

Harbour Closure Orders and Orders Removing Pilotage Functions

Guidance for applicants

Executive Summary

1. Harbour authorities are responsible for managing safe and efficient harbours. This includes specific responsibilities in relation to the safety of vessels and people within the harbour, efficient navigation and the protection of the port environment.
2. The *Port Marine Safety Code*, encourages harbour authorities to keep their powers under review and to take action as necessary to ensure they remain fit for purpose. In some cases this may mean relinquishing powers that are no longer necessary for safe and economic operation of the harbour.
3. Harbours underpinned by a local legislative framework of powers are Statutory Harbour Authorities (SHAs) in terms of the Harbours Act 1964 and those with statutory pilotage powers in addition, are also Competent Harbour Authorities (CHAs) in terms of the Pilotage Act 1987.
4. The Marine Navigation Act 2013 created two new processes allowing Scottish Ministers to make an order, under their devolved powers, revoking a harbour authority's status as either a Statutory Harbour Authority or a Competent Harbour Authority.

5. This guidance explains the purposes of such orders, the process for making them, and what information is required with an application for an order.
6. Further specific advice can be obtained from the ports policy branch on 0131 244 7878 or by email to harbourorders@transport.gov.scot

HARBOUR CLOSURE ORDERS

1 – Background

The legislation

- 1.1. The Marine Navigation Act 2013 inserted sections 17A to 17F into the Harbours Act 1964 to allow Scottish Ministers to make a harbour closure order in respect of a harbour:
 - a) on the application of the harbour authority;
 - b) with the consent of the harbour authority; or
 - c) if Scottish Ministers have consulted the harbour authority and are satisfied that they are unlikely to object.

The new sections 17A to 17F are set out in full in annex A

- 1.2. Section 17A(2) requires the Scottish Ministers to publish guidance about the circumstances in which a closure order will be made. The guidance requires the Scottish Ministers to have regard to the underlying

purpose, which means the purpose of permitting or requiring statutory harbour authorities to cease to maintain harbours which are no longer commercially viable or necessary.

What is a harbour closure order?

1.3. This does not mean that a harbour will physically close or cease to exist but it does mean that a harbour authority would be relieved of its statutory duties and will no longer be classed as a statutory harbour authority (SHA). It may mean that the way people use the harbour area has to change.

What is a statutory harbour authority?

1.4. A SHA is a harbour authority which has been given a range of statutory powers or duties for the purpose of improving, maintaining or managing a harbour. The statutory powers or duties are given by Acts of Parliament or harbour empowerment or revision orders made under the Harbours Act 1964 that are local to each authority.

Why would a statutory harbour authority apply for an Order?

1.5. A SHA may wish to be relieved of its statutory functions, where the harbour is no longer viable, commercially or otherwise, because of:

- a change in the local economic area;

- physical restrictions in terms of the size of ships that can access its facilities;
- a drop in the number of vessels using the area;
- not being able to compete with other local ports;
- a change in the type of vessels using the area.

1.6. If a harbour is not viable then the harbour authority may not be able to fulfil the duties or meet the costs imposed on it by its statutory functions. This may cause dis-benefits to the SHA and those using or considering using the harbour.

What should a statutory harbour authority consider before applying for a closure order?

1.7. There are three kinds of duties a harbour authority has: statutory duties, imposed either in the local legislation for that authority or in general legislation; general common-law duties; and fiduciary duties. The order will only remove the statutory duties; the other two kinds of duties may still exist for the SHA. If the former SHA remains the owner of the infrastructure they will retain the responsibilities associated with ownership.

1.8. The first step for the harbour authority is to ensure that it is aware of its local duties and the powers, policies, systems and procedures that they have in place. This is to ensure that nothing is removed unintentionally. The SHA should review the powers in its local legislation including those incorporated from other enactments.

- 1.9. These may include powers to make byelaws or give directions either general or special and to manage and maintain the harbour. Some of the powers may derive directly from the Harbours Act 1964.
- 1.10. If an SHA, taking into account the above, is considering giving up its statutory functions, which includes its enforcement powers then it is recommended that it consult informally with users and anyone with an interest in the harbour.
- 1.11. An SHA considering relinquishing its powers should also bear in mind that the PMSC also applies to non statutory harbours.

2 – What an Application must cover.

- 2.1. When applying to have its statutory functions removed the authority should submit a draft copy of the proposed order and provide certain minimum information.
- 2.2. If a harbour authority is not in the position where it can afford to fund the legal advice necessary to draft an order or where an authority has ceased to exist in a physical sense then they should inform Transport Scotland that it wishes to have its statutory functions removed but are not in a financial position to do so. Subject to due consideration and agreement Transport Scotland may in consultation with the SHA work with it to draft a proposed order and go through the application process.

