

**MARINE MANAGEMENT ORGANISATION
HARBOURS ACT 1964 (AS AMENDED)**

**PROPOSED PORT OF SWANSEA (TIDAL LAGOON)
HARBOUR REVISION ORDER**

**STATEMENT IN SUPPORT OF APPLICATION BY
TIDAL LAGOON (SWANSEA BAY) PLC AND
ASSOCIATED BRITISH PORTS**

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1. Introduction

- 1.1 This Statement relates to the application being made by Tidal Lagoon (Swansea Bay) plc (“TLSB”) and Associated British Ports (“ABP”) (together, the “Applicants”) for the proposed Port of Swansea (Tidal Lagoon) Harbour Revision Order 2015¹ (“HRO”).
- 1.2 TLSB is the promoter of a nationally significant infrastructure project (“Project”), within the meaning of sections 14(1) and 15 of the Planning Act 2008 (“2008 Act”), which is authorised by The Swansea Bay Tidal Generating Station Order 2015¹ (“DCO”). ABP is the relevant harbour authority for the Port of Swansea.
- 1.3 The application, made in a letter to the Marine Management Organisation (“MMO”), dated [◆] November 2015, is accompanied by²:
- a) 6 copies of the draft HRO; and
 - b) this Statement in Support.
- 1.4 The application is for a harbour revision order to be made under the powers conferred on the Secretary of State for Transport by section 14 of the Harbours Act 1964 (“1964 Act”) which are delegated to the MMO by the Harbours Act 1964 (Delegation of Functions) Order 2010.³

2. Existing Jurisdiction

2.1 Harbour Authority

- a) The Port of Swansea is owned and operated by ABP on a commercial basis.
- b) The general powers and duties of ABP are set out in the Transport Act 1981. Its general duty is to provide port facilities at its harbours to such extent as it may think expedient, having due regard to efficiency, economy and safety of operations and the interests of its employees and those of its subsidiaries. The powers granted to ABP under the Transport Act 1981 are in addition to any other power conferred upon it by any other enactment (including local legislation at individual harbours).

2.2 Planning Authority

¹ S.I. 2015/1386.

² The fee for the application in the amount of £4,000 has already been paid by TLSB to the MMO, which has confirmed receipt.

³ S.I. 2010/674.

- a) The City and County of Swansea Council currently has no planning jurisdiction beyond the mean low water mark in Swansea Bay. The area outside of its jurisdiction, which lies within UK territorial waters, is within the jurisdiction of the Welsh Government in respect of certain functions including marine licencing under the Marine and Coastal Access Act 2009, but not as a local planning authority under the 2008 Act.
- b) This limit on planning jurisdiction precludes CCSC from discharging requirements contained in the DCO and from enforcing its provisions against TLSB under the 2008 Act in relation to the authorised development carried out beyond the mean low water mark in Swansea Bay. These powers are of relevance to the interaction of the Project authorised by the DCO with ABP.

3. Need for Harbour Revision Order

3.1 In the final iteration of the draft DCO submitted to the Examining Authority, on 25 November 2014, TLSB sought to address these jurisdictional issues through the inclusion of provisions adjusting the jurisdiction of ABP (and Neath Port Authority (“NPA”), together the “Harbour Authorities”) and extending the jurisdiction of CCSC (and Neath Port Talbot County Borough Council (“NPTCBC”), together the “Planning Authorities”).

3.2 However, in granting development consent the Secretary of State for Energy and Climate Change decided that she did not have the power under the 2008 Act either to:

- a) adjust the jurisdiction of ABP in respect of the Port of Swansea (or NPA in respect of the Port of Neath) over the area in which the development will be situated; or
- b) extend the planning jurisdiction of CCSC (or NPTCBC) beyond the mean low water mark in Swansea Bay.

