

The Rosyth International Container Terminal Harbour Revision Order 2013

Summary

Scottish Ministers have laid the Rosyth International Container Terminal Harbour Revision Order before the Scottish Parliament for approval by the affirmative procedure. The Order confers powers to dredge a channel that is essential to operation of the new facility, but no environmental assessment of this dredging has been made. Approval now could be in breach of EU law – a possible infraction that is avoidable and would not, if procedures are completed properly, imperil the development of a container terminal on the Firth of Forth. RSPB Scotland believes that the Order should not be made until the environmental assessment has been completed and the results taken into account.

Background

Port Babcock Rosyth (“PBR”) has been the harbour authority for the former naval dockyard at Rosyth since 2009¹. In 2011, PBR applied to Transport Scotland for a harbour revision order (“HRO”) under section 14 of the Harbours Act 1964² to construct the “Rosyth International Container Terminal” (“the RICT”). Objections from RSPB Scotland, Scottish Natural Heritage (SNH)³ and others were not withdrawn⁴, and a public inquiry was held in early 2012⁵. The inquiry report was published in March 2013⁶, upholding objectors’ arguments over the proposed dredged channel. Nevertheless, following further consultation⁷, Scottish Ministers have laid a modified version of the HRO before the Scottish Parliament for approval.

The container terminal proposals

The RICT is proposed to be built on brownfield land reclaimed from the Firth of Forth in the 1980s, and lies immediately adjacent to part of the Firth of Forth Special Protection Area (SPA – see below). The scheme includes excavation of a new berth and – critically – dredging of a new access channel directly from the main river. PBR consider the scheme to meet the description of national development 6 (“Additional container freight capacity on the Forth”) in the second National Planning Framework for Scotland (“NPF2”)⁸. Accordingly:

“Development proposals will require environmental impact assessment. As part of appropriate assessment under the Habitats Directive, consideration of potential effects in combination with the Replacement Forth Crossing and development at Grangemouth will be required as the projects are developed. Environmental and appropriate assessment at the strategic level will be required for any developments which have not been subject to such assessment as part of the NPF preparation process. Any measures necessary to compensate for effects on the Firth of Forth SPA should be co-ordinated strategically over the area of the SPA.”

The Firth of Forth SPA

The Firth of Forth is the most important site wholly within Scotland for wintering and migratory waterbirds, most of which depend for their food on mud and sand flats exposed by the tide. The best shorebird habitat was designated as an SPA by Scottish Ministers under the European Birds Directive in 2001. At Rosyth, intertidal mud and sand flats lie immediately to the west of the proposed container terminal and dredged channel, and form part of the SPA. Although there would be no direct land take from the SPA by the terminal itself, there is a real risk that creation and maintenance of the new access channel will indirectly lead to the loss or deterioration of intertidal habitat, by erosion, accretion or slumping,

¹ <http://www.legislation.gov.uk/ssi/2009/27/contents/made>

² <http://www.legislation.gov.uk/ukpga/1964/40/contents>

³ The Scottish Government’s advisors on nature conservation

⁴ http://www.rspb.org.uk/Images/statement_of_case_tcm9-350630.pdf

⁵ <http://www.dpea.scotland.gov.uk/CaseDetails.aspx?id=qJ13769>

⁶ http://www.transportscotland.gov.uk/files/Port_Babcock_Rosyth_HRO_-_doc_291b_-_PLI_report_revised_21_January_2013.pdf

⁷ http://www.rspb.org.uk/Images/RSPB_response_to_HRO_amendments_tcm9-350649.pdf

⁸ <http://www.scotland.gov.uk/Publications/2009/07/02105627/0>

or by a combination of all processes, under different wave and tidal conditions. No information has been supplied to allow an assessment of this risk to be carried out, as required by the Habitats Regulations⁹ in order to ensure that there will be no significant damage to the SPA.

Environmental assessment of projects with multiple consents

Paragraph 8 of the HRO empowers PBR to dredge the access channel, to specified dimensions (150 metres wide, dredged to 9.5m below chart datum, plus side slopes, resulting in an estimated capital dredge of 700,000m³). Dredging, and disposal of dredgings, also require licences to be issued by Marine Scotland under the Marine (Scotland) Act 2010¹⁰. PBR has not applied for licences from Marine Scotland, and instead argued at the inquiry that assessment of the environmental effects of dredging, including on the SPA, could be deferred to such a subsequent stage. This approach appears to us to be entirely wrong.

Besides being illogical to give consent to a project without assessing its effects as a whole, in our view it would also be unlawful, in terms of regulations transposing both the Environmental Impact Assessment (EIA) and Habitats Directives. In simple terms, EIA caselaw makes it clear that the effects of a project must be assessed as a whole, at the stage of the principal consent – as soon as possible in the overall consenting process¹¹. For the RICT, it is clear that the HRO is the appropriate stage. Confirming the HRO now, even with a clause to prevent work commencing until Marine Licences are issued, risks seriously prejudging that licensing process, as paragraph 8 of the HRO would be a material consideration in determining the licences.

Mitigating the effects of dredging

The Habitats Regulations and Directive do not preclude development that damages SPAs. Projects may be consented if damaging effects can be mitigated; and even if this is not the case, projects for which there is no alternative solution and which clearly have sufficiently high public interest to over-ride the public interest in avoiding damage to the SPA may also be consented, provided compensatory measures are secured to completely offset the damage. However, all of these steps depend critically in the first instance on an accurate assessment of the nature and scale of the impact¹². None of these subsequent options for consenting the RICT are presently open to Scottish Ministers, as no assessment has been made of the dredging impacts.

The way forward

For the reasons set out above, the RICT HRO cannot be made as currently drafted or timetabled. It is clear that the environmental impacts of the RICT scheme as a whole must be assessed before consent can be given (or not), regardless of whether this requires account to be taken of mitigation, alternative solutions, imperative reasons of over-riding public interest, or compensatory measures. All of these require prior quantification of the impacts – and, by artificially restricting assessment of the RICT to landside impacts, this has not been done. The Order cannot be determined until the impacts of the dredged channel have been assessed. Therefore, the Order should be withdrawn by Scottish Ministers (or, failing that, it should not be passed by the Scottish Parliament), to allow an assessment of the dredging enabled by the Order to be made. Whether this happens at the same time as or before an application for the marine licences that are also needed is a matter for Scottish Ministers. Once the dredging impacts have been properly assessed, in consultation with SNH, consideration can then be given to whether, and if so subject to what conditions, the RICT scheme as a whole should be consented.

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⁹ <http://www.legislation.gov.uk/ukxi/1994/2716/contents/made>

¹⁰ <http://www.legislation.gov.uk/asp/2010/5/part/4>

¹¹ See paras 144 – 154 of <http://www.scotland.gov.uk/Publications/2011/06/01084419/0>

¹² C-304/05 Commission v Italy (Stelvio)