- 2.3. An authority should provide a full narrative giving the background and rationale for seeking to be relieved of its powers in respect of the harbour.

Full or Partial closure

- 2.4. A SHA must specify if it wishes to be relieved of all its powers or only specific ones and the reasons for this.

Transitional Provisions

- 2.5. The SHA should state whether it seeks any transitional provisions for works to be carried out in respect of the harbour before the authority can be relieved of its statutory functions. Also who would carry out the works and who will pay for them.

Transfer of property, rights and liabilities

- 2.6. A SHA has many statutory functions and an explanation needs to be given on what will happen to these functions and who, if anyone will take them on.
- 2.7. This may include, where applicable, but is not limited to provisions that would deal with:
- (a) transferring assets that would otherwise not be capable of being transferred
 - (b) creating interests, rights or liabilities in relation to assets transferred or in connection with a transfer;

- (c) enforcement of rights or liabilities (whether transferred or created by the order);
- (d) the transfer of rights and liabilities in relation to employment (including provisions for deemed continuity);
- (e) pension schemes (including provision for amending schemes, winding them up, transferring their administration, and saving rights existing before a transfer takes effect);
- (f) terminating appointments;
- (g) compensation for loss of appointments;
- (h) extinguishing liabilities to Scottish Ministers
- (i) winding up of the SHA's affairs;
- (j) winding up of any company wholly owned by the SHA;
- (k) the dissolution of the SHA.

2.8. A SHA will need to state who may take over their role in various matters for example:

Lighting and buoying responsibilities - under Part VIII of the Merchant Shipping Act 1995 (MSA95) each SHA is the local lighthouse authority for its area (section 193, as amended) and under section 198 of that Act a local lighthouse authority may be directed by the general lighthouse authority (the Northern Lighthouse Board in Scotland) to lay down buoys, or alter lighthouses, buoys and beacons in its area. The future responsibility for any lights or buoys should be discussed with the NLB.

Oil pollution - section 137(2)(d) of the MSA95 enables the Secretary of State to give direction to a SHA as respects ships or cargoes where an accident has occurred in a harbour.

Wrecks – section 252 of MSA95 provides a power where a vessel is sunk, stranded or abandoned in or near to the approaches of a harbour so that it is, or is likely to become, a danger to navigation to take possession or, raise, remove or destroy the vessel, to light and buoy it until raised or destroyed and to sell and reimburse the authority from the proceeds of sale.

Pensions – harbour authorities should explicitly explain what is going to happen with their pension liabilities if applicable.

Part 3 - Application Process

- 3.1. Applications may be discussed informally by contacting the ports policy team and the full application should be emailed to harbourorders@transport.gov.scot
- 3.2. as well as being submitted in hard copy as required by schedule 3 of the Harbours Act 1964.
- 3.3. Section 17D and Part 1 of Schedule 3 of the 1964 Act set out the procedure that harbour authorities must follow before applying.

Pre-application

- 3.4. Anyone intending to apply for a harbour closure order should contact Transport Scotland prior to making an application to ensure they are aware of what should be included in their statement and draft closure order. Please note Transport Scotland cannot provide legal advice in regards to the draft order but can give a 'without prejudice' opinion.

Consulting other organisations

- 3.5. Authorities are encouraged to consult other relevant stakeholders and those organisations and persons likely to be affected by the proposals prior to making the application.

Public notices

- 3.6. Once a SHA has submitted its application, it must arrange for a notice of that application to be placed in the Edinburgh Gazette and for two consecutive weeks in one or more local newspapers. A 42-day period for objections and representations will then begin from the date of the first published notice.
- 3.7. Transport Scotland will discuss and agree the content of these notices prior to publication. In some cases there are additional advertising requirements, for example, where the harbour closure would authorise the stopping up of a public right of way paragraph 12 of

schedule 3 will apply. Again, the wording of these notices should be first agreed with Transport Scotland.

3.8. In order to publicise the closure order as widely as possible it is recommended that authorities publish their intention and a copy of the draft order on their website if they still have one. While this is not a statutory requirement, it is good practice to do so.

