

## Sayers S (Scott)

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**From:** THOMPSON Paul [PaulThompson@bdb-law.co.uk]  
**Sent:** 21 June 2012 15:45  
**To:** Sayers S (Scott)  
**Cc:** 'msales@biggartbaillie.co.uk'; 'angus.dodds@fife.gsx.gov.uk'; 'mrs.sue@btinternet.com'; 'claire.BSmith@rspb.org.uk'; 'Darren.Hemsley@snh.gov.uk'; 'suzanne.mcintosh@yahoo.co.uk'; 'Morag McNeill'; HALLATT Alex  
**Subject:** Proposed RICT Order: response by Forth Ports  
**Attachments:** Forth Ports Response to Reporters (21\_06\_12).PDF

Scott

Further to the letter which my firm sent to you on 14 June 2012 in response to your email of that day, I now attach Forth Ports response to the Reporters on the matters raised in that email.

Regards  
 Paul.




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**From:** Scott.Sayers@scotland.gsi.gov.uk [mailto:Scott.Sayers@scotland.gsi.gov.uk]  
**Sent:** 14 June 2012 14:05  
**To:** msales@biggartbaillie.co.uk; HALLATT Alex; angus.dodds@fife.gsx.gov.uk; morag.mcneill@forthports.co.uk; mrs.sue@btinternet.com; claire.BSmith@rspb.org.uk; Darren.Hemsley@snh.gov.uk; suzanne.mcintosh@yahoo.co.uk; morag.mcneill@forthports.co.uk  
**Subject:** PORT BABCOCK, ROSYTH

Dear all

The reporters note that Babcock now submit that no further procedure is required in relation to the proposed amendments to the HRO. Having considered the parties' submissions on this issue the reporters are minded to agree that a hearing or inquiry session is not required.

However, they seek clarification of a number of issues noted below. Parties should respond

22/06/2012

to the points raised by **Friday 22 June**. The reporters will decide on further procedure in the light of those responses. When responding parties should indicate whether they consider that the session scheduled for the week commencing 2 July can be dispensed with. If it is thought that it should proceed parties should give revised time estimates for the duration (5 days have been set aside) and their views on what form the session should take.

### *The port limits*

Babcock submit that Forth Ports' plan entitled "Comparison of Proposed HRO Boundaries" does not accurately represent the proposed plan port limits as described in Schedule 1 to the Applicant's draft HRO and shown on Sheet I Rev A. Can Babcock please provide a plan showing the existing port limits, those submitted with the application, the revised limits provided at the inquiry as shown in Sheet I Rev A and their understanding of Forth Ports' proposed delineation of the outer harbour limits. It would be helpful if parties could use their best endeavours to agree a single plan showing each of these scenarios.

Forth Ports are invited to expand upon their justification for a 30 metre boundary from the port premises having regard to the other examples cited by Babcock (North Killingholme Haven HEO 1994 and The Harwich Parkeston Bay HRO 2010) and the location of the main navigation channel of the Forth relative to the RICT.

Forth Ports are invited to comment on the submission made at pages 3 and 7 of Babcock's Further Response that neither the proposed extension of the PBR port limits to the east of the existing port limits, nor the areas immediately on the river side of the existing PBR port limits, nor the access channel to the Contractors Jetty are within Forth Ports' jurisdiction, being works on the bed of the Forth constructed by the Secretary of State for Defence that are thus excluded in terms of Schedule 1 to the Forth Ports Authority Order Confirmation Act 1969.

### *Timing of any extension to the port limits*

Forth Ports submit that if the HRO is confirmed the proposed extension of the port limits should not come into force until it is clear that construction of the RICT will proceed. Babcock have no objection in principle to the transfer of jurisdiction being delayed to an appropriate time and suggest a suitable trigger at page 8 of their submission. What are Forth Ports' views on that proposal ?

### *The open port duty*

Forth Ports accept that section 33 of the 1847 Act should not apply to the whole of the PBR area but argue that it should, however, apply to what they define as the 'outer harbour limits' so as not to impede public rights of navigation in the Forth. Babcock is concerned that the wording proposed by Forth Ports would not preclude transshipment of cargo in the immediate vicinity of the entrance to the RICT and offers an alternative position. What are Forth Ports' views on that proposal ?

The reporters understand the proposed definition of 'outer harbour limits' to comprise the area extending approximately 30 metres seaward of the port premises and including the area between the tidal jetty known as Middle Jetty and the Forth face of the north side of the structure of the port basin entrance which is coloured brown on the port map. Is that correct ? If so, how is the proposed amendment to paragraph (1) of Article 17 of the HEO to be interpreted ?

*Article 7 (power to deviate)*

Could Forth Ports please explain the purpose of the reference to Schedule 2 in this Article ?

*Power to dredge and tidal works*

Forth Ports question whether, if the HRO were to be confirmed, it would be necessary for Babcock to apply for a marine licence for dredging. Babcock contend that such a licence would be necessary and state that they would not oppose the insertion of an express provision to the effect that RICT dredging works shall not be exempt from marine licensing and that such works would be a “licensable marine activity” within the meaning of the Marine (Scotland) Act 2010 and that the Exempted Activities Order would not apply. What are Forth Ports’ views on such a provision ?

