procedures, as the Secretary of State is persuaded that the Commissioners in practice observe such procedures voluntarily, and it is in their interests to build consensus wherever possible with their stakeholders.
35. The RYA had two other broad concerns about the proposed Article 14: whether it is possible for harbour revision orders to contain provisions related to conserving the environment and to include these within the ambit of general directions and whether small vessels (less than 24 metres in length) should be exempt from general directions.
36. As regards the concern raised as to vires, the Secretary of State has had regard to the requirement laid upon harbour authorities under Section 48A of the Harbours Act in respect of environmental duties and Paragraph 16A of Schedule 2 to that Act which enables a harbour revision order to confer powers for the conservation of the natural beauty of all or part of the harbour etc.

37. The Secretary of State has concluded that it is intra vires for the Order to be made in terms which confer power on the Commissioners to include in its General Directions directions in respect of conservation.
38. As regards the concern raised as to small vessel exemptions, the Commissioners argue that a blanket exemption for small vessels would significantly limit the effectiveness of general directions.
39. The Secretary of State has again had regard to the Department's policy view that it is for harbour authorities to make operational decisions in their areas subject to adequate safeguards. In the case of Poole Harbour, as regards its local legislation and practices, she considers that such safeguards exist. The Commissioners have justified the need for regulation of small craft by way of identifying the number of incidents involving such vessels and the numbers of subsequent prosecutions. She has concluded that the RYA have not made a case for a blanket exclusion of small vessels from inclusion within the general direction powers.
40. Finally, the Secretary of State has considered the RYA's criticisms of Article 10 and the power to appropriate parts of the harbour. The Secretary of State agrees with the Commissioners that the power is well precedented in local harbour legislation and notes that the article proposed by the Commissioners contains novel provision only in respect of matters pertaining specifically to Poole Harbour.
41. The Commissioners state that they are surprised at the RYA's opposition as the powers are intended to facilitate recreational navigation. The RYA's objection is aimed at the broad nature of the powers and in contrast to the Commissioners' claims have suggested that commercial rather than recreational users will benefit, even if that is not the currently stated aims of the Commissioners.
42. The Secretary of State has noted the RYA's view that recreational boating events are best organised and regulated on a voluntary basis and she finds some merit in that argument (and notes that the Commissioners do also). She accepts however that the Commissioners are seeking to ensure that adequate controls are in place as a fallback should voluntary arrangements not be effective. She also notes that the Commissioners have given a commitment to further the recreational use of the Harbour. In that light and of the general policy about operational decision making she has concluded that the powers in Article 10 should be included in the Order.

### **The Secretary of State's Consideration of the amendments to the Poole Harbour Revision Order 2001**

43. The Secretary of State has also considered the Order in the light of the Commissioners' aims to comply with her guidance *Modernising Trust Ports - A Guide to Good Governance*, the document issued by the Secretary of State in 2000 and revised and reissued in August 2009. That document sought to encourage trust ports to modernise their legislation and in particular to aim for a constitution that produced Boards that were fit for purpose.
44. The Secretary of State notes that the Commissioners promoted the Poole Harbour Revision Order 2001 (SI 2001/2820) to provide for a new constitution and that the aim of the proposed Order is to update that with modernisation provisions. The Secretary of State welcomes the willingness of the Commissioners to seek to

### **The Secretary of State's Decision**

45. The Secretary of State is satisfied, for the reasons given above, that the making of the Order is desirable in the interests as set out in section 14(2)(b) of the Harbours Act 1964 and that the Order should be made.
46. The Secretary of State authorises the making of the Order with the amendments already indicated above and with modifications not substantially affecting the character of the Order which appear to her to be necessary or appropriate.
47. A copy of this letter is being sent to all those who objected or made comments and representations. The decision will also be published on the Department for Transport website.

### **Challenge to Decision**

48. The circumstances in which the Secretary of State's decision may be challenged are set out in Annex 2 to this letter.

