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Ms Linda A. Knarston
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Your ref:
LPA139.3/LAK/YML

Date:
30 December 2010

Dear Linda

HARBOURS ACT 1964- LERWICK HARBOUR REVISION ORDER

I refer to the application submitted on behalf of your client, Lerwick Port Authority ("LPA") on 11 August 2010 for the making of the Lerwick Harbour Revision Order (the "HRO") under section 14 of the Harbours Act 1964 ("the 1964 Act"). This letter conveys the Scottish Ministers' decision on this application.

Purpose of HRO

The purpose of the HRO is to authorise the construction of certain harbour works on the seabed at Greenhead Base, Point of Scattland, Mairs Yard and Holmsgarth Jetty in the jurisdiction of the LPA harbour limits in the Parish of Lerwick and Shetlands Islands Area. This would involve:-

- the construction at Greenhead Base of a concrete suspended deck quay on steel bearing piles and rock armour revetment slope comprising a total of 1.185 hectares;
- the reclamation and infilling of seabed at Point of Scattland to be retained on the seaward limits by a rock armoured revetment slope comprising a total of 0.3750 hectares;
- the construction at Mairs Yard of a steel sheet pile quay wall with concrete cope connecting with the existing Holmsgarth jetty and reclamation with rock armour revetment slope, comprising of a total area of 1.450 hectares; and
- the construction of a sheet pile quay wall and jetty with concrete cope incorporating and extending the existing Holmsgarth Jetty comprising a total area of 1.310 hectares.

The Application

LPA submitted an application to the Scottish Government on 11 August 2010. An environmental statement (the ES) was submitted along with the application. Notice of the application for the HRO was advertised in the Shetland Times on 13 August 2010 and in the Edinburgh Gazette on 17 August 2010.

The ES addressed the environmental aspects of hydrology and hydrogeology, coastal process, ecology, road transport, air quality, noise and vibration, marine transport, landscape and visual, archaeology and cultural heritage. The ES described the environmental effects of the proposals, examined the nature and scale of these effects and recommended measures to manage and control adverse impacts. Beneficial impacts were also carefully considered.

Scottish Ministers received advice from the Scottish Environmental Protection Agency (SEPA), noting that it would object to the application if the requirement that an environmental management plan (EMP) was not satisfied. No further objections to the application were received. Representations on the Environmental Statement were received from bodies consulted under paragraph 15 of part 1 of Schedule 3 of the 1964 Act.

Consultation

SEPA noted that it was satisfied with the proposed scope of the ES. They also noted that the ES set out useful principles and would provide a useful basis for a site specific EMP to be drawn up once contractors were appointed.

Although some of the proposed works will be regulated by SEPA, many will not and these required to be covered by a condition. SEPA has therefore recommended that a full EMP be submitted at least two months prior to the commencement of any works for the approval of the determining authority in consultation with SEPA and other agencies as appropriate, and that all work shall be carried out in accordance with the approved plan.

SEPA is satisfied that the matter concerning the EMP has been suitably addressed by way of an Undertaking signed by LPA on 21 September 2010 to submit an EMP as described. Scottish Ministers were concerned to ensure that the duty to obtain approval for the EMP prior to the commencement of the works was made a condition in the Order and subsequently Ministers have made a modification in the Order to reflect this.

SEPA also made some general comments with regard to consents required under the Water Environment (Controlled Activities) Regulations 2005 (as amended) (CAR) and other regulatory requirements and good practice advice that can be found on its website. SEPA also provided some general comments to LPA on flood risk and air quality, noting that both should be discussed with Shetland Islands Council.

Comments were received from Shetland Islands Council which acknowledged that the ES addressed the main issues in terms of the potential impact and the means of mitigating them where necessary. The Council noted that infill materials and rock armouring would be sourced from local quarries and recovered materials from Dales Voe and suggested that the latter should be detailed and quality and quantity addressed. They were also concerned about the socio-economic aspects of sourcing the infill and rock armour from local quarries, given that much greater quantities may be required by other capital projects being undertaken in Shetland at the same time, and asked that the ES address this.

