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[REDACTED]

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Our Ref FOI/19/01364.

18 June 2019

## REQUEST UNDER THE ENVIRONMENTAL INFORMATION (SCOTLAND) REGULATIONS 2004 (EIRs)

Dear [REDACTED]

Thank you for your request dated 31 May 2019 under the Environmental Information (Scotland) Regulations 2004 (EIRs).

The information you have requested is 'environmental information' for the purposes of the Environmental Information (Scotland) Regulations 2004 (EIRs), we are required to deal with your request under those Regulations.

### You asked for

written correspondence between the Minister and those Civil Servants as a formal record of the advice given and the decision taken.

### Response to your request

Please note that there were no meetings held to discuss this request.

The advice and recommendation to the Minister for Local Government, Housing and Planning regarding the screening request is noted at Annex A. The response from the Minister for Local Government, Housing and Planning is noted at Annex B.

### An exception applies

Exceptions under regulations of the EIRs applies to some of the information you have requested:

#### Regulation 11(2) Applies – Personal data belonging to a third Party.

The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA 2018) came into effect in May 2018, making many changes to data protection laws in the UK. Regulation 11 of the Environmental Information (Scotland) Regulations 2004 (the EIRs) sets out when personal data can and cannot be disclosed under the EIRs.

Personal data must not be disclosed if it is:

- the personal data of the person requesting the information (regulation 11(1))
- the personal data of a third party – (regulation 11(2))

The exceptions in regulation 11 are generally absolute, which means that they are not subject to the public interest test. However, in two specific situations, the exception in regulation 11(2) is subject to the public interest test. This means that, even if the exception applies, the personal data must be disclosed unless, in all the circumstances of the case, the public interest in making the personal data available is outweighed by the public interest in not making it available.

Reg 10(4)(d) - Material in the course of completion, unfinished documents, or incomplete data

This exception is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exception. We have found that, on balance, the public interest lies in favour of upholding the exception. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. Reg 10(4)(d) applies to information within the document which cannot be made public as doing so would cause prejudice to another department, person, or decision making process as the information is still in being worked on or is under active consideration.

Reg 10(5)(d) Confidentiality of proceedings provided for by law (includes legal advice)

Again the public interest test has been applied to this exemption. The information is not available as part of this request as it contains legal information which is not to be shared with the public. The Scottish Government maintain the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials are able to receive legal advice in confidence, like any other public or private organisation.

The right to request a review

If you are unhappy with this response to your EIRs request, you may ask us to carry out an internal review of the response, by writing to Stephen Gallagher, Interim Director for Local Government and Communities, Area 3F North, Victoria Quay, Edinburgh, EH6 6QQ. [Stephen.Gallagher@gov.scot](mailto:Stephen.Gallagher@gov.scot).

Your review request should explain why you are dissatisfied with this response, and should be made within 40 working days from the date when you received this letter. We will complete the review and tell you the result, within 20 working days from the date when we receive your review request.

If you are not satisfied with the result of the review, you then have the right to appeal to the Scottish Information Commissioner. More detailed information on your appeal rights is available on the Commissioner's website at:

<http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>.

Yours sincerely

[Redacted signature]

[Redacted name]

PS / Minister for Local Government, Housing and Planning,

## **EIA-NAY-042 - PROPOSED HUNTERSTON DECOMMISSIONING PORT THIRD PARTY SCREENING REQUESTS FOLLOWING PREVIOUS SCREENING DECISION ISSUED BY NORTH AYRSHIRE COUNCIL (NAC)**

### **Purpose**

1. To invite the Minister to agree our recommendation to decline a number of Third Party Screening Direction requests relating to proposed decommissioning of marine structures (Port and Resource Centre (PARC) project)) at Hunterston.