Consultation process

3.9. At the same time as the advert appears in the newspapers Scottish Ministers will consult such bodies as it considers appropriate. Each consultee will be given a 42- day period to respond which may run concurrently with the public notice period. Typical consultees may include:

- Ports industry bodies
- Scottish Environment Protection Agency
- Maritime and Coastguard Agency
- Northern Lighthouse Board
- local authorities
- neighbouring harbour authorities
- Chamber of Shipping
- Royal Yachting Association

The list of consultees will be notified to the authority who will be required to provide each consultee with a copy of their application documents.

Registering an objection or representation

3.10. Organisations or individuals wishing to object to or make a representation about a harbour order must do so within the 42 day statutory period allowed for objections and representations.

Resolution of objections

3.11. Where objections to a harbour closure order are made, the authority will be allowed a period to negotiate with the objectors with a view to resolving the objections. The length of this period will be agreed with the authority if required.

Written representations

3.12. Where there are outstanding objections and efforts to resolve them have been unsuccessful, Scottish Ministers will make a decision on how best to proceed with the application and this may include a process of written representations or in very contentious cases a public inquiry or hearing.

Scottish Ministers' decision

3.13. Once Scottish Ministers have taken the decision on whether or not to make the closure order they will notify

the authority, consultees and any objectors and publish the decision on the Transport Scotland website.

3.14. The authority must publish a notice in the Edinburgh Gazette and local newspaper stating:

- that the harbour closure order has been made
- where a copy of the order can be viewed
- when the order comes into operation
- the procedure to challenge the validity of the order.

3.15. If the authority retains a website then the closure order should also be published there and the making of the order should also be published on local notices in and around the harbour.

PILOTAGE FUNCTION REMOVAL ORDERS

1. A Competent Harbour Authority (CHA) is a statutory harbour authority (SHA) with duties to assess the need for pilotage and powers to provide the appropriate pilotage services and impose pilotage directions as necessary to secure the safety of ships navigating in their waters.

2. A CHA is responsible for all pilotage matters at its facilities, including the authorisation of pilots and the grant of Pilotage Exemption Certificates. The geographic area for which a CHA is responsible for pilotage may be wider than that for which it is an SHA.

3. A CHA is obliged to keep pilotage services for its geographic area under review and to consider what pilotage services are needed and whether any should be mandatory. A CHA must arrange for such pilotage as they consider necessary and may incur liability for failure to maintain an adequate service.

4. The discharge of such functions by a CHA, even if it concludes that no pilotage is needed in its area, involves a level of responsibility on the part of the CHA with related costs in terms of money and time. Consequently a CHA for an area where pilotage is no longer considered necessary may wish to be relieved of the functions.

5. The removal of pilotage functions from harbour authorities would relieve them of their powers and duties relating to pilotage under the Pilotage Act 1987 (“the 1987 Act”). A harbour authority from which such functions were removed would cease to be a CHA, but would continue to be an SHA unless a closure order was also sought.

6. Provisions enabling this to be done came into force with the commencement of section 1 of the Marine Navigation Act 2013 in October 2013. This section amends the 1987 Act to provide Scottish Ministers with powers to specify by Order that a harbour authority in Scotland is not a competent harbour authority.

7. The process for making such an Order is simpler than that for a harbour closure order. A harbour authority wishing to be relieved of its CHA status should apply to Transport Scotland explaining:

- its reasons for believing that neither pilotage nor a regular assessment of the need for pilotage provision is required in its area;
- an assessment of likely costs and benefits arising from relinquishing CHA status (including, but not limited to, the impact on the harbour authority, any pilots authorised by the CHA, harbour users, and the environment); and

- any consequential provisions that may be required in the order.

8. A CHA considering relinquishing its powers should consult other relevant authorities and organisations and persons likely to be affected by the proposal prior to making the application.

9. Scottish Ministers will consider the application and may seek further information from the CHA if required. If they are minded to proceed with the Order, they may consult with appropriate national and local bodies (such as those listed at paragraph 3.8, plus the UK Maritime Pilots Association).

10. After considering the consultation responses, Scottish Ministers will then decide whether or not to make the Order and, if not, to consider alternative proposals with the applicant.

11. If Ministers decide to make the Order, Transport Scotland will draft it and share a copy with the CHA before it is made. Once made the Order will be laid before the Scottish Parliament.

Contacts

Enquiries about this guidance or making an application should be sent to Harbourorders@transport.gov.scot

Annex A

Harbour closure orders

17A Power to make closure order.

(1)The Secretary of State may make an order under this section in respect of a harbour (a “closure order”)—

- (a)on the application of the harbour authority, .
- (b)with the consent of the harbour authority, or .
- (c)if the Secretary of State has consulted the harbour authority and is satisfied that they are unlikely to object.