Do Forth Ports agree that the effect of section 26(1)(i) of the 1969 Act is that a licence is not required from them for dredging which is authorised by a power contained in a HEO/HRO to dredge the approaches and channels leading to the port limits, even though that dredging would take place in an area falling within their jurisdiction ?

Forth Ports consider that, even if a marine licence is needed for dredging works, such works should nevertheless be subject to their own licensing regime or the protective provisions set out in Schedule 2. Would Forth Ports, as harbour authority for the Forth, be consulted by Marine Scotland if an application were made by Babcock for a marine licence for dredging works in respect of the RICT?

Although Babcock object to Forth Ports having the power to approve tidal works or dredging they offer to consult with Forth Ports in relation to dredging beyond the 10 meter contour line and to copy applications for marine licences for such works to Forth Ports. What are Forth Ports’ views on this proposal ?

Could Babcock please clarify whether the offer to copy applications for marine licences to Scottish Ministers (page 22 of the submission) is limited to dredging works beyond the 10 meter contour line or is intended to be of more general application to any tidal works or dredging that might require a marine licence ?

The proposed amendment to Schedule 2 to the Order require the approval of Forth Ports of the detailed design of tidal works [and dredging]. Do Forth Ports consider that their status as harbour authority for the Forth would be sufficiently protected if there were a requirement for Scottish Ministers to consult them about an application for authority to carry out tidal works ? If not, please explain the reasons for this.

*Schedule 2: Power to survey the river bed*

The reporters note that it is a feature of a number of HEO/HROs for a power to be conferred on Scottish Ministers to survey the river bed. Would such a provision be appropriate here ? If not, why not ?

*Schedule 2: protective action and remedial action regarding sedimentation*

Would Babcock or Forth Ports object to the proposed clauses relating to protective action and remedial action in relation to sedimentation (amendments 31.7 and 31.10) in Schedule 2 being recast so that Scottish Ministers would have the powers proposed to be conferred

on Forth Ports, such powers being exercisable following consultation with Forth Ports, Marine Scotland, SEPA, SNH and any other person or body whom the Scottish Ministers considered ought to be consulted about the environmental impact of the works authorised by the HRO ?

## *Schedule 2: statutory functions*

Babcock object to the functions of the company and its officers being subject to enactments relating to Fort Ports, byelaws made by Forth Ports, and the exercise by Fort Ports or its harbour master of their functions. They accept, however, in principle that some provision regarding the interface between the two harbour authorities may be appropriate provided there is a sufficient degree of reciprocity. The reporters have reached no view on the need for protective provision but invite Babcock to provide text that would be acceptable to them if Ministers were minded to include such provisions as offered at page 39 of their submission.

Kind Regards

Scott

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Dh'fhaodadh gum bi teachdaireachd sam bith bho Riaghaltas na h-Alba air a chlàradh neo air a sgrùdadh airson dearbhadh gu bheil an siostam ag obair gu h-èifeachdach neo airson adhbhar laghail eile. Dh'fhaodadh nach eil beachdan anns a' phost-d seo co-ionann ri beachdan Riaghaltas na h-Alba.

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# **PROPOSED RICT HARBOUR REVISION ORDER**

## **RESPONSE BY FORTH PORTS TO REPORTERS CLARIFYING ISSUES RAISED IN SCOTT SAYERS' EMAIL OF 14 JUNE 2012**

### **1 Introduction**

This paper contains the response sought from Forth Ports to the points raised in Scott Sayers' email of Thursday 14 June 2012 and has been produced by the deadline of Friday 22 June 2012 sought for that response.

### **2 The port limits**

#### **2.1 Agreed composite plan**

Forth Ports stands ready to use best endeavours, as requested by the Reporters, to agree a single plan showing the various proposed scenarios. To that end, it looks forward to receiving a draft of the composite plan which the Reporters have requested that Babcock produce.

#### **2.2 Justification for 30 metre boundary**

2.2.1 30 metres will provide Babcock with control over the waters immediately adjacent to its existing and proposed facilities and will encompass not only the totality of the berthing area of the proposed new container berths but also all the waters adjoining the port which a vessel might occupy were it to berth alongside the dock walls.

2.2.2 Forth Ports maintains the position summarised in its Closing Submission (see 1.1 and 2, particularly 2. 2.1.42-44) In particular, it should be borne in mind that:

- (a) contrary to Babcock's assertion, Forth Ports does not concede that Babcock should be given this limited (c. 30 metre) jurisdiction in any event – as stated in Forth Ports Closing Submission, its position is that this limit is appropriate if, but only if, it is decided to recommend approval of the HRO for the RICT;
- (b) Babcock has made no case for expanded harbour jurisdiction limits other than for RICT purposes - to do so other than in connection with the RICT, it would have to make a separate application;
- (c) Forth Ports maintains that 30 metres is consistent with jurisdictional arrangements on estuaries elsewhere in the United Kingdom. In some cases, it concedes, more extensive limits have been conferred (perhaps by agreement with the harbour authority concerned) but it is important in each case to look at the circumstances and to focus on what, having regard to the particular circumstances of the case in question, is appropriate;