### **Priority**

2. Routine.

### **Ministers Role in Third Party Screening Requests**

3. Under the EIA Regulations Scottish Ministers have the power to make a screening direction *'if requested to do so in writing by any person.'* However, because the person asking for the direction is not the developer there is no requirement for Ministers to do so, and if they choose to do so there is no time limit on issuing the direction.
4. Circular 1/2017 sets out that third party requests should be considered on a case-by-case basis and that; *'Some indication should therefore be looked for in the correspondence that the third party has seriously considered the basis on which an EIA might be needed, and has offered relevant grounds for the request. In each case the test to be applied is whether the issues raised give rise to a real risk that the planning authority's assessment was not, and does not remain valid.'*

### **Grounds of Third Party Request**

5. Fairlie Community Council's request relates to the following planning applications, which have all been approved by North Ayrshire Council:
  - a. Application (16/00268/P P) to delete Condition 1 of planning permission (11/00230/PPM) to remove the temporary restriction on the use of the site at Hunterston Construction Yard,
  - b. Application for variation of condition No.1 of Planning Permission (16/00268/PP, 17/01273/PP Large Marine Structures),
  - c. Consents for improvements to quay (18/00134/PP), and
  - d. Creation of caisson dock gates (18/00132/PP) and shore based infrastructure.
6. This was an extensive third party request, the main points of the request can be summarised as:
  - 'Salami slicing' - due process not followed, with the project broken up to subvert EIA requirements.

- lack of detail and lack of consultation; and,
- concern regarding potential impacts including on population; natural heritage, ecology, and the Southannan Sands SSSI.

7. We have also since received two further Third Party Screening requests from other residents of Fairlie. While these requests have offered limited grounds for the request nevertheless we have taken these into account in our consideration and we consider it appropriate to answer them at the same time as responding to Fairlie Community Council.

### **Council Consideration and Screening**

8. These planning applications have all been approved by NAC.

9. The Council considered the proposals in terms of the 2011 EIA Regulations. They accepted that the proposed development would have the potential to result in adverse environmental effects. The screening opinion issued by the Council, reflects their conclusion that these effects were not significant.

10. It was the opinion of the Planning Authority that the proposed development did not require a full Environmental Impact Assessment to accompany any planning applications for the above proposed developments. Whilst the Council's Screening Opinion takes a light touch approach, the Council opinion was underpinned by an [EIA Screening Checklist](#), which considered the environmental effects in greater detail. Crucially, the Environmental Report which informed the Council decision, had included all of the elements of the wider scheme set out in the subsequent planning applications (to NAC) and the original licensing application (to Marine Scotland).

11. It was the opinion of NAC that there was no likely significant effect. The Council went on to comment that there was potential for there to be environmental effects which may be unacceptable in their impacts upon the environment, local receptors, the site and/or the surrounding area. There was still a need for sufficient information to be provided in support of the planning application to enable these effects to be properly established and assessed by the Planning Authority. Appropriate information / reports were required as part of the processing of the applications to address all identified concerns and environmental impacts. Consideration was subsequently given to environmental impacts and effects during the processing of the planning applications.

### **PAD Assessment**

12. This is a complex case. There is an extensive site history both with multiple planning applications, and other consenting regimes in play. Other parts of the Scottish Government also have interests at Hunterston. On October 26, the Scottish Government granted funding through the Decommissioning Challenge Fund towards various infrastructure works at Hunterston, along with funding other sites across Scotland. Marine Scotland are involved in the Marine Licensing aspects of the scheme. SNH have also been a consultee in the EIA process with North Ayrshire Council. There is correspondence in the public domain, in which SNH officers express frustration that they were being asked to comment on the lock / caisson gates proposals, whilst expressing a view that the wider scheme may require EIA.

13. A key element of the third party request raises concerns about 'salami slicing' by the developer to get round EIA regulations. In this case, we are aware that it was NAC that suggested that the developers submit a series of separate applications for the development of the Hunterston Dry Dock.

14. We also note that the Screening Request submitted to NAC was accompanied by a document entitled “Hunterston Construction Yard Environmental Review” carried out by Enviro Centre which covered proposals for various works at Hunterston. It did not cover the port elements of the PARC project, as that is not development requiring planning permission, and is not considered, by the developer or Council to form part of this project.

15. The EIA Implications of the development were considered in the whole, within the Environmental Report. Whilst the proposed development was then broken down into separate elements for planning submissions, it was within the gift of the applicant to do this, and it was a decision for the Council as to whether to accept this proposition. It is notable that this approach may have reduced risks to the developer, such as if one element was deemed unacceptable, the other elements would not have been refused, as would have been the case had they all been present in a single application. However, the Community Council contends that this was collusion to conceal the true scale and nature of the proposals. Further assessment on each of the Community Council’s areas of concern are covered at Annex A.