Yours faithfully

Richard Bennett  
Maritime Commerce and Infrastructure

## Detailed summary of exchanges in respect of RYA objection to the Order

1. Mr Whelan's e-mail stated the grounds for objection as relating to Articles 10, 14 (2) (f) and 23 (4) of the Order as applied for. The RYA's objections concerned the power to exclude specific classes of leisure craft from areas of the harbour, the power to prohibit entry into or movement in the harbour of small craft, and the period to deal with unserviceable vessels. The RYA's objection to Article 23(4) has since been removed subject to the Order being modified to extend the notice period.
2. The Commissioners first set out to the Secretary of State a response to the RYA's objection in a consolidated document dated 28 September 2007. This contained copies of correspondence between the parties, not previously seen by the Secretary of State. Further documents have been received as follows:
  - From Bircham Dyson Bell, acting on behalf of the RYA, on 31 October 2007.
  - From Winckworth Sherwood, acting on behalf of the Commissioners, on 3 March 2008.
  - From Bircham Dyson Bell, on 10 April 2008.
  - From Winckworth Sherwood, on 21 May 2008.
  - From Bircham Dyson Bell, on 29 May 2008.
  - From Winckworth Sherwood, on 29 May 2008.
3. In their first representation of 28 September, the Commissioners set out the outstanding issues between the parties at that time. This analysis has not been disputed and the Secretary of State's consideration is based on the points identified there as being at issue. The points involve Article 10 of the draft Order, the matter in dispute being the proposed power to appropriate parts of the Harbour; and Article 14, where the matter in dispute concerns the proposed power to issue general directions.

### *Representations considered by the Secretary of State*

#### *RYA 15 March 2006*

4. Although the first document in the sequence listed above is one sent by the Commissioners, it contains a letter of 15 March 2006 from Bircham Dyson Bell on behalf of the RYA and it is this letter which begins the Secretary of State's consideration of the representations. The letter of 15 March sets out the following arguments in support of the RYA's opposition to the Order.
5. The central issue of concern to the RYA is the width and unfettered nature of the powers proposed to be conferred on the Harbour Master by Articles 10 and 14 of the draft Order. The powers proposed appear to go well beyond the existing precedents and could be achieved by use of byelaws while recognising the current slow process of byelaw confirmation.
6. The RYA propose a moderating process to apply to the intended powers which would involve prior consultation by the Commissioners with the Chamber of Shipping, the RYA and such other representative organisations as the Commissioners think appropriate, and then if the Commissioners' proposals were

7. The RYA believe that this process would guarantee an appropriate degree of consultation, allow the speedy implementation of non contentious measures, provide a fast-track basis for adjudicating upon objections but with a fair hearing, and would preserve the Commissioners' role in taking the final decision. This would avoid the perceived deficiencies of the byelaw making process.
8. Moving on to further points, in respect of Article 10 the RYA believe the reference to setting apart or appropriating any part of the harbour is too wide given that it is intended only to secure that a particular vessel or vessels may berth at a particular point. The RYA suggest therefore that the words "any part of the harbour, or" are deleted and that after the words "any lands, works, buildings, machinery, equipment or other property of the Commissioners in the harbour" are inserted the words "together with such part of the harbour as may be necessary to be occupied by vessel using such facilities".
9. The RYA further request the deletion of Article 10(2) as they do not believe it necessary, use of special directions being sufficient for the Harbour Master needs. Harbour users should not interfere at present, in keeping with good practice and the rules of navigation.
10. In respect of Article 14 the RYA want the deletion of Paragraph (1)(b) as powers of general direction should not be extended to purposes of conservation either of necessity or out of appropriateness. The RYA also want small vessels (under 24 metres) to be exempted from the proposed byelaw-making powers in Paragraph (2) (b), (d) and (f), as the powers are not needed for small vessels, especially recreational craft.
11. In their letter, the RYA also raised concerns with consistency between Articles 17 and 29. This has been withdrawn on the understanding that the Order as made will contain an amendment to Article 17 agreed with the Commissioners. Similarly, an amendment to Schedule 2 to which the Commissioners have signalled their approval will resolve RYA's concerns to ensure that byelaws to regulate certain activities do not prevent navigation by recreational vessels. .