- (d) in the case of the Forth, a key consideration is that vessels going to other destinations transit the area beyond the 30 metre limit and need to use that outer area;
- (e) Forth Ports exercises a wide range of functions in the outer area, which require considerable expertise and resources and need to continue to be exercised in the interests of all users and stakeholders<sup>(1)</sup>;
- (f) Babcock's proposed additional area would intrude into the navigation channels for e.g. Port of Rosyth and RNAD Crombie;
- (g) the grant of Babcock's proposed limits would run counter to the clear principle established since the Rochdale Report in 1964 of estuaries generally being under the responsibility of a single harbour authority;
- (h) no evidence has been produced to justify such a policy change or the process of fragmentation which it may give rise to; and
- (i) Babcock's new argument that the RICT berths should be viewed as *"akin to spaces at the end of a private driveway"* ignores the significance of this area for other vessels; it also appears to confirm Forth Ports' concern as to Babcock's likely demeanour towards other users were it to be given charge of this area.

## 2.3 Response to Babcock submission that area around existing Port Babcock is outside Forth Ports' jurisdiction

### 2.3.1 As stated at 2.1.2 of Forth Ports' closing submission:

*"Forth Ports Limited is the harbour authority for the whole of the Forth, to the level of mean high water springs<sup>(2)</sup>. The only exclusion from Forth Ports' jurisdiction is of "works constructed or owned by the Secretary of State for Defence on the bed of the Forth"<sup>(3)</sup>. No evidence was led at the inquiry of the existence or extent of such works. Although Babcock did, in exchanges prior to the inquiry, claim that Forth Ports had not succeeded to the jurisdiction of the former Dockyard Port of Rosyth, this assertion was not repeated in evidence at the inquiry. Forth Ports Limited is also the competent harbour authority for the purposes of the Pilotage Act 1987."*

### 2.3.2 Babcock has responded:

*"The Applicant's position is that neither the proposed extension of the PBR port limits to the east of the existing port limits (including around the South Arm), nor the areas immediately on the river side of the existing PBR port limits nor the access channel to the Contractors Jetty are within Forth Ports jurisdiction. That*

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(1) See 2.1.3 of Forth Ports Closing Submission for a list of its responsibilities.

(2) APP-T1, paragraph 5; paragraph 4, definitions of 'port' and 'Forth'; schedule 1; definition of 'level of high water'; APP-T2, schedule, paras 2 and 3.

(3) Schedule 1, APP-T1.

*is because such areas comprise works on the bed of the Forth constructed by the Secretary of State for Defence and so are explicitly excluded in terms of schedule 1 to the Forth Ports Authority Confirmation Act 1969 (“the 1969 Act”)(APP- T1).”*

- 2.3.3 There remains no basis before the inquiry or otherwise for assuming that any tidal works at Port Babcock constructed by the MoD extend beyond the dock walls.
- 2.3.4 Babcock’s position, which is unsupported by evidence, also produces the unlikely anomaly that, despite the MoD providing for the transfer of Port Babcock to it and despite Scottish Ministers sanctioning the 2009 HEO, the position was allowed to be created and sustained whereby a part of the Forth, frequented by vessels using either or both of Babcock’s or Forth Ports facilities at Rosyth and known to be formerly the responsibility of the MoD, lacked any harbour authority at all.
- 2.3.5 It should also be borne in mind that the former Rosyth Protected Area as shown on the Admiralty Chart is no more than an historical (out-dated) remnant on that chart. It has no bearing on current jurisdictional responsibilities. It casts no light whatsoever on the extent of *“works constructed or owned by the Secretary of State for Defence on the bed of the Forth”*.

### **3 Timing of any extension to the port limits**

- 3.1 Whilst Forth Ports is pleased to note that Babcock accepts the principle of any transfer of jurisdiction being delayed to an appropriate time, Forth Ports considers that the trigger suggested by Babcock is defective for the following reasons:

- (a) as a matter of law, “commencement” in relation to development means no more than a minimal construction activity irrespective of any real intent to undertake or complete the development in question or the likelihood of this happening;
- (b) it would therefore be possible for Babcock to trigger the transfer of jurisdiction, if granted, irrespective of whether RICT was actually then truly proceeding; and
- (c) Babcock’s proposed trigger also includes no requirement that it be ready and able to take over harbour authority responsibilities for the area in question. This is important because that area, including as it does tidal areas, is different in nature from that to which Babcock’s harbour authority experience relates.

- 3.2 Forth Ports continues to commend the trigger which it proposed, being:

*“(1) The following provisions of this article have effect from such date as may be specified by the Company in writing to Forth Ports Limited and by notice in the Edinburgh Gazette, being a date not earlier than the date upon which Scottish Ministers inform the Company that they are satisfied that the Company has arranged for the execution of the works and is ready to take responsibility as harbour authority for the whole of the port limits”.*

- 3.3 Babcock’s contention that such a trigger embodies a risk, or too great a risk, of potential litigation overlooks the facts that the test is a subjective one for Scottish Ministers. A third



party seeking to challenge it would have to prove that Scottish Ministers could not reasonably have concluded, even if others might come to a different opinion, that Babcock had arranged for the execution of the works and was ready to take over. It is therefore in practical terms appropriately free from significant or undue risk of challenge.