16. In addition to the planning applications to the Local Authority, a Marine Licence was also submitted to Marine Scotland for the dredging and construction elements of the proposals. There has however been a significant change in the dredging element of the proposed development. The tidal sands flats flanking the construction yards form a Site of Special Scientific Interest. The dredging required was described as 150,000 to 200,000m<sup>3</sup> of dredging in the Environmental Review (February 2017). It is now noted the most recent draft marine license application (October 2018) includes a proposal for 2,400,000m<sup>3</sup> of dredging. This information is not in the public realm at this time. There are multiple EIA Regimes in place in Scotland. In addition to the Terrestrial planning EIA regulations, there are also The Marine Works (Environmental Impact Assessment) (Scotland) Regulations 2017.

17. Marine Scotland previously advised the developer that EIA was not required, however that position has now come under review given the current draft licensing application, and its proposals for significantly increased dredging volume. We understand that the Complainants are not aware of this at this time. We consider that detailed consideration of the dredging impacts upon the SSSI at Southannan Sands are a matter best left for the further future consideration of Marine Scotland. Marine Scotland advised PAD on 16 November that they now consider they may have reason to reconsider the licensing and Marine EIA positions they have previously taken. The increase in dredge volume is potentially significant. They had declined to accept the most recent license application from the developer, and consider it deficient on a number of fronts. Marine Scotland subsequently met with the developer on November 23 to discuss their recent marine licence application for Hunterston and the differences between it and what was previously screened, as a result of the meeting the following action points were agreed:

- Peelports will withdraw their current marine licence application.
- Peelports will review and update drawings and method statements to more accurately reflect the likely size and scope of the proposed works.
- Peelports will submit a further EIA screening request to Marine Scotland based on these updates.

18. Marine Scotland will then make a determination on the need for Environmental Impact Assessment, in light of this updated information. It would be open to the developer in their EIA to consider the cumulative environmental effects of aspects of the project, including any arising in combination with the land based elements.

19. Given that planning permission has already been granted, it was unclear what the practical effect of issuing a Screening Direction in this case would be, in terms of

existing permissions. However it remains open at this time for Marine Scotland to further consider the details of the emerging altered dredging works upon the SSSI, in reaching an updated conclusion on EIA under the relevant marine regulations. Regulation 10(5)(d) [REDACTED]

### Conclusions

20. The screening opinion issued by the Council concludes no likely significant environmental effects. Whilst the correspondence from the third party questions the validity of the planning authority's screening opinion, on reviewing this, it is concluded that due process has been followed with regards to the seeking and obtaining of a Screening Opinion for the project. The Community Council disagree over the definition of the project, however the regulations are for the Planning Authority to interpret and implement. There will be further consideration by Marine Scotland of the impacts upon the Marine Environment and the SSSI arising from the latest revised details of the proposed development, should these progress.

21. Regulation 10(4)(d) [REDACTED]

### Presentation

22. There is a potential for legal challenge on this case, whatever decision were to be made by the Minister. The Community Council may seek to challenge a decision by Scottish Ministers not to direct on the need for EIA – crowdfunding is underway in terms of proceeding with further challenge of the current EIA position. The Developer would be likely to seek to challenge a positive screening determination, particularly given a change in the previously confirmed position would have taken place.

### Recommendation

23. It is recommended that Scottish Ministers decline to issue a screening direction in this case. A letter will be issued to the Community Council and other requesters in this regard. It is also recommended that PAD inform the planning authority that we have no reason to fundamentally question the validity of their screening opinion.

Planning Decisions  
4 February 2018

<p>Copy List: DG Education, Communities &amp; Justice DG Economy Stephen Gallagher Solicitor to the Scottish Government and PS Chief Planner [REDACTED] [REDACTED] ) [REDACTED]</p>	<p>Regulation 11(2)</p>
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## APPENDIX A – Assessment of Grounds of Request

In terms of the detail of the various issues raised in the 3<sup>rd</sup> party request:

1. *Salami Slicing.* Fairlie Community Council highlight that the Authority and developers had agreed to make the required alterations to the yard via three separate planning applications, and a marine license. The Council and developer are entitled to submit and consider multiple consents. In this case we understand that the local planning authority encouraged that approach be taken. Consideration does need to be given to the whole of the project for EIA purposes The Environmental Report submitted by the agent for the applicants did cover the various strands of the development subsequently applied for. The Community Council does not agree with the project definition on which the Council and Developer undertook screening. The Environmental Screening Report covers the different elements in the round. The Environmental Screening document lodged with the Council in advance of its screening decision did cover the wider proposal/project, albeit not the definition advanced by the complainant that included the wider PARC project. This will remain a disputed matter. The Community Council consider the project is wider in scope. However, the narrower scoped project considered by the developer and council does appear to have considered all of the elements requiring statutory consents.
2. *There was concern about lack of detail and lack of consultation.* There is however no statutory requirement for public consultation at the screening stage. .
3. *The Community Council express concerns about consultees not visiting the site to inform the screening decision.* This is not a statutory or regulatory requirement.