*Commissioners' letter of 28 September 2007*

12. In response to the RYA's arguments the Commissioners submitted the following points.
13. Articles 10 & 14 are well precedented in local harbour legislation subject only to amendments required in the circumstances of Poole Harbour.
14. The amendments to Article 10 would in particular include a power to set apart areas of the harbour for regattas and other events which are included specifically to facilitate recreational navigation.
15. The purposes for which general directions may be made include conservation of parts of the harbour which are designated or protected under environmental legislation. Poole Harbour was designated as a Special Protection Area in 1999 on account of its international important population of bird species, migrating birds and waterfowls, and is a European Marine Site. The inclusion of environmental

16. It is accepted that the objectives of Articles 10 and 14 could be achieved by byelaws but the RYA admit, and the Government's Port Policy Review recognised, that the current process of harbour byelaw confirmation can be cumbersome and result in unnecessary delay.
17. In respect of the RYA's proposed moderating process, the Commissioners responded that it was inappropriate and unnecessary for the following reasons:
  - The Commissioners have offered a sealed undertaking in favour of the RYA to consult them before making appropriations or general direction. The stakeholder consultation arrangements are well established and it is considered they work effectively. The undertaking will give legal force to these arrangements.
  - The RYA can submit expert advice to the Commissioners as part of the consultation process and could bring suitably qualified advisers and others to meetings with the Commissioners. As a matter of law and practice the meaning of consultation is well understood, and the Commissioners could not be said to have consulted properly if they refused to consider arguments or material put to them. It is therefore unnecessary to make provision in the Order for the obtaining of independent reports.
  - The concept of referring "disputes" to an independent person, or the need for independent adjudication, appears to be largely meaningless, since the Commissioners would always have the final decision.
  - Delay. The exchange of representations, obtaining an expert's report, the holding of meetings and the subsequent consideration by the Commissioners could take weeks or months. This is wholly inappropriate in the context of the exercise of management powers which may be needed for safety purposes.
  - The process would give rise to costs.
  - The Department for Transport has not endorsed the RYA's arguments for independent adjudication submitted to the Ports Policy Review.
  - The procedure is unprecedented and does not apply to other harbours which may be in competition with Poole. PHC accordingly may be disadvantaged commercially if the exercise of essential management powers is restricted unduly.

*Bircham Dyson Bell 31 October 2007*

18. The RYA responded on 31 October. The following is a summary of the points made.
19. The proposed appropriation power and to issue directions do the following things:
  - Interfere with the public right of navigation
  - Create a series of criminal offences
  - Enable PHC to set the precise terms of criminal offences without any outside guidance, endorsement or supervision
  - Result in circumstances where the insurance applicable to vessels is liable to be rendered invalid

- Avoids the need to make byelaws the procedure for which allows for the RYA to object and be heard at a public inquiry with an inspector reporting to the Secretary of State before a final decision.
20. The proposed powers are wide ranging and could be used to make general directions to require some or all recreational craft to use or refrain from using any part of the harbour at all or at certain times, limit the times when any part of the harbour could be used by some or all vessels, impose moving exclusion zones around particular vessels, introduce speed limits, require the use of engines, signalling and telecommunications or other equipment, prohibit navigation during times of poor visibility, and to require masters of vessels to provide information to and for that purpose to report to the Harbour Master.
21. The RYA gave examples of issues that have arisen in respect of powers of general direction and asked for further points to be considered, namely:
- The Commissioners do not seem to have sought byelaw powers.
  - The Port Policy Review while envisaging reform of the byelaw procedures, also specifically offers the prospect of replacement safeguards.
  - As the Review has not concluded, either application for new powers should await that conclusion or otherwise settled on their individual merits.
  - The RYA proposals are fully consistent with Better Regulation principles, the importance placed on prior and comprehensive consultation with stakeholders, the principles of the Ports Policy Review and current Local Government and Public Involvement in Health Bill.
22. The undertaking offered by the Commissioners lacks the key element which affords the principal safeguard, namely the provision for referral to and a report by an independent person. This would ensure that in a contested case the Commissioners case for exercise of the power would have to be fully explained and documented and be subject to independent and objective examination, the Commissioners would retain ultimate discretion to proceed having considered the report, that decision would be open to legal challenge only if it was patently perverse to proceed and the fact that their concerns had been given a fair hearing would act as a powerful spur to persuade the RYA and others to accept the decision.
23. Other advantages would be: guarantee of appropriate degree of consultation, very speedy implementation of non-contentious measures, provision of fast track basis for adjudicating upon objections, reserving the decision to the Commissioners, and avoid perceived deficiencies with the byelaw process.
24. The RYA criticised the Commissioners' own consultation proposals as follows:
- The Commissioners retain absolute discretion on how to engage with the RYA.
  - The requirement in the undertaking not to make the proposed appropriation or direction "until they have considered" the RYA's representations is arguably a lower threshold than the language commonly adopted in legislation requiring a body to "have regard to", "to have full regard to" or "to take into account".
  - The proposed entitlement to a meeting with the Harbour Master or nominee is liable to be interpreted as precluding the need as may be appropriate in some