- 3.4 If the Reporters are minded to commend some reformulation of a timing amendment, then Forth Ports submits that this should reflect the principles behind Forth Ports' proposed wording, namely clarity that:

- (a) steps have been taken to ensure that RICT is being commenced and is likely to be completed; and
- (b) Babcock has in place all the necessary staffing and arrangements to manage the new harbour area, including adequate provision to comply with the Port Marine Safety Code.

## **4 The open port duty**

### **4.1 Transshipment as a potential issue (and related points)**

- 4.1.1 The Reporters may wish to note, if they are not already aware, that a proposal by SPT Marine Services to tranship 4 miles off the Forth coast proved very controversial and was shelved in 2008 when Forth Ports announced that it would not progress SPT's application. New regulations governing Ship to Ship Transfers, both within and outside harbour areas, are in the process of being implemented and will allow transshipment within harbour authority areas but only as part of a programme of transfers authorised by the harbour authority, after assessment of environmental effects and subject to consent in the case of Scottish harbours, of Scottish Ministers<sup>(4)</sup>.
- 4.1.2 There is no proposal for transshipment in the vicinity of Port Babcock and, in Forth Ports' view, no likelihood of an application for one, or of any such application, if ever made, being approved. Apart from other considerations, such a location would not be appropriate due to its proximity to a main channel at a narrow part of the estuary and proximity to shallow water.
- 4.1.3 Babcock's reference to possible transshipment in the area appears to be nothing more than scare-mongering.
- 4.1.4 As stated in e.g. paragraph 7.2.4 of *A Guide to Good Practice on Port Marine Operations (prepared in conjunction with the Port Marine Safety Code)*, a harbour authority's primary duty is to ensure the safe and efficient use of the harbour by those who have a right to use it and navigate in those waters. If the RICT is authorised, Forth Ports will and must, consistent with that duty, manage

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(4) see S.I. 2010/1228 and S.I. 2012/742 and the guidance at MSN 1829(M): <http://www.dft.gov.uk/mca/mcga07-home/shipsandcargoes/mcga-shipsregsandguidance/marinenotices/mcga-mnotice.htm?textobjid=470B989976BA0C92>

navigation in its harbour to facilitate the use of the RICT facility and to ensure that that use is not inappropriately prejudiced by other navigational activity. It is simply not realistic to suggest that Forth Ports would or could exercise its navigational powers to hinder proper use of the RICT.

- 4.1.5 Forth Ports will necessarily need to manage its harbour area within the vicinity of the RICT having regard to the right of all to navigate in it and, as demonstrated by Captain Baker's evidence, is well equipped to do so. In contrast, Babcock appear intent on appropriating the area as a private access way.
- 4.1.6 Though Babcock has made reference to the RYA and others not objecting to the disapplication of section 33, it is not apparent that any stakeholders actually noticed that this was the import of the RICT proposals, this only becoming apparent to Forth Ports on a close study of Babcock's two HRO applications. It is not something which it appears that Babcock consulted upon and, had it done so, Forth Ports would have expected that a number of interests would have objected.
- 4.1.7 What Babcock describes in its Further Response document as "*so called public rights of navigation*" are actual rights, safeguarded by section 33 which itself underpins the general public right of navigation in tidal waters. The suggestion that "*it may well be that the effect of section 33 being incorporated is ordinarily to create a right of navigation*" is simply misconceived and betrays a lack of familiarity with harbour law and government guidance on it.
- 4.1.8 So far as the use of berths is concerned, the position is adequately dealt with by article 17 (power to appropriate parts of port, etc.) of the 2009 HEO, having regard to Forth Ports proposal to allow the exercise of that power within the inner (30 metre) area.
- 4.1.9 Babcock's own proposal (as contained in its Applicant's Further Response document) is now for a new article 6(4) in the following terms:
- "The Company shall permit any vessel not bound for or originating at the port to navigate through the outer harbour limits subject to payment of any applicable charges and compliance with the terms of Port Babcock's Orders 2009 to 201[X] and any requirement lawfully promulgated by or on behalf of Company by virtue of powers thereunder."*
- 4.1.10 The difficulty with this is that it would be possible for Babcock pursuant to such a power to direct when, where and how a vessel should so navigate and without it being under any duty or subject to any incentive to operate its powers other than in the interests of RICT and for its own commercial benefit. That contrasts with the duty of Forth Ports to behave even-handedly and to have due regard to the public right of navigation and all relevant interests in the Forth.
- 4.1.11 It should be noted that Babcock's proposal also expressly contemplates charges being levied on vessels in transit although there is no suggestion that they will obtain any benefit from Babcock. Dividing up responsibility for part of the Forth in this way and duplicating administration and charging can hardly be in the

interests of the efficient and economic operation of the Forth harbour area or in the interests of shipping generally.

- 4.1.12 Section 33 operates elsewhere as the statutory guarantor of the public right of navigation where that right continues to be exercised. Babcock has made no case for it not to continue to do so here.

## **4.2 Confirmation of extent of Forth Ports' proposed 'outer harbour limits'**

- 4.2.1 Forth Ports confirms that the Reporters' understanding of its proposed 'outer harbour limits' is correct, that is to say that it comprises the area extending approximately 30 meters seaward of the port premises and including the area between the tidal jetty known as Middle Jetty and the Forth face of the north side of the structure of the port basin entrance which is coloured brown on the port map.