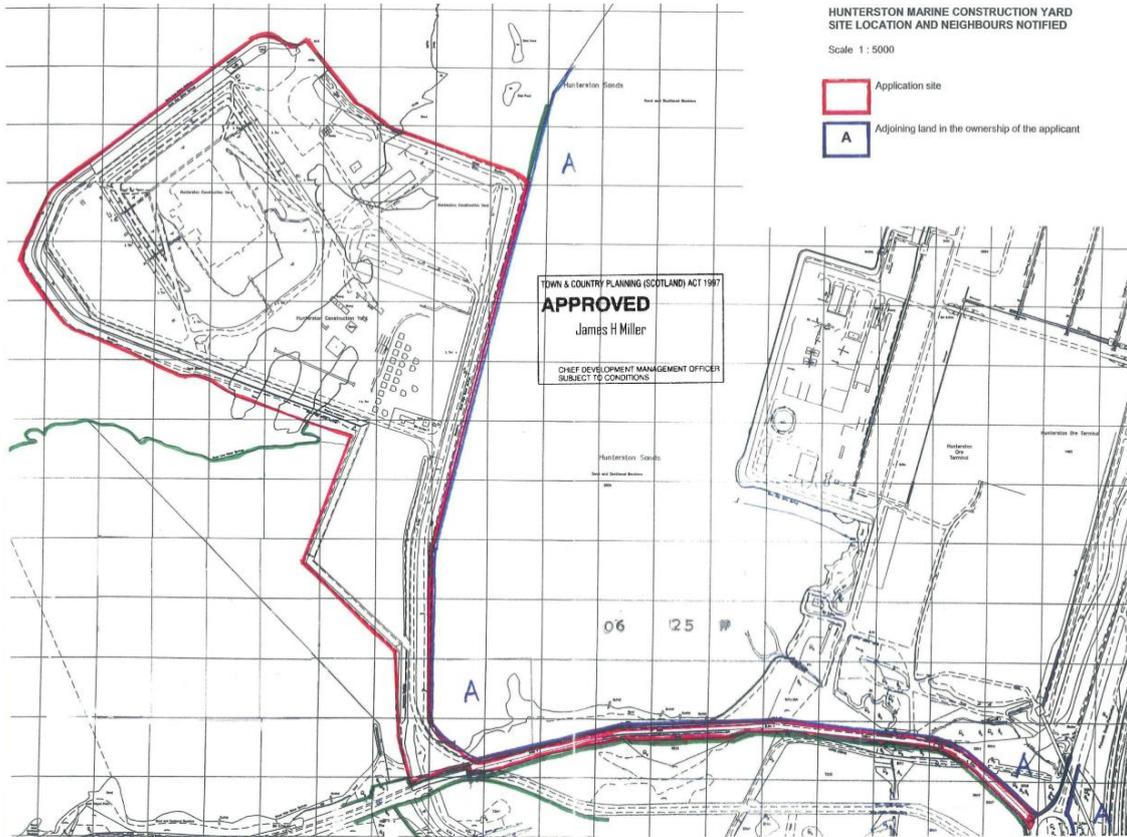
*Water line (Mean Low Water Springs).* The Community Council makes extensive reference to Mean Low Water Springs (MLWS). The MLWS sets the administrative boundary between Marine Scotland and the Planning Authority (North Ayrshire Council in this case). The MLWS also sets part of the boundary of the Site of Special Scientific Interest. In this case the MLWS is disputed by the Community Council. The purported effect of the change in boundary would be that part of the dredge pocket would then be within the SSSI, and would as a result have required an EIA. The position and scope of dredging are matters being considered by Marine Scotland. It is also contended by the Community Council that the wrong determining body considered the applications, the boundary between terrestrial and marine planning bodies not having been correctly applied. It is apparent that the Council and Marine Scotland has used Ordnance Survey Mapping to ascertain the boundary point between their respective areas. However, Marine Scotland and the Council have considered the applications before them. It is not the role of Scottish Ministers to police administrative boundaries. There will be further consideration of impacts upon the SSSI to be undertaken by Marine Scotland in due course.

