We (members of Fairlie & 2300+ Petitioners) believe:

That the Hunterston 'oil-rig' Project should necessitate a Mandatory EIA as similar project descriptions are listed in Annex I of the EIA Directive (85/337/EEC), its amendments and transpositions to UK and Scottish legislation.

That the Competent Authorities may have provided negative EIA scoping opinions without realizing and avoiding the full scope of the terms of the Directive thus enabling further development without the developers engaging in the mandatory processes involved in Annex 1 or even Annex II EIA procedures.

That many inconsistencies and errors have been made during the scoping and screening process, including Competent Authorities being informed that significant impacts can be reduced to insignificancy by the application of various conditions and licenses, further circumventing EIA requirements.

The Public have been denied access to the EIA decision making process. Statutory Consultees ability to intervene and provide consultation on a marine EIA scoping and screening procedures were restricted. The Authorities have a responsibility to ensure public participation in the implementation of the EIA Directive.

We offer some points to support:

1. **The project falls under the definition of a 'Project subject to Mandatory EIA'**

All projects listed in Annex I of the EIA Directive are considered to have significant effects on the environment and require an EIA. Projects subject to mandatory EIA include:

Paragraph 8(b): Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry ports) which can take vessels over 1350 tonnes.

The Developers interpretation of Paragraph 8(b) from their 'Clarification to Request for Screening Opinion' (Ref) correspondence to NAC Planning states:

> *Developer states:* "*The development is not and would not be a trading port which this paragraph is intended to address, it would be a construction and decommissioning yard and the proposed activity is a recovery, reuse and recycling operation, not trading goods"*

Contrary to the Developers insistence that Paragraph 8(2) is only meant to address 'Trading ports', the logical semantics of this paragraph 8(2) clearly address:

- Trading Ports;
- Piers for loading connected to the land;
- Piers for unloading connected to the land;
- Outside ports (excluding ferry ports) which can take vessels over 1350 tonnes.

The EU Directives are legal instruments of the EU, and domestic courts in the UK must take account of the decisions of the Court of Justice of the European Union. The CJEU has consistently held that the EIA Directive must be interpreted as having a '**wide scope and broad purpose' (Kraaijveld (Dutch Dykes) Case C-72/95**). This has implications for Competent Authorities when they are screening for EIA. The narrow interpretation held by Developers and Competent Authorities, of paragraph 8(2), and subsequent rejection of the project description is contrary to this ruling.

An example of how the **'wide scope and broad purpose'** applies, is found in the Court of Appeal judgment relating to a planning proposal to construct a storage and distribution facility **(Goodman and another v Lewisham London Borough Council [2003] EWCA Civ 140**). The planning authority took the view that as such development was not specifically described in either the Directive or Regulations, there was no need to consider an EIA. Following legal challenge, the Court of Appeal quashed the application because they said that the Annex description goes far wider than the normal understanding. They also held that the planning authorities decision '*not to examine the reach of Annex descriptions'* was '*outside the range of reasonable responses that was open to the planning authority'*.

It has only been since the variation in planning to decommission large marine structures (16/00268/PP, 17/01273/PP). and release of Developers Marketing Video that the true purpose of the pier development, via marine license process, and larger Project are now being drip-fed to the Public. There is little doubt that the Pier development and wider Project will involve intermodal trading, heavy lift, loading, unloading, storage and all other activities involved with operating a port complex that is involved with decommissioning and trading of oil rigs.

The exclusion of the pier proposal and wider Hunterston Project from the definitions and more specifically to, Annex 1 paragraph 8(2), is contrary to the Directive and must be reconsidered.

2. **Planning consent has been sub-divided to avoid scrutiny regarding environmental protection.**

The 'Planning Consent Process offered by the Developer identified and then progressed using two key aspects to obtain planning consents:

1. Application for variation of condition No.1 of Planning Permission (16/00268/PP, 17/01273/PP).

2. Consents for improvements to quay (18/00134/PP), creation of caisson

dock gates (/1800132/PP) and shore based infrastructure.