- 4.2.2 Forth Ports' proposed amendment to paragraph (1) of article 17 (power to appropriate parts of port etc) is framed as part of Forth Ports' amendments to article 3 of the draft RICT Order as follows:

*'(d) in paragraph (1) of article 17 (power to appropriate parts of port etc.), after the words "any part of the port" insert "other than any part of the outer harbour limits extending in a southerly direction more than 30 metres seaward of the port premises".'*

- 4.2.3 This amendment will not be necessary if the RICT Order is made conferring on Babcock harbour jurisdiction only for the 30 metre area and not over what Forth Ports has sought to define as "the outer harbour area". If, however, the RICT Order is made transferring harbour jurisdiction from Forth Ports to Babcock over that outer harbour area, then this amendment is necessary in order to ensure that Babcock cannot, through exercising its article 17 power of appropriation overcome the open port duty and exclude other vessels from this outer area.

## **5 Article 7 (power to deviate)**

The reference should be to Schedule 1 (Mitigation measures) of the Forth Ports' (4 May 2012) track change draft HRO, the purpose being to ensure that any limitations on height or scale in that Schedule take precedence over any general power to deviate.

## **6 Power to dredge and tidal works**

### **6.1 Forth Ports' view on Babcock's proposed amendment confirming that dredging is a 'licensable marine activity'**

- 6.1.1 Forth Ports is content with this and agrees that it makes sense to put beyond doubt that Babcock's capital dredging and its disposal of dredgings in tidal waters is subject to marine licensing.

- 6.1.2 However, Forth Ports continues to question whether Babcock should be granted the new statutory authority it seeks to dredge, not least given that the consequence of such dredging, including future maintenance dredging, have not been environmentally assessed.

## **6.2 Effect of section 26(1)(i) of the 1969 Act**

- 6.2.1 The effect of section 26(1)(i) of the 1969 Act is that a licence is not required from Forth Ports for dredging which is specifically authorised by an enactment, including a power contained in a HEO/HRO, but the application of this exemption:

- (a) depends upon whether the HEO/HRO power being relied upon does expressly authorise the dredging in question; and
- (b) would leave intact any provisions of the HEO/HRO which apply the licensing powers or their equivalent (e.g. by way of protective provisions)<sup>(5)</sup>.

- 6.2.2 In the present case:

- (a) article 7 (Power to dredge) of the 2009 HEO authorises Babcock to dredge within its existing port limits (i.e. since it has no outer limits, this means just the main basin and locked entrances leading to it) *“and within the approaches and channels leading to the port limits”*;
- (b) article 8 (Power to dredge) of the RICT Order as proposed by Babcock would substitute for this an express power to dredge within its proposed new limits *“and within the approaches and channels leading to the [new] port limits”*; and
- (c) Forth Ports has proposed that article 8 of the RICT Order be deleted and that capital and maintenance dredging under the HRO, if made, be subject to Forth Ports proposed protective provisions.

- 6.2.3 Forth Ports' position<sup>(6)</sup> is that:

- (a) article 7 of the 2009 HEO, when taken on its own (i.e. without the RICT Order being made in any form), exempts Babcock from the need to obtain a dredging licence from Forth Ports for dredging operations within the immediate eastern approaches to its locks and main basin – the precise extent of this is open to argument but, in Forth Ports' view, would not extend any significant distance out into the Rosyth main channel; also it does not exempt Babcock from Forth Ports licensing of dredging deposit sites which are elsewhere within Forth Ports jurisdiction;

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(5) As stated in Forth Ports' Further Explanation document (p.18), specific consenting regimes are commonly replaced by express statutory provision in this way.

(6) Insofar as, or it is felt that, this is not so stated, or clearly so, in Forth Ports' earlier submissions, this summation should be taken as superseding them.

- (b) article 8 of the proposed RICT Order, as sought by Babcock, would exempt Babcock from the need to obtain a dredging licence from Forth Ports for any dredging within its proposed new limits including the substantial area extending out from the RICT berths to the main channel of the Forth and, additionally would do so (as in the case of the article 7 HEO power) to a small albeit indefinite extent beyond, insofar as that area can be described as encompassed in the phrase “*approaches and channels leading to the port limits*”; as with article 7 of the 2009 HEO, it also does not exempt Babcock from Forth Ports licensing of dredging deposit sites which are elsewhere within Forth Ports jurisdiction; and
- (c) Forth Ports’ proposed amendments would mean that Babcock would retain in terms of express powers the power in article 7 of the 2009 HEO the reference in which to the port limits would then encompass whatever limits were conferred on it by the RICT Order and would be subject to consent to dredging activities under the Forth Ports protective provisions in place of consent under the 1969 Order.

### **6.3 Would Forth Ports as harbour authority for the Forth be consulted by Marine Scotland on marine licences for RICT?**

6.3.1 Paragraph 10 of Marine Scotland’s General Guidance to Applicants<sup>(7)</sup> states:

*‘If the application falls within a harbour area, the local harbour/port authority and the local authority planning department will be consulted as necessary.’*

6.3.2 Under Babcock’s proposals, the application would no longer fall within Forth Ports’ harbour area (the relevant area having been transferred to Babcock).