3.3 The Secretary of State in her decision letter, dated 9 June 2015, explained:

- a) at paragraph 14, that the boundaries of the Planning Authorities’ jurisdiction would need to be extended through the process provided for in the Local Government (Democracy) Wales Act 2013 (the “2013 Act”); and
- b) at paragraph 28, that the boundaries of the Harbour Authorities’ jurisdiction would need to be amended through a harbour revision order made under the

1964 Act.

- 3.4 It is for these reasons that the Applicants are making the application for the HRO to the MMO under section 14 of the 1964 Act. A parallel application for the proposed Port of Neath (Tidal Lagoon) Harbour Revision Order is being made by TLSB and NPA for the same reasons.
- 3.5 The Applicants consider that the changes to harbour limits and extension of the jurisdiction of CCSC can be achieved under section 14 of the 1964 Act. Further explanation of the content of the articles of the proposed HRO is set-out below (see paragraph 6).

4. The Harbours Act 1964

- 4.1 Section 14 of the 1964 Act confers powers which have been devolved to the MMO (see paragraph 1.4 above) to make an order under that section, known as a harbour revision order, in relation to a harbour which is being improved, maintained or managed by a harbour authority in the exercise and performance of statutory powers and duties for achieving all or any of the objects specified in Schedule 2 of that Act.
- 4.2 Section 14(2)(a) of the 1964 Act requires that a written application be made to the MMO by the authority engaged in improving, maintaining or managing the harbour in question and section 14(2)(b) provides that the MMO must be:

“satisfied that the making of the order is desirable in the interest of securing the improvement, maintenance or management of the harbour in an efficient and economical manner or facilitating the efficient and economic transport of goods or passengers by sea or the interests of the recreational use of sea-going ships”.

- 4.3 Because this is not an application for a harbour revision order which, directly or indirectly, authorises a project (within the meaning of paragraph 1 of Schedule 3 to the 1964 Act), prior notification to the MMO under paragraph 3(a) of Schedule 3 to the 1964 Act is not required (see further paragraph 5.2 below).
- 4.4 The Applicants have nevertheless given the MMO notice of their intention to make the application (see further paragraph 7.1 below).
- 4.5 The application for the HRO under section 14 of the 1964 Act meets the conditions set out in that section. In particular, the application meets the requirements of:

- a) section 14(1) of the 1964 Act because it is made in relation to a harbour which is being improved, maintained and managed by a harbour authority in the exercise and performance of its statutory powers and duties for the purpose of achieving objects falling within Schedule 2 of that Act. It relates to the harbour comprised in the Port of Swansea;
- b) section 14(2) of the 1964 Act because:
 - (a) the application is made upon the written application of the harbour authority engaged in improving, maintaining or managing the harbour as well as TLSB having an interest in the harbour; and
 - (b) the making of the HRO is desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner since it relates to management of the harbour in its interactions with the Project authorised by the DCO.

4.6 Paragraph 6 of Schedule 2 to the 1964 Act provides that a harbour revision order may include provision for “*settling (either for all purposes or for limited purposes) the limits within which the authority are to have jurisdiction or altering (with for all purposes or limited purposes) such limits as previously settled*”. Accordingly, the alteration of the limits of the two harbours is entirely appropriate within the powers.

4.7 Paragraph 8A of Schedule 2 to the 1964 Act provides that a harbour revision order may also include provision for “*enabling the authority to close part of the harbour or to reduce the facilities available in the harbour*”. Removal of areas from the harbour’s harbour limits is thus within the powers of the 1964 Act.

4.8 The Applicants consider that the proposed HRO achieves the objects in both paragraphs 6 and 8A of Schedule 2 in satisfaction of section 14(1) of the 1964 Act.

4.9 Further, section 14(2B) of the 1964 Act provides that nothing in section 14(2)(b) of the 1964 Act shall prevent the making of an order facilitating:

- a) the closing of part of the harbour,
- b) a reduction in the facilities available in the harbour, or
- c) the disposal of property not required for the purposes of the harbour,

if the appropriate minister is satisfied that the making or the order is desirable on grounds other than those specified in section 14(2)(b) of the 1964 Act. As such, items (a) or (b) above are applicable in this case.

