EXPLANATORY MEMORANDUM TO

THE HARWICH HAVEN AUTHORITY (PENSION FUND) HARBOUR REVISION ORDER 2011

2011 No. 207

1. This explanatory memorandum has been prepared by the Marine Management Organisation and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 The purpose of this instrument is to substitute for section 70 in the Harwich Harbour Act 1974 (c.i) (which confers powers on the Harwich Haven Authority to maintain a contributory pension fund for servants of the Authority) a new section which confers a broader based power to maintain one or more pension funds.

2.2 The substituted section 70 differs from the original in two respects. First, it authorises the provision of pension funds, without any description of such funds as contributory or non-contributory. Second, in providing for any pension fund to be regulated in accordance with rules, the substituted section allows for such rules to be consented to, in addition to being made by, the Authority and removes any reference to the Authority operating any such fund.

2.3 The order will remove the legal uncertainties that have arisen in relation to the existing pension fund (see below).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Harwich Haven Authority applied to the Secretary of State for Transport in April 2009 for the present order to be made under section 14 of the Harbours Act 1964. The responsibility for the consideration of the application, and the making of any order, passed to the Marine Management Organisation by virtue of the Harbours Act 1964 (Delegation of Functions) Order 2010 (S.I. 2010 / 674) which delegated the Secretary of State's functions under section 14 to the Organisation except in relation to specified applications.

4.2 The Authority is a body corporate created by statute. Its statutory powers and duties are mainly in the Harwich Harbour Acts and Orders 1973 to 2008 and the present order. Section 70 of the 1974 Act, as originally enacted, is a power to maintain a contributory pension fund for the servants of the Authority.

4.3 Under the power provided by section 70 the Authority maintains a pension fund ("the Fund"). It was established in 1936 as a contributory fund, expressly legislated for in the Harwich Harbour Act 1938 and continued to be

contributory until 1977. In that year, with the agreement of the contributors, the Fund became a non-contributory fund i.e. a pension fund to which all contributions are made by the employer, with no contributions from the members. The change was made retrospective to 1 January 1974 (and in anticipation of the change contributions were not collected after that date) and the Fund has been non-contributory ever since.

4.4 Section 70 as originally enacted provides for the pension fund to be operated by the Authority and for the Authority to be responsible for making and altering as necessary the rules governing the pension fund. In practice, the Fund has followed the governance model common to pension funds in being operated pursuant to a trust deed ("the Trust Deed") by independent pension fund trustees ("the Trustees"). The Trustees have in practice made and amended the rules of the Fund, the amendments being formally submitted to the Authority for agreement rather than formal consent.

4.5 Thus the Fund, which was originally contributory and which is legislated for as a contributory fund, is in fact non-contributory; and the Fund is operated, and the rules of the Fund are made, by independent Trustees, not the Authority.

4.6 There is considerable uncertainty as to the meaning and legal effect of section 70 of the 1974 Act as originally enacted. Whatever it's meaning, there is a direct conflict between it and the Fund Rules. Some quite widely differing views have been given in legal opinions obtained by the Authority from several legal experts in the fields of legislation such as the Authority's Acts and orders and pensions law.

4.6 The application was made because the Authority and the Trustees agreed that, for the policy reasons given below, such uncertainties should be resolved and that the best way to achieve this was to alter the legislation in the way provided by article 2 of the order.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

6.1 The Marine Management Organisation has made the following statement regarding Human Rights:

In our view the provisions of the Harwich Haven Authority (Pension Fund) Harbour Revision Order 2011 are compatible with the Convention rights.

7. Policy background

7.1 In the legislative context and circumstances described above, the concern is that the Authority may be open to legal challenge in relation both to maintaining the Fund as a non-contributory pension fund and as regards the validity of the Trust Deed and the Rules made by the Trustees. No such

challenge has been made and nor has the validity of the present arrangements been questioned. However, the risk remains, with results that could be highly prejudicial to the Fund and its members. The new section 70 removes these uncertainties, providing a sound and unambiguous basis for one or more pension funds to be administered and for the Authority to make payments from its revenues.

7.2 In common with many final salary pension schemes, the Fund is in deficit. This deficit has arisen primarily due to increased longevity of members and lower than expected investment returns. This current scheme deficit is being addressed by way of an agreement between the Authority and the Trustees by which the Authority is making additional contributions as part of a recovery plan monitored by the Trustees and their advisers in agreement with the Pensions Regulator. As explained below in relation to impact, the deficit and the order are unrelated. Indeed, there is nothing the order could do in relation to the deficit.

8. Consultation outcome

8.1 A notice was placed in the London Gazette and for two consecutive weeks in a local newspaper detailing the proposed order and how any objections or representations may be registered in accordance with the Act. Ten objections were received within the statutory 42 days period allowed, two of which were subsequently withdrawn prior to the commencement of a public inquiry into the application. Nine of the objectors are members of the pension scheme and one objection was made on behalf of the union, Unite. None of the objectors appeared at the public inquiry. In his report the inspector, Mr Alan Boyland BEng (Hons) DipTP CEng MICE MCIHT MRTPI, recommended the order be made with minor drafting modifications. The report can be found at: http://www.marinemanagement.org.uk/works/harbour/documents/hha_inspectors.pdf

8.2 In addition to the statutory notice, the Authority consulted the Trustees, who were in agreement that the application should be made (see above) and who wrote confirming their support for the order. The Authority also implemented a consultation and communication programme with its employee Fund members and representatives of their union, Unite. Meetings were held, letters were written and there was regular contact with all concerned by telephone, email and face to face. The Authority believes the proposals to have received widespread support. Against the the ten objections to the order, the Fund currently has approximately 188 members comprising pensioners, deferred members and active employees.

9. Guidance

9.1 The Marine Management Organisation does not proposing to issue guidance in respect of the effects of the order. However, the Authority will publish particulars, and serve copies of the order in accordance with paragraph 24 of Schedule 3 to the Harbours Act 1964.

10. Impact

10.1 The impact on business, charities or voluntary bodies is nil.

10.2 The impact on the public sector generally is nil.

The impact of the order, which is limited to the Fund and the Authority, is that it will place the Fund on a clear and unambiguous footing.

The order does not change the current non-contributory scheme to being contributory. Neither does it make any changes at all to the Fund or the Fund's Rules. Further, the order has no bearing on the present deficit in the Fund or the way, outlined above, in which the deficit is being addressed.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not impose obligations on small business.

12. Monitoring & review

12.1 The Marine Management Organisation does not propose to monitor the effectiveness of the order which will be a matter for the Harwich Haven Authority in the first instance.

12.2 The continued effective performance of the Fund will continue under the direct control of the Trustees (comprising two employee nominees and three Authority nominees), in regular contact with the Authority and consultations as necessary, and subject to the overall regulation of the Pensions Regulator. This operational and regulatory framework is entirely independent of and unrelated to the order.

13. Contact

13.1 Andrew Watson at the Marine Management Organisation email: Andrew.watson@marinemanagement.org.uk