6.3.3 Whilst Marine Scotland might still consult Forth Ports and Forth Ports considers that it should, that in itself does not obviate the need for and purpose of Forth Ports’ separate licensing controls which it exercises and needs to continue to exercise as the harbour and conservancy authority for the Forth.

### **6.4 Forth Ports’ view on Babcock’s offer to consult Forth Ports on dredging beyond the 10 metre contour line**

6.4.1 As stated at 2.1.11 of Forth Ports’ Closing Submission:

*‘The applicant’s navigation expert, Captain Keenor, accepted in cross-examination that there is no navigational reason for the proposed HRO boundary. His admission to this effect, in cross-examination, was entirely unqualified. An attempt, in re-examination, to confine the admission to the so-called ‘south west triangle (i.e., the area beyond the -10m CD contour: FP75) was not successful. It merely established that the Brookes Bell berthing simulations (APP-S14) did not support a change in jurisdiction in the south-west triangle. It supplied no positive justification for a change in jurisdiction anywhere else.’*

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(7) See: <http://www.scotland.gov.uk/Resource/0039/00392668.doc>

6.4.2 Forth Ports will continue to have a legitimate interest as harbour and conservancy authority both sides of the 10 metre contour line. Making provision simply for the area beyond it will not suffice and, in any event, dredging within the 10 metre contour line may have operational and other implications beyond it.

6.4.3 Consultation by Babcock is also in itself insufficient. This is because:

- (a) navigation for which Forth Ports remains responsible is liable to be obstructed or otherwise affected; and
- (b) Forth Ports has other statutory functions which are liable to be impacted upon.

6.4.4 Mr Sayers email refers to Babcock's willingness to copy applications for marine licences to Forth Ports. Forth Ports has been unable to find any reference to this in Babcock's submissions.

**6.5 Babcock to clarify whether offer to copy applications for marine licences to Scottish Ministers is limited to dredging works beyond the 10 metre contour line**

Forth Ports awaits Babcock's response but, for the reasons reiterated above, consultation in itself is insufficient. Forth Ports would also highlight that Marine Scotland is a directorate of the Scottish Government and, so, it would appear needless for an application to be the subject of separate additional consultation with Scottish Ministers, if that is what Babcock is proposing. The Reporters should also note that marine licences are not required for the act of dredging (if using standard techniques) for the maintenance of a channel, if that lies within a harbour authority area.

**6.6 Forth Ports view on adequacy of a requirement, if made, for it to be consulted by Scottish Ministers on applications for approval of tidal works**

6.6.1 As Forth Ports understands it:

- (a) Babcock now supports Forth Ports proposed amendment of the definition of "tidal works" save that its position is that there requires to be an exclusion from this definition of dredging works (see Applicant's Further Response document); and
- (b) it follows, if this is agreed, that tidal works as so defined would be subject to approval of Scottish Ministers under article 10 of the 2009 HEO.

6.6.2 Forth Ports has proposed (see paragraph 1 of its proposed protective provisions) that Babcock's plans of tidal works (and, for that matter, capital dredging if that is encompassed in this) are first approved by it before going to Scottish Ministers. This will help avoid a situation arising whereby Forth Ports, with its detailed knowledge and special expertise of conditions on the Forth (including e.g. traffic movements, and other planned or foreseeable works and operations), which can most sensibly be brought to bear as early as practicable, finds itself in disagreement with detailed aspects of the proposal as submitted to Scottish Ministers and on points which could readily have been resolved to Babcock's satisfaction if it had been involved earlier. Provision for consultation by Scottish

Ministers on applications after they are received by them is thus significantly less attractive and operationally may well prove ineffectual.

6.6.3 Whilst, at least theoretically, consultation of Forth Ports by Scottish Ministers could result in Scottish Ministers ensuring that Forth Ports is adequately protected in its status as harbour authority (e.g. by Scottish Ministers conditioning the terms of their approval):

- (a) there is no certainty that this will happen in practice or that Marine Scotland will be sufficiently resourced and without the distraction of conflicting priorities to achieve this;
- (b) it is likely to be at best difficult for Scottish Ministers to express conditions for the benefit of others such as Forth Ports or another harbour authority where these involve a degree of sub-delegation of powers;
- (c) the functions which Forth Ports has and is concerned are liable to be prejudiced remain Forth Ports' functions and not those of Scottish Ministers; and
- (d) it remains vital that Forth Ports as the harbour authority knows and can exercise a degree of control over how and when such activities are taking place e.g. in its role in coordinating vessel movements across the estuary.

6.6.4 Forth Ports would also point out in relation to the RICT proposals that it is the movement of construction materials by sea and dredging which will have the most impact on the Forth and its own responsibilities. It is not clear that approval by Scottish Ministers of plans and sections of the works will necessarily cover the movement of construction materials and Babcock are proposing that dredging activities are not covered at all by tidal works approval.