- 4.10 If it is not accepted by the MMO that the HRO is desirable on the grounds of securing the improvement, maintenance or management of the harbour (which the Applicants consider that it is), it is evident that the making of the HRO is desirable on other grounds, as described in paragraphs 3 and 6 of this Statement. The HRO will allow CCSC to monitor, regulate and conduct enforcement activities within the lagoon, in relation to the interfaces with the Port of Swansea. CCSC is one of the appropriate bodies (together with NPTCBC) to undertake such activities (as decided by the Secretary of State), but do not have the jurisdiction to do so. The HRO will achieve this.
- 4.11 Further, once the lagoon is completed, it will be impractical for ABP to exercise its functions as harbour authority in relation to the lagoon, the area of water adjoining it (outside of the lagoon) and how the lagoon and its associated activities interact with the harbour and its operations (including the ships using the harbour). This is also particularly important as CCSC acts as a conservator for certain areas of the River Tawe.
- 4.12 The application for the HRO would not be being made by ABP were this not the case. Therefore, by extending the jurisdiction of CCSC such that these functions can be undertaken by an appropriate body, the management of the interaction of the Project with the harbour in an efficient and economical manner will be secured (as required section 14(2)(b) of the 1964 Act), while this in itself is a desirable ground on its own merits (falling within section 14(2B) of the 1964 Act). The HRO secures that the interests of the public in the planning sphere as well as the harbour authority are properly regulated and managed by CCSC.
- 4.13 Furthermore, the physical works of the Project can be expected to accrete to the local authority areas in due course. This is provided for in section 72 of the Local Government Act 1972 for planning purposes, although this is only the case when the works are in being. In the interim between the making of the HRO and the coming into being of the works the planning interaction between the harbour (as opposed to the jurisdiction of Natural Resources Wales) and the Project is not managed. Therefore, it is appropriate and desirable for the management of the harbour for the planning jurisdiction of CCSC to be extended as envisaged by the HRO.

4.14 The HRO contains all of the jurisdictional changes required, obviating the need for a separate application under the 2013 Act.

5. The Planning Act 2008

5.1 Section 33(2)(a) of the 2008 Act provides that to the extent that development consent under that Act is required for authorising development, such development cannot be authorised by a harbour revision order under section 14 of the 1964 Act. The HRO does not authorise any such development, although it does relate to such a project, which is already authorised by the DCO.

5.2 Section 120(9)(a) of the 2008 Act similarly provides that to the extent that a matter may be included in a development consent order under that Act, a harbour revision order under section 14 of the 1964 Act may not include any such provision. Although the authorised development under the DCO is to be carried out in a harbour, the harbour itself is not a nationally significant infrastructure project for the purposes of the 2008 Act. The proposed HRO does not seek to authorise the development which is the subject of the DCO (since it has already been authorised) and the restrictions provided in sections 33(2)(a) do not apply.

5.3 In relation to section 120(9)(a) of the 2008 Act, the Secretary of State said in her decision letter, dated 9 June 2015, at paragraph 28 that:

“The Order as submitted by the ExA included provisions amending the jurisdiction of the two ports. The Secretary of State does not consider that such an amendment is within the powers afforded by the Act and she has removed them. As a consequence, in order to make the requested amendments, the Applicant will have to seek a Harbour Revision Order under the provisions of the Harbours Act 1964”. (emphasis added)

5.4 The Secretary of State's finding in relation to the planning jurisdiction of the Planning Authorities, at paragraph 14 of her decision letter, was that:

“[T]he Applicant sought the inclusion of powers in the Order that would extend the planning jurisdiction of both the City and County of Swansea Borough Council and Neath Port Talbot County Borough Council to the offshore elements of the Development. Such an approach would allow the local authorities to monitor, regulate and conduct enforcement activities at the lagoon. However, the Welsh Government argued that the Planning Act

does not allow the Secretary of State to grant such powers and that such jurisdiction extensions should only be made by it (for which there is a dedicated procedure under the recent legislation enacted by the National Assembly for Wales). The ExA took a different view and included provisions to extend the jurisdiction of the two councils in the Order it recommended to the Secretary of State. The Secretary of State has considered this matter and concluded that it would not be appropriate to include the provisions to extend planning jurisdiction in the Order that is attached to this decision. The Secretary of State recognises that her decision will mean that the Applicant will have to avail itself of the process to change jurisdiction set out in the Local Government (Democracy) Wales Act 2013”.