- The Harbour Master can be in the position of being both initiator of a proposal for consultation and responsible for conducting and reporting on the consultation. This supports the need for a degree of independent adjudication.
  - Where there is a real dispute, absence of an independent report will rob the process of a sense of fair hearing and undermine acceptance of the Commissioners' decisions.
  - There is nothing in the Commissioners' suggestions to act as a spur to ensure that proposals are only brought forward which either command general support or, if they do not, are fully appraised and justified.
  - No provision is made for further consultation in relation to any modifications to a proposed appropriation or direction which may be made by the Commissioners and which are different from or fall short of any modifications requested by the RYA.
  - There is a probable technical oversight in Clause 4.5(b) of the Commissioners proposals, relating to reasons for not making a modification or direction that may have been requested.
  - A lesser period may be more appropriate than the minimum 3 year period proposed as triggering an entitlement to review.
25. The RYA concede that their suggested process is new but it has been put forward in the light of the move away from byelaws and the increase in the number of harbour authorities seeking general direction powers. An agreement now exists with the Broads Authority for the application of broadly equivalent requirements to those the RYA propose for Poole.
26. The byelaw process is not proposed for replacement because there is an inherent fault in the process and therefore the checks and balances within it should be retained.
27. The RYA make specific responses to the assertions in the Commissioners' letter of 27 September at Section 6.1.
- The Commissioners' undertakings are not sufficient to provide the safeguards the RYA desires. In addition the current arrangements do not provide for a statutory advisory committee.
  - Leaving the final decision with the Commissioners does not render the process meaningless as the existence of the process in itself will have a benign influence on the exercise of powers and reaction of stakeholders.
  - On delay, the Commissioners' process already allows for three months consultation and thorough consideration of powers is justified.
  - On costs, these are likely to be lower than involved in byelaws which go to public inquiry and would be appropriate and proportionate to the circumstances. The RYA proposals also allow for the independent person to award costs in relation to a referral to him thereby ensuring that the Commissioners are not subjected vexatiously or unreasonably to undue expense.