Another useful example of the Court of Justice European Unions approach to environmental protection involves case ***C1-42/07 Ecologistas en Accion-CODA v Ayuntamineto de Madrid*** **[2009] PTSR 458**. Where the planning authorities sub-divided a project into 15 independent sub projects, only one of which triggered an EIA. The court rejected the Developer's argument stating that the Project was contrary to the very wide purpose of the Directive and should not fall outside its scope simply because the Annexes do not specifically refer that particular kind of Project.

Environmental pollution from the preparation and 'demolition phase' of the Hunterston Project is already occurring over the SSSI, on Protected Shell Fish Waters and within reach of European Protected Species. The courts have defined demolition and decommissioning works as a 'project' and concluded that demolition works come within the scope of EIA Directive and constitute a project within the meaning of Article 1(2) thereof. (C-50/09, paragraphs 86-107). They concluded that demolition works cannot be excluded from the scope of national legislation and within the Projects context in the EIA Directive.

Based on case law, and in order to ensure a high level of protection of the environment, the amended EIA Directive provides that the screening procedures and environmental impact assessments should take account of the impact of the 'whole project' in question and, where relevant, demolition phases (Annex II A, point 1 (a), and Annex IV, point 1 (b) and 5(a)). Under the terms of the Directive the demolition works currently taking place on the coal terminal should be considered part of a whole project and require to proceed through the EIA screening process.

It is contrary to the Directive to split up projects so they are less easily defined in the Annex project categories. Paper-chased screening procedures cannot be used as a surrogate for an EIA, There must be a full EIA assessment, and project considered as a whole.

3. **Inconsistencies and inappropriate management in the screening and pre-consultation process.**

The Developers and Competent Authorities Scoping, 'Clarification' and Screening opinions make reference and relate to a 5-year-old project. These screening opinions were agreed, clarified and accepted before the true extent of the larger Oil Rig Project (17/01273/PP) and operational purpose of the pier development (18/00134/PP) was known or could be reasonably contemplated.

Referring to the pier development (18/00134/PP),

> *The Developer states: The same proposed development (the refurbishment of existing quay and associated dredging) was screened jointly by Marine Scotland and North Ayrshire Council under the same*

EIA regulations and considered not to be an EIA development.

Many inconsistencies and errors have been noted in the scoping and screening process for the Hunterston project. For instance, the developers have presented an out of date scoping opinion created for an older development and have pursued this as their basis to acquire beneficial 'negative' screening opinions at future dates. They are also referencing a singular EIA screening opinion from a smaller pier development, to endorse their environmental appraisal process, and to negate the requirements for an EIA across the whole decommissioning Project at Hunterston.

The ***Ecologistas en Accion-CODA*** case demonstrates that the Courts take a robust approach and that the entire purpose of the EIA Directive would be frustrated if local planning authorities could circumvent their obligations by simply artificially dividing up projects that have significant effects on the environment. It is therefore questionable whether the strategy used by the Developers to 'paper chase' favourable opinions is in accordance with the purpose of the EIA Directives.

Its Is clear from 'publicly available' and FOI requested correspondence that the Developer's scoping requests are not only scoping for a favourable Competent Authority EIA decision, but also for the terms and conditions designed to mitigate impacts and repeatedly presenting this as an alternative to EIA. The Competent Authorities may be avoiding care or proper judgment to ensure that conditions designed to mitigate the likely effects of a project are not used as a substitute for an EIA or to circumvent the requirements of the EIA Directive.

Parallels with the Hunterston Project can also be drawn with **Regina oao Lebus v South Cambridgeshire DC [2002] EWHC 2009** where mitigation measures were being offered to frustrate the purpose of the of the EIA directive and then serve as a surrogate for it.

In this case**,** the planning officer took the view, after meetings and discussions, that it was not an EIA development and the applicant was told informally that an EIA would not be required. The planning case officer made no written record of his conclusions. At the planning meeting the officers concluded that adverse impacts of the development would be insignificant with proper conditions under planning obligations. The application was challenged and planning permission was quashed.

So far as planning conditions and EIA the courts have stated, "it is not appropriate for a person charged with making a screening decision to start from the premise that although there may be significant impacts, these can be reduced to insignificance by the application of conditions of various kinds".