5.5 As stated above, the Applicants consider that the HRO contains all of the jurisdictional changes required, obviating the need for a separate application under the 2013 Act.

6. Port of Swansea (Tidal Lagoon) Harbour Revision Order

6.1 The proposed HRO would adjust the existing jurisdiction of ABP over the Port of Swansea to exclude the area of the authorised development under the DCO. The area of Swansea Bay to be excluded from the jurisdiction of the Port of Swansea is depicted on Plan 1 provided at Appendix A to this Statement. The jurisdiction of CCSC would be extended to the DCO limits to allow it to monitor, regulate and conduct enforcement activities within the lagoon, in relation to the interfaces with the port. Importantly these include the powers of the Planning Authorities under Articles 16 to 23 of the DCO as enforcing authority for the purposes of Part 8 of the 2008 Act (pursuant to section 173 of the 2008 Act).

6.2 Article 3 - Harbour Jurisdiction

a) This article provides that once the seawall authorised by the DCO is built and the lagoon is enclosed, the sea walls of the lagoon and the area within the lagoon (as far as they are relevant to the Port of Swansea), together with an area outside of the lagoon, will cease to be part of the jurisdiction of the ABP, and any enactments conferring powers or duties on ABP will cease to apply to those areas thereby excluded from its jurisdiction.

6.3 Article 4 - Planning, etc. Jurisdiction

- a) This article provides that the area within the DCO limits accretes to CCSC from the date on which the HRO comes into effect until the date when the authorised development is completed for the purposes of the Town and County Planning Act 1990 Act and the Control of Pollution Act 1974. On completion of the authorised development, the lagoon and relevant works will remain within the jurisdiction of CCSC, and the area of jurisdiction will reduce. This confers on CCSC powers of enforcement for those offshore areas ordinarily outwith its administrative jurisdiction. These jurisdictional changes are depicted on Plans 2 and 3 provided at Appendix B to this Statement.

7. Application Consultation

- 7.1 Prior to the making of this application, TLSB has engaged in pre-application consultation with key stakeholders, including (but not limited to) the pre-application consultation summarised in the table below.

Period	Action
23 July 2015	Meeting with Welsh Government attended by James Hooker (Senior Planning Manager, Development Management, Planning Directorate, Department for Natural Resources, WG), Tamsin Brown (Marine Policy, WG) plus Christine Ayers, Steve Halsall and Sinead O'Toole (Boundary Commission, WG)
24 July 2015	Meeting with CCSC, NPTCBC and Natural Resources Wales attended by Richard Jones (CCSC), Nicola Lake (NPTCBC), Pete Jordan (NRW)
26 June 2015 - 24 November 2015	Email correspondence with MMO.

8. Conclusion

- 8.1 In addition to paragraphs 6 and 8A of Schedule 2 to the 1964 Act, paragraph 17 of Schedule 2 provides that a harbour revision order may include provision for:

“Any object which, though not falling within any of the foregoing paragraphs, appears to the appropriate Minister to be one of achievement of which will conduce to the efficient functioning of the harbour”.

8.2 For the reasons mentioned above, the Applicants considered that to the extent that any provision contained in the HRO does not fall specifically within any other paragraph of Schedule 2, the provisions of the HRO would be conducive to the efficient functioning of the Port of Swansea and it is therefore within the scope of the 1964 Act for them to be included in the HRO.

DLA Piper UK LLP

November 2015

APPENDIX A - HARBOUR JURISDICTION PLAN

APPENDIX B - PLANS

PLANNING JURISDICTION