- It is accepted that the Department has yet to respond on its ports policy.
  - On relative disadvantage with other ports, the RYA say that the proposed powers are new and that their proposals would not cause delay where appropriately followed. They are requesting the Government to apply similar procedures at all harbours wanting general powers.
28. The RYA add some other points namely:
- The Commissioners have not justified their arguments that conditions applying to personal watercraft or the enforcement of special directions would be easier to implement with the power of general direction.
  - The RYA's proposed adjudication process would be limited to the RYA and other bodies proposed by the Commissioners avoiding a long drawn out process.
29. Moving away from the adjudication process the RYA made a series of points in opposition to the Commissioners' proposed power to appropriate. The RYA consider that the power should only apply to water areas whilst and to the extent that vessels benefiting from the appropriation of such land based facilities occupy such areas whilst using those facilities. Navigable areas should not be subject to a greater degree of exclusion by way of authority appropriation for private, commercial or other purposes. The Commissioners might be subject to pressure to exploit open water areas to secure additional revenue in relation to areas which should remain public areas.
30. The Commissioners' example of where use would be made of the power was inappropriate and could be done by special direction.
31. Regattas, boat races and other recreational functions are best organised and regulated on a voluntary basis.
32. Other points are:
- Voluntary arrangements are shown to work and provide greater flexibility;
  - All craft must comply with the International Collision Regulations;
  - Absolute exclusion of other navigation users is rarely necessary;
  - Cost pressures could lead the authority to see their powers as an alternative to policing on the water;
  - A regulatory charge would be inappropriate when the appropriation powers are used at the insistence of the Commissioners;
  - Statutory prohibitions do not in themselves prevent occasional reckless or anti-social behaviour and might increase their incidence;
  - Regulatory impositions are liable to give rise to conflicts with vessel Masters own responsibilities.
33. The RYA then argued that General Directions should not be issued in the interests of conservation, their main points being as follows.
34. There is no precedent for the conferment of the general directions power for conservation purposes.
35. The Commissioners had made no case for the power and are now alluding to a general duty to have regard to environmental and public access considerations

36. The purpose of the precedented power of general direction is for the purpose of and in the interests of facilitating navigation. Use for purposes of conservation would be to constrain the public right of navigation.
37. The balance of interests would be altered as between navigation and conservation.
38. Other powers are available to safeguard conservation eg protection for SSSIs and marine nature reserves.
39. The byelaw mechanism is the appropriate method to control navigation in the interests of conservation.
40. Finally, the RYA considers the case for including an exemption for small vessels. The points they make are as follows:
41. Small recreational vessels do not have low flash point cargo or present special risks to vessels which do. The Commissioners have not provided any evidence as to why recreational craft need to be precluded from navigating in fog or other forms of restricted visibility. The RYA believes this must remain a matter for the judgment of the master of a vessel and in any case the Commissioners cannot prohibit vessels seeking relief from restricted visibility from entry into harbour.
42. No evidence has been provided as to why it is necessary to govern the movement of small vessels or to impose reporting of VHF requirements. Many small vessels do not have VHF.
43. A prohibition of transit through the harbour entrance is not justified. The power is not currently required and the case for the availability of a power of general direction for this purpose has no basis.
44. Small recreational craft present, relatively speaking, little danger to others (or to passengers and crew on them). The general manoeuvrability and low displacement of small recreational craft mean that there is very much less cause for additional rules beyond the International Collision Regulations. Self responsibility in relation to journey programming and navigation is the essence of small craft seamanship and ought not to be interfered with without good cause.

*Commissioners' Letter of 3 March 2008*

45. The Commissioners responded on March 3 beginning with some general points as follows:
46. The RYA have failed to note properly that Poole Harbour in addition to being one of the most important and popular locations for yachting and related activities in the UK, is also a major commercial port and passenger terminal as well as being used for recreational pursuits and moreover is subject to environmental designations.
47. The RYA have also failed to acknowledge that at least one Harbour Commissioner will always be appointed to represent recreational marine activities, and many Commissioners are, and have been, recreational users of the harbour.
48. The Commissioners have always observed the principle of having regard to the interests of all stakeholders. The RYA seem concerned to protect the interests of