(2)The Secretary of State must publish guidance about the circumstances in which a closure order will be made. The guidance—

- (a)must require the Secretary of State to have regard to the underlying purpose, and
- (b)must be reviewed and (if appropriate) revised from time to time.

(3)In this section— .

- (a)“the underlying purpose” means the purpose of permitting or requiring harbour authorities to cease to maintain harbours which are no longer commercially viable or necessary;
- (b)“the harbour authority” in relation to a harbour means any harbour authority which has statutory duties to manage, maintain or improve the harbour.

17B Content of closure order

(1)A closure order must relieve the harbour authority of—

- (a)all statutory functions in respect of the harbour, or
- (b)specified statutory functions in respect of the harbour.

(2)A closure order may transfer specified functions of the harbour authority to a specified body (with the body's consent).

(3)A closure order must include transitional provision about the cessation of the harbour authority's functions (including provision about rights and liabilities in relation to the performance of functions before the closure order takes effect).

(4)A closure order may—

- (a)permit or require the harbour authority to carry out works in respect of the harbour;
- (b)permit the Secretary of State to carry out works in respect of the harbour;
- (c)require a harbour authority to pay for works carried out under paragraph (b);

(d) confer on the harbour authority or the Secretary of State power to acquire (whether by agreement or compulsorily) land described in the order as the site of works to be carried out under paragraph (a) or (b).

17C Harbour closure orders: property etc.

(1) A closure order may include provision for the transfer of property, rights and liabilities of the harbour authority.

(2) In particular, a closure order may include provision—

- (a) transferring things that would otherwise not be capable of being transferred;
- (b) creating interests, rights or liabilities in relation to things transferred or in connection with a transfer;
- (c) for enforcement of rights or liabilities (whether transferred or created by the order);
- (d) about the transfer of rights and liabilities in relation to employment (including provision for deemed continuity);
- (e) about pension schemes (including provision for amending schemes, winding them up, transferring their administration, and saving rights existing before a transfer takes effect);
- (f) terminating appointments;
- (g) for compensation for loss of employment (or office).

(3) A closure order may include provision—

- (a) extinguishing liabilities to the Secretary of State;
- (b) about the winding up of the harbour authority's affairs;
- (c) about the winding up of any company wholly owned by the harbour authority;
- (d) about the dissolution of the harbour authority.

(4) A provision of a closure order transferring property, rights or liabilities may—

- (a) make the transfer subject to a condition (such as the grant of an interest in favour of a third party), and
- (b) include provision about the effect of failure to comply with the condition.

(5) Provision under this section may confer a function on the Secretary of State.

17D Harbour closure orders: procedure

(1) Part 1 of Schedule 3 has effect in relation to closure orders as in relation to harbour revision orders.

(2) In relation to closure orders made otherwise than on the application of the harbour authority Part 1 of Schedule 3 has effect with any necessary modifications, in particular—

- (a) ignore paragraphs 3, 5, 6, 7, 9, 13 and 14,
- (b) treat a reference to the applicant as a reference to the Secretary of State,

- (c) treat a reference to the application for an order as a reference to the proposal to make an order,
- (d) treat a reference to being notified of a proposed application as a reference to proposing to make an order, and
- (e) paragraph 8 applies if the Secretary of State decides that the order would relate to a project which falls within Annex I or II to the Directive and is a relevant project, in which case—

- (i) the Secretary of State must prepare the environmental statement, having consulted bodies with environmental responsibilities, and
- (ii) the statement must include the information specified in sub-paragraph (2) (and may include other information).

(3) Section 44 applies in relation to closure orders as in relation to harbour revision orders.

17E Harbour closure orders: devolution

(1) In relation to fishery harbours in Wales—

- (a) the power to make closure orders vests in the Welsh Ministers, and
- (b) a reference in this group of sections to the Secretary of State is to be treated as a reference to the Welsh Ministers.

(2) In relation to harbours in Scotland—

- (a) the power to make closure orders vests in the Scottish Ministers,
- (b) a reference in this group of sections to the Secretary of State is to be treated as a reference to the Scottish Ministers, and
- (c) the reference in section 17D(1) to Schedule 3 is a reference to that Schedule as it has effect in relation to Scotland.

17F Supplemental

(1) A closure order may include incidental, consequential, transitional or saving provisions.

(2) In particular, a closure order—

- (a) may amend, repeal or revoke an enactment of local application, and
- (b) may disapply or modify the application of any other enactment.

(3) A closure order—

- (a) may make provision generally or only for specified purposes, and
- (b) may make different provision for different purposes.