4. The Significant Environmental Effects

As far as the EIA and Habitats Directive is concerned, everyone seems to be

ignoring the big '**Significant Environmental Effects'** elephant in the room. The project to construct, and implications of operating, an oil rig decommissioning port on top of, and next to, a SSSI site.

This will involve the removal of hundreds of thousands of tonnes of sediment from, and around, the impact zone of the SSSI. In itself this should trigger the EIA process, but is even more critical when removing the very feature the site is designated for. It stands to reason that if developers plan to remove this feature that there will be 'significant environmental effects'. The Developers have also indicated that UK Priority Species will be suffocated by dredge sedimentation, in a SSSI which has already lost 40% of its potential surface area to industrial land reclamation.

The Scottish Natural Heritage Southannan Sands SSSI Environmental Management Statement (20/03/13) for the site includes:

- The sandflats are of national significance
- Contains UK LBAP priority habitats
- 170ha (40%) of intertidal sand flats have already been lost to industrial land reclamation.
- SNH wish to "protect the site and to maintain and where necessary enhance its features of special interest".
- That SNH aim to "maintain the extent of the intertidal sandflats by ensuring protection from damaging impacts, in particular any future coastal development".
- The SNH SSSI Management Statement reiterates that "Coastal development could have an adverse impact on the sandflats through direct habitat loss and interfering with the natural processes in the coastal ecosystem".
- With reference to existing and other industrial developments it says, "These development proposals all have the potential to have adverse effects on the sandflats feature of Southannan Sands SSSI".

This SNH management statement for the site provides evidence that the project location on the SSSI is susceptible to the development impacts being proposed by this type of project. This situation should have automatically triggered an EIA Schedules in either Annex I or II.

It is inconceivable and irrational for anyone to consider that the Projects development and operation will not have a significant environmental effect on the SSSI. The Project should have been subject to mandatory EIA.

5. Conclusion

We (Fairlie and 2300+ Petitioners) believe that the irrational approach that the Developers and Competent Authorities have and continue to take in relation to the scoping, screening and consenting processes is in breach of EU and the transposed EIA Directives. There are many examples illustrated in case law where similarities can be drawn with the Hunterston Project and illustrate non-compliance to EIA Directive.

We have made request to Marine Scotland and SNH for information relating to the decision and screening process. MS LOT have withheld information because of exceptions under regulations 10(4)(d) of EIR (unfinished or incomplete information). Requests have been made to SNH but have responded that need an extension of 20 days to respond to FOI EIR requests.

We (Community & 2300+ Petitioners) believe it is a matter of urgency, interest, public record and with reference to (***Mellor v Secretary of State for Communities and Local Government*** (C-75/08) [2010] P.T.S.R. 880.), that the Competent Authorities have a responsibility to provide the reasons for underlying determinations. We accept the recent momentum, consultation and attempts to ease legislative burden and transposition of the EU EIA Directive into member state legislation. However the EIA Directive is explicit and should not be sacrificed by the subjugation of projects through the planning and licensing process.

The splitting-up of Hunterston planning and licensing permissions is too restrictive a process and deprives a large number of affected people the opportunity to challenge decisions (***Karoline Gruberv Unabhängiger Verwaltungssenat für Kärnten (C-570/13)*****[2015] Env LR D6)**. This 'strategy' has also prevented statutory marine planning consultees, having any input and restricted access to the EIA Scoping, Screening and Clarification decisions. The authorities have a duty to ensure a 'wide access to justice' even when making contentious decisions during early stages of the EIA Directive. (***R. (on the application of Simmons) v Bolton MBC*** **[2011] EWHC 2729 (Admin))**. And failing accepted procedures all affected parties should be shown courtesy and be entitled to a review. ***Liechtensteinische Gesellschaft fur Umweltschutz v Gemeinde Vaduz*** **(Case E-3/15) [2016] 3 CMRL 15**,

North Ayrshire Council, Marine Scotland, Clyde Marine Planning Partnership and Scottish Ministers have an opportunity to rectify these issues on the 8th Aug 2017 where they should provide their statutory opinion that a full mandatory EIA is required to realign the Hunterston Project to the EIA Directive.

Without prejudice
David Nairn
Fairlie Community Councilor