49. The consultation carried out by the Commissioners before submitting the Order has drawn no outstanding objections from any of the local yacht clubs or from the Poole Yachting Association.
50. The RYA is failing to acknowledge the existing non statutory consultation and liaison arrangements - twice yearly meetings with all harbour user groups which the Commissioners believe work successfully. There are various instances where differences between harbour users and harbour authorities were resolved without recourse to legal proceedings or the adjudication processes sought by the RYA.
51. The Commissioners have ascertained the views of and gained the support of other stakeholders in support of the Order in contrast to the RYA.
52. The appropriation of part of the harbour for regattas will positively assist those recreational users who are participating, in that access will be denied to non participating vessels. Large areas of the harbour are environmentally protected and environmentally sensitive. General directions will enable those areas to be further protected by eg restricting moorings or access.
53. There are a large number of small vessels in Poole Harbour. A blanket exemption for vessels under 24 metres would significantly limit the effectiveness of general directions.
54. The Commissioners then respond to a number of the specific comments from the RYA in the letter of 31 October 2007 as follows:
  - One Commissioner is a member of the RYA.
  - If insurance policies are liable to be invalidated by illegal activity, this will apply equally to all sorts of offences under harbour legislation.
  - The Commissioners will take all the steps envisaged by the RYA and make directions such as referred to by the RYA in sub-paragraphs a-d of 6.7, if the need arises.
  - [6.8].It is surely for the owner of the vessel to ensure either that he has sufficient skills to assure the speed of his vessel, or otherwise to have the appropriate equipment.
  - The Commissioners would not envisage a requirement for mandatory carriage of VHF unless this became national policy. The absence of VHF equipment has not, in the past, been the cause of difficulties in Poole Harbour.
  - The story at Cowes was that the Harbourmaster there decided that a safety boat should be on duty and sought payment of a modest fee for this service (£100). The RYA initially objected but subsequently agreed. The RYA's objection was based in part on expense; the Poole Harbour Master believes that the Cowes direction was reasonable and was required for safety reasons. It is also understood that the other Solent harbour authorities supported the decision taken by Cowes.
  - [6.9] The RYA's comments are misleading. For some years the Harbourmaster was concerned that a number of races crossed the main shipping channels. This was a matter that was regularly discussed with the

- It was acknowledged in the Parkstone Yacht Club's Risk Assessment for 2005/06 that navigation buoys in the main shipping channel should not be used as racing marks. As part of the consultation, PHC put down three racing marks from the main shipping channel which are now used in lieu of the navigation markers.
- On the issue of RYA's suggested procedures for independent adjudication these are seen by the Commissioners as setting aside the concept behind the trust port, which is that it should comprise an appropriate range of expertise and should take decisions in the best interests of its stakeholders. Instead the RYA wish to introduce different and unprecedented arrangements which are not supported by the harbour's commercial navigational interests.
- The appointment of an independent adjudicator would compromise the authority of the harbourmaster and a 32 week time scale is unacceptable.
- On the power to appropriate, the Commissioners believe their proposed powers are proportionate and reasonable. They are surprised that the RYA remain opposed to appropriations for recreational navigational events. The Commissioners are committed to furthering the recreational use of the harbour and article 10 of the proposed Order will assist this. It is agreed that voluntary arrangements are desirable but on occasions these must be reinforced by statutory controls.
- On conservation directions, the Commissioners state that as a statutory harbour authority they are subject to environmental duties under European and domestic legislation. There is support for their approach from Natural England.
- On exemptions for small craft the Commissioners are surprised that the RYA seek to have small recreational craft excluded from the direction powers. Such vessels if unregulated can endanger themselves, their occupants and other vessels. During the calendar year 2007 there were 42 reported incidents involving close quarters, speeding and the impeding of vessels. Those caught speeding were prosecuted. Of these incidents 34 involved craft of less than 24 metres. None involved commercial craft. During the last 10 years there have been an average of 12 prosecutions a year all involving vessels under 24 metres in length.
- During 2006 the Harbourmaster did have to give an instruction to prevent a yacht race which had started during foggy weather from crossing a main shipping channel. In the Harbourmaster's view the race should not have been started as the conditions were such it was "obvious" that the race was potentially dangerous.
- The use of motors in the harbour entrance is contentious. At present there is a "Use Your Engine" notice at the harbour entrance. It has no statutory force. There are very good safety reasons for engines to be used and no compelling reasons, whether safety or otherwise, against. Notwithstanding this, the RYA