## **7 Schedule 2: power for Scottish Ministers to survey river bed**

7.1 A power to require a survey of the river bed is a useful tool, both in relation to dredging or works consenting functions and in relation to abatement /remediation powers since it enables a status check to be made for the purposes of establishing a baseline which can then be referred to if remedial action appears to be required.

7.2 In relation to marine licensing of dredging by Marine Scotland, it is possibly arguable that Marine Scotland may be able to require a survey as a condition of the grant of consent. As the Reporters will have noted, Forth Ports has proposed as part of its proposed protective provisions that Forth Ports is empowered to require one. The reporters may also like to note that Forth Ports regularly requires pre and post dredge surveys from its licence applicants – it has for example just agreed such for a dredging application in Granton.

7.3 Such a power in relation to tidal works also forms apart of the standard protection of tidal works provisions and can help inform a decision as to whether remedial action is needed in relation to tidal works. Thus, in relation to the Forth:

- (a) section 64 (survey of tidal works) of the 1969 Order enables Scottish Ministers to order a survey and examination of any tidal work belonging to Forth Ports and section 63 (abatement of works abandoned or decayed) enables Scottish Ministers to require Forth Ports to repair and restore any such work which is abandoned or decayed or to remove it; and
- (b) articles 9 (survey of tidal works) and 11 (abatement of works abandoned and decayed) of the Port Babcock Rosyth HEO 2009 make similar provision.

## **8 Schedule 2: protective action and remedial action regarding sedimentation – Forth Ports’ view on possible conferment of proposed protection on Marine Scotland rather than Forth Ports**

8.1 As with the query dealt with earlier concerning consultation of Forth Ports by Scottish Ministers in relation to tidal works approval, whilst, at least theoretically, conferment of the proposed protective action and remedial action provisions on Scottish Ministers rather than Forth Ports, to be exercised following consultation of Forth Ports by Scottish Ministers, could result in Scottish Ministers ensuring that Forth Ports is adequately protected in its status as harbour authority:

- (a) there is no certainty that this will happen in practice or that Marine Scotland will be sufficiently resourced and without the distraction of conflicting priorities to achieve this;
- (b) it is likely to be at best difficult for Scottish Ministers to express conditions for the benefit of others such as Forth Ports or another harbour authority where these involve a degree of sub-delegation of powers; and
- (c) the functions which Forth Ports has, and is concerned are liable to be prejudiced, remain Forth Ports’ functions and not those of Scottish Ministers.

8.2 In relation to these protective provisions, it is also relevant to note that they are to support on-going harbour management and are not related simply to initial works applications. It is not clear if Scottish Ministers, as opposed to Forth Ports, are in a position to carry out the ongoing monitoring which the powers imply. They may require to be used in circumstances other than those triggered by an application from Babcock.

8.3 Forth Ports reiterates that it is invested with important functions in relation to the whole of the Forth which it must continue to exercise. These have their basis in the 1969 Order but also in public legislation e.g. in section 48A of the Harbours Act 1964 (which Babcock has acknowledged) and in its role as a competent authority under the Habitats Regulations. Sections 3 (sustainable development duty), 15 (decisions by public authorities affected by marine plans), 82 (duties of public authorities in relation to marine protected areas) and 83 (duties of public authorities in relation to certain decisions) of the Marine (Scotland) Act 2010 may also be cited as relevant in this connection.

8.4 The Reporters are also invited to note that there is no evidence that Forth Ports licensing, which the Marine (Scotland) Act has left in place, is unduly burdensome in any way. Forth



Ports licences are granted conditional on a Marine Scotland licence being granted where applicable and for a nominal sum in comparison to the Marine Scotland licence. As it happens, Forth Ports has recently granted PBR a licence, timeously at a cost of £150.

## **9 Schedule 2: statutory functions – possible reciprocity text sought from Babcock**

- 9.1 Forth Ports would welcome the opportunity to comment on this, particularly as Babcock has had the opportunity to comment on Forth Ports' proposed formulation (which is based on established precedent).
- 9.2 Forth Ports would also submit that any such text must take into account that Forth Ports has harbour authority and conservancy functions which encompass the whole of the Forth and, in exercising these, it does have regard, as it must and will continue to do so, to the interests of all users and other stakeholders, not just to those of one dock operator.
- 9.3 As the Reporters will appreciate, Forth Ports own proposals, in keeping with precedent, provide for Forth Ports' statutory functions to take precedence. The rationale for this, as will be appreciated, is that, in case of overlap or conflict, one statutory regime must do so. Whilst Forth Ports will wish to consider whatever proposals Babcock may wish to bring forward on their merits, it submits that any reciprocal/interface arrangements need to be consistent with Forth Ports' overriding jurisdiction in the estuary taking precedence.
- 9.4 Forth Ports also invites the Reporters to note that, whilst Babcock has suggested in its Applicant's Further Response document that "*a measure of this nature*" (ie some reciprocation provision) "*was floated in discussions at Forth Ports offices on 19 May 2011*" and then goes on to say "*It is unfortunate that Forth Ports' agents took 50 weeks to put forward suggested text*", Babcock actually took a rather different stance at that time and subsequently. That stance was recorded in Biggart Baillie's letter of 8 June 2011 to Forth Ports and contemporaneous Formal Response document, both being similarly worded on the point and the latter of which states:

*"Insofar as there may be a need to provide formally for notification to the estuary harbour authority of vessel movements in/out of PBR jurisdiction or otherwise for the co-ordination of the controls of the two authorities, Babcock has indicated a willingness to Forth Ports to explore the scope for agreement on such matters with Forth Ports, with a view to possible agreement on an amendment to the terms of the HROs as applied for. Babcock have made clear, however, that for there to be any such dialogue, Babcock will require Forth Ports to accept the principle that the PBR port limits (and hence Babcock's existing jurisdiction) can be extended."*

- 9.5 In other words, Babcock was not prepared to negotiate with Forth Ports or to offer anything, even on a Without Prejudice basis, unless Forth Ports conceded the principle of its proposed new limits being carved out of Forth Ports' jurisdiction. This was and remains unacceptable to Forth Ports though, at all times and unlike the position taken by Babcock, Forth Ports remained willing (as confirmed e.g. in the conclusion to its statement of case) to enter into open negotiations with Babcock and it continued to invite proposals from Babcock (Bircham Dyson Bell's letter on behalf of Forth Ports to Biggart Baillie dated of 30 September 2011 e.g. inviting "*any proposals which your client may have to meet the issues of concern to Forth*

Ports"). Babcock has remained unwilling to engage with Forth Ports and has limited itself to taking a reactive and essentially negative stance to such amendments as Forth Ports has now put forward.

- 9.6 Babcock is wrong to state that Forth Ports' own proposal "*extends harbour authority interface provisions*". Paragraph 12 of Forth Ports' proposed protective provisions reflects exactly the provision for the PLA in paragraph 18 of Schedule 8 to the London Gateway Order. If, however, the Reporters consider that it would be better limited in its application to any new limits which may be conferred on Babcock under the HRO, if made, Forth Ports would have no objection to that.

## 10 Other matters arising

- 10.1 Contrary to Babcock's allegations, most of the issues arising on Forth Ports proposed amendments are properly matters for legal submission.
- 10.2 As stated in Forth Ports closing submission, it is for Babcock to make its case for being given the powers it seeks, particularly in so far as these involve expropriating part of another harbour authority's limits of jurisdiction. The burden of proof remains with Babcock and not on Forth Ports. Babcock has failed to discharge this in relation to the matters raised by Forth Ports.
- 10.3 The Reporters are invited to ignore Babcock's constant refrain that Forth Ports is proceeding in its case and submissions on the proposed RICT Order on a non-bona fide, disingenuous and self-serving basis. No evidence at all has been produced to demonstrate these unfounded assertions, whilst the facts e.g. Forth Ports assistance with the aircraft carrier contract and its recent grant of a licence to Babcock for dredging point to the opposite conclusion. Forth Ports has simply taken in relation to the RICT proposals those points which it is appropriate for a responsible harbour authority to take and, in the face of Babcock's failure to engage with it at all, has had no choice but to pursue objections to the proposals. Babcock's repeated attempts to discredit Forth Ports are without foundation and should be seen themselves as no more than self-serving, being deployed simply in an attempt to undermine Forth Ports reputation and record in exercising its statutory harbour functions.
- 10.4 For the avoidance of doubt, Forth Ports reiterates here that it stands by the case it has made, as set out in its Closing Submissions and, as respects proposed amendments to the draft Order, in its Further Explanation and in this response. The only additional qualifications which it would make and which the Reporters may find it helpful to note are that:
- (a) Forth Ports can accept Babcock's minor change to its proposed PDR amendment;
  - (b) In relation to the CEMP and Forth Ports' proposed reinstatement of original article 17, Forth Ports accepts that Scottish Ministers can view this as unnecessary provided that they are satisfied (which Forth Ports has not been) that all environmental mitigation and commitments as previously expressed are either superseded by the CEMP commitments or are inserted as additions to it; and
  - (c) Forth Ports has no objection in principle to "international" being removed from or replaced in any definition of the purposes for which the RICT, if authorised, may be

used if that word (though included in the project description and proposed Order title) is considered inappropriate. However, given that the RICT proposals have been promoted as a development to meet the requirements of National Development 6 in NPF2 and Babcock has sought to justify it on that basis alone, Forth Ports submits that there can be no substantive objection to a multimodal container terminal user restriction being imposed as it has suggested.

- 10.5 In relation to rail provision in connection with the proposed RICT, Forth Ports would point out that Babcock is incorrect in its description of the facilities at Grangemouth which are inside the terminal, as those on the site visit will have clearly seen and is illustrated on Forth Ports plan. Also, all Forth Ports submissions on rail are related to its submissions on the need to comply with NPF2 (the requirement is for *"multimodal container terminal facilities"*) and, contrary to Babcock's assertions to the contrary, are appropriately made on that basis.
- 10.6 There are multiple aspects of Babcock's submissions which Forth Ports takes issue with but, in the interests of closure and upon the basis that its own case is now sufficiently set out in its own submissions, Forth Ports is content to rest its case on the submissions it has now made, assuming that Babcock add no further submissions and unless the Reporters feel that they would like further elucidation on any point from Forth Ports.
- 10.7 Forth Ports does, however, reserve its position in relation to expenses as it has noted that Babcock also does.

**21 June 2012**