In terms of ecology, the Council noted that the ES concentrated on grey seals and recommended that it should also consider the common seal, particularly in regard to their breeding and moulting periods (June - August inclusive) when they are more sensitive to disturbance. The Council also commented that pinnipeds (seals) and cetaceans have well developed underwater hearing and are affected by sudden sounds or continuous noise. The Council recommended that the ES should consider the noise impacts in more detail and mitigate the impact.

Scottish Natural Heritage (SNH) confirmed that the ES adequately covered their areas of interest. They reconfirmed the advice given in the ES that a licence would have to be obtained before the dismantling of rock armour takes place to avoid contravening Regulation 39(1)(c) of the Conservation (Natural Habitats & Etc) Regulations 1994 (the "Habitats Regulations"). They also stressed that to avoid disturbance to wild life the "soft-start" approach at the beginning of each day when pile – driving is taking place must be applied as described in the ES. They noted that if whales or dolphins are sighted in Lerwick harbour, pile – driving must be suspended until the animals have gone, to avoid an offence under Regulation 39(1)(c) of the Habitats Regulations.

The Applicant's Response

A formal Undertaking dated 21 September 2010, signed by the Chief Executive and 2 Board members of LPA was sent to Scottish Ministers noting that LPA undertakes that in the event of the Lerwick Harbour Revision Order being made, LPA will, at least 2 months prior to the commencement of any works authorised by the Order, submit a full site specific environmental management plan (EMP) for the written approval of Scottish Ministers in consultation with the Scottish Protection Agency (SEPA), and that all such works shall be carried out in accordance with the approved plan.

In response to other comments made by SEPA with regard to flood risk, LPA has advised that Chapter 3.3.3 of the ES clearly states that no fluvial flooding is likely given that the tidal flooding risks have been mitigated through raising the level of the new quays. In terms of air quality, a scoping consultation was undertaken with Shetland Islands Council as recommended by SEPA, and the assessment of predicted impacts and mitigations measures proposed and detailed at Chapter 2.47 and 7.5 of the ES.

In response to the comments made by Shetland Islands Council, LPA advised that the infill material will all come from LPA's Dales Voe site, with larger rocks imported from overseas and delivered by sea. There will be no impact on other capital projects undertaken in Shetland at the time of the development as no other project will have access to the Dales Voe site without LPA's consent.

Both grey seals and common seals will be included in the marine mammal observation procedure of the EMP being prepared for each of the works specified in the order.

Although the issue of both common and grey seals and marine acoustic noise are dealt with in great detail in Chapter 5.7 of the ES, the suggestions made by the Council in respect of cetaceans and pinnipeds will be included in the marine mammal observation procedure in the EMP for each of the works.

Scottish Ministers' Decision

The Scottish Ministers have carefully considered:-

- the ES; and
- the results of the consultations with Shetland Islands Council, SNH and SEPA, and have concluded that the comments raised have been suitably addressed by LPA and that any remaining concerns will be addressed by the site specific EMPs which require written approval by Scottish Ministers.

Compatibility with Scottish Government Policies and National Outcomes

The Scottish Government's policy on ports is set out in Modern Ports: a UK Policy. This states that it is in the national interest that the nation's ports remain able to handle current trade and its potential development efficiently and sustainably. It is Government policy that port development complies with the ports policy and the Scottish Government's key purpose of sustainable economic growth. Ministers believe that the Lerwick Harbour Revision Order is clearly aligned to the achievement of this Purpose and policy.

Compatibility with Harbours Legislation

Section 14 of the 1964 Act sets out the objectives for the achievement of which a harbour revision order may be made. The Scottish Ministers are satisfied that this HRO meets these objectives and that the HRO should be made in the interests of securing the improvement, maintenance and management of the harbour in an efficient and economical manner.

The Scottish Ministers have decided to make the Order with modifications which do not appear to them to substantially affect the character of the order. The proposed modifications comprise of a revised preamble which updates and fully narrates the process by which the order was made and a revised article 16 to provide for the EMP.

Right to Challenge Decision

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

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

Availability of Decision

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

Yours sincerely



ALASTAIR WILSON
Director