55. The RYA made further representations in a letter of 10 April, the main points being:

- The third party representations submitted by the Commissioners should be disregarded by the Secretary of State as they were not invited, the RYA had no opportunity to comment on the letters sent by the Commissioners before sending, the letter from the Commissioners was unbalanced and designed to secure a favourable response and there is no opportunity under the written representations procedure to examine the reasoning behind the responses.
- If these representations are to be taken into account the RYA ask for the equivalent opportunity to engage with those making them.
- The RYA is aware of the harbour authorities' duties relating to conservation and protection of the environment. Its view is that the environmental designations are not more important than the public right of navigation and that conservation objectives are not something which should be pursued through general directions.
- The RYA's adjudication proposal is not designed only to protect recreational interests - the Chamber of Shipping is included in the suggested list of consultees. It would be for the Commissioners to consult with those they think appropriate but the RYA proposes that the stakeholders consulted under any new protective provision should be restricted to those with legitimate recreational interests and the Chamber of Shipping, so as to avoid the Commissioners being required to consider vexatious objections.
- The RYA represents, and speaks for the interests of all forms of recreational and competitive boating, representing sailing, motor cruising, sports boats, windsurfing, inland boating, powerboat racing and personal watercraft. The Commissioners are aware that the RYA response is a matter of importance to all RYA members. Inferences in favour of the Commissioners' arguments should not be drawn simply because local clubs have not raised any individual objections.
- The adjudication process proposed can be applied in relation to the interests of all stakeholders; there is no precedent in other sectors eg in local government, for the conferment on local bodies of a general and unconstrained power to create criminal offences in this way by local decree.
- The RYA questions the authority behind the giving of directions for environmental purposes; it appears well beyond the ambit of section 14 and Schedule 2 to the Harbours Act 1964. Section 48A of that Act imposes obligations as to how harbour authorities must act but does not provide a basis for the conferment of new powers or obligations.
- Case law on appropriation of parts of harbours, which require appropriations to derogate as little as possible from section 33 of the Harbours, Docks and Piers Clauses Act 1847, runs counter to the Commissioners' intentions.
- The proposals for an adjudication process have been accepted by the promoters for inclusion in the current series of Caledonian Maritime Assets Harbour Revision Orders. The current form of the proposed Yarmouth (Isle of

- The RYA questions how even an experienced vessel owner or master is supposed to ascertain exactly what speed he is travelling over the ground when he will necessarily be on water and when the difference between exceeding the speed limit and not doing so will be a unit of less than 1 knot.
- The Commissioners might require mandatory carriage of VHF, if the power of general direction is granted, without a full discussion of the arguments against doing so.
- In respect of events at Poole in 2005 the relevant point for the RYA is that the final form of direction was different from that originally proposed by the Harbour Master and which would have been introduced by way of general direction.
- The RYA's proposed adjudication process means that an independent adjudication process would have been followed and alternative viewpoints thereby given a fair hearing. This would provide the greatest prospect of final determination being accepted by all concerned even in the most contentious cases so facilitating implementation and helping to secure voluntary compliance.
- The RYA would expect that any exercise by the Commissioners of proposed Articles 10 or 14 which it viewed as improper would be subject to judicial review and therefore cannot see that acceptance of the independent adjudication procedure would leave the Commissioners in a position different from the one it would have been in without that procedure.
- A generic prohibition of personal watercraft may well be unreasonable in a situation where conditions could properly manage their use.
- The proposed independent adjudication process would not compromise the authority of the harbour master. There is nothing unusual in delegated statutory powers being subject to some form of checks and balances, particularly where criminal offences are to be created. In any event the Harbour Board and not the Harbour Master makes the final decision in respect of the giving of general directions and appropriations.
- The RYA's proposed procedure does not greatly extend the timescale. The Commissioners' consultation would take 12 weeks, a period easily exceeded as far as matters currently regulated by byelaws are concerned.
- The Commissioners have not explained how they would use the proposed general direction powers in relation to small recreational craft for the purposes set out in draft article 14(b), (d) and (f).
- The RYA continues to oppose any attempt to require the use of engines.

*Winckworth Sherwood 21 May 2008*

56. The Commissioners made further representations in a letter of 21 May, the main points being:

- The Commissioners are perfectly justified in obtaining support letters. The RYA could respond to the points or contact the writers of the letters should they so wish. The comments of stakeholders are relevant.