4. *The extent of the project described.* The “Project” described by the Community Council in their screening request includes pre-existing elements for which planning permission is not required, such as the port and rail terminals. Furthermore, it includes 300 hectares of “Development Land” for which there is no further detail provided, though we note there are substantial areas of developable land for employment uses allocated in the Local Development Plan. The Screening template used by NAC gave consideration to cumulative effects. Specifically, consideration was given under the screening questions “Should the application for this development be regarded as an integral part of a more substantial project? If so, can related developments which are subject to separate applications proceed

separately? The response was “No, Separate applications can proceed independently and would operate as separate developments.”

5. *Marine Scotland Email to North Ayrshire Council*, February to May 2017. In January 2018, an email was released to Mr Nairn. This covers an initial email from the agent to Council Peelports and Marine Scotland and North Ayrshire Council in February 2017. Further comments were then made as the email circulated around marine Scotland and North Ayrshire Council. It is clear from the limited content of this email which we have seen, that consideration was being given as to whether the development (in particular the use of the adjacent port) would fall within schedule 1 of the EIA regulations. The Council, out with the email exchange, has advised in public that it is content that the port had the benefit of existing use rights, and did not require planning permission. It is only right that consideration was given to what schedule the development fell under. What the email shows is a particular viewpoint of a person, at a moment in time. It does not bind or compel Marine Scotland, The Planning Authority, or for that matter Scottish Ministers to a position.

# APPENDIX B – SITE LOCATION (Planning Application to NAC)



## APPENDIX C – AERIAL IMAGERY



## APPENDIX D – Letter to Fairlie Community Council and Others

Your ref:  
Our ref: EIA-NAY-042

Dear [REDACTED] and others Redacted - Regulation 11(2)

### **THE TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) REGULATIONS 2017: SCREENING DIRECTION; Hunterston**

1. I refer to your letter and to your request, pursuant to regulation 7(4)(b) of the above regulations, that Scottish Ministers issue a screening direction to determine whether an Environmental Impact Assessment ('EIA') is required in connection with the above proposal.
2. Having considered the points you raised in your correspondence, officials were satisfied that the issues raised were sufficient to suggest that more detailed consideration was required.
3. Further to those considerations, the Scottish Ministers have considered the details of the case, along with the Screening Determination of North Ayrshire Council, and your supplementary submissions and have reached the view that they are declining to issue a Screening Direction in this case.
4. A copy of this letter has been sent to both the developer, and North Ayrshire Council.

Yours faithfully



DG Education, Communities & Justice <[DGECJ@gov.scot](mailto:DGECJ@gov.scot)>; DG Economy <[DGEconomy@gov.scot](mailto:DGEconomy@gov.scot)>; Gallagher S (Stephen) <[Stephen.Gallagher@gov.scot](mailto:Stephen.Gallagher@gov.scot)>; Solicitor to the Scottish Government & PS <[DLCEAPDLSSGSSGPS@gov.scot](mailto:DLCEAPDLSSGSSGPS@gov.scot)>; Chief Planner <[Chief.Planner@gov.scot](mailto:Chief.Planner@gov.scot)> Redacted Regulation 11(2) [REDACTED]

[REDACTED]

Communications CSSE <[CommunicationsCSSE@gov.scot](mailto:CommunicationsCSSE@gov.scot)>; [REDACTED]

**Subject:** Third Party EIA Screening Request - Hunterston Marine Yard

P.S. / Minister of Local Government, Housing and Planning,

**TOWN AND COUNTRY PLANNING (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND) REGULATIONS 2017: THIRD PARTY SCREENING REQUEST: PROPOSED DECOMMISSIONING OF MARINE STRUCTURES; HUNTERSTON**

1. Please find attached a submission, annexing an assessment, site plan, photographs and draft letter, in relation to Third Party requests for a screening direction at Hunterston.

**Purpose**

2. For the Minister to agree our recommendation to decline a number of Third Party Screening Direction requests relating to proposed decommissioning of marine structures (Port and Resource Centre (PARC) project)) at Hunterston.

**Priority**

3. Routine.

Thanks

[REDACTED]

[REDACTED] | Senior Planner | Planning & Architecture | Scottish Government | [REDACTED]