- The Harbour Authority is required to have regard to environmental considerations. The proposed powers of general directions for environmental purposes will facilitate compliance with these obligations.
- The RYA's amendments to the Order give prominence in the procedure to the RYA.
- It is plainly relevant that local clubs have not objected.
- Local authorities and other public bodies have various powers to lay down requirements contravention of which may lead to criminal penalties eg under road traffic legislation.
- To the extent that appropriations under Article 10 of the proposed Order derogate from Section 33 of the 1847 Act this will only be for the proper management of the harbour.
- Scottish Ministers have declined to include the RYA's adjudication procedures in Scottish Harbour Orders. Yarmouth is not comparable to Poole being a small harbour used largely for recreational navigation and for a ferry service to the mainland.
- The owner or master is already required by Byelaw 2(aa) to determine his speed through the water.
- No general direction would be issued requiring the use of VHF unless this becomes national policy.
- The Commissioners will consult stakeholders on a non statutory basis before giving directions.
- The power to give directions requiring the use of engines is well precedented. A general direction requiring the use of engines will only apply if engines are fitted.
- The procedures for harbour directions in the proposed Marine Navigation Bill do not lay down any procedures for independent adjudication or comparable arrangements.

*Bircham Dyson Bell 29 May 2008*

57. The RYA made further representations in a letter of 29 May, the main points being:

- The RYA has not argued that the views of stakeholders are irrelevant, only that the letters of support obtained by the Commissioners are of no evidential value and that obtaining proper views of stakeholders would require a further detailed exercise and appropriate scrutiny.
- It can only be inappropriate to hold some kind of hearing or inquiry if one is unnecessary.
- Section 48A does not provide a legal basis for conferring additional conservation powers.
- Existing local arrangements offer no safeguards against the making of general directions which adversely affect recreational boating interests and which, unlike the existing arrangements for byelaw-making which these new powers would replace, involve no external confirmation procedure.

- Decisions on the outstanding Scottish Orders referred to have yet to be made. The one so far made was made after omitting the proposed power to issue general directions.
- It is the wide scope of the proposed powers of general direction that needs to be borne in mind in considering the RYA's proposals and not just the Commissioners' current intentions relating to the exercise of those powers.<sup>3</sup>

*Winckworth Sherwood 29 May 2008*

58. No new points were made in this letter.

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<sup>3</sup> There were two additional points made that related to a draft Marine Navigation Bill that was consulted on in 2008, but has not yet been brought before Parliament as a Government Bill. This draft Bill, among other things, contained powers for Ministers to confer on all harbour authorities powers of general direction. The Consultation Document explained that the Government intended to use such powers in respect of a harbour authority only upon request from the harbour authority.

### **Right to Challenge the Decision**

Right to challenge an order made under sections 14, 15A and 16 of the Harbours Act 1964 (the 1964 Act).

As provided for by section 44 of the 1964 Act, any person who desires to question a harbour revision or harbour empowerment order (which are not confirmed by an Act of Parliament under section 6 of the Statutory Orders (Special Procedure) Act 1945, or under section 2(4), as read with section 10, of that Act) or an order under section 15A, may challenge the order on the grounds that:

- (1) there was no power to make the order; or
- (2) a requirement of the 1964 Act was not complied with in relation to the order.

Any such challenge should be made within six weeks from the date on which the order comes into force.

Upon such application, the High Court may, by interim order, suspend the operation of the order or any provision contained in it, either generally or so far as may be necessary for the protection of the interests of the applicant, until the final determination of the Court proceedings.

If the Court is satisfied that there was no power to make the order or that the interests of the applicant have been substantially prejudiced by a failure to comply with a requirement of the 1964 Act, the Court may quash the order or any provision contained in it, either generally or so far as may be necessary for the protection of the interests of the applicant.

Where section 44 is not relevant to the complaint - for example, because the Secretary of State has decided not to make an order - a person aggrieved by the Secretary of State's decision may seek permission to initiate judicial review proceedings, if appropriate. Any challenge must be brought promptly and in any event within three months of the decision being challenged.

It is suggested that anybody who is contemplating applying to the High Court to challenge the validity of an order, or applying for leave to judicially review a decision (such as a decision not to make an order), seeks legal advice.