

HMS Victory 1744: Options for the management of the wreck site

A Public Consultation by the Ministry of Defence and the Department for Culture, Media and Sport

Response by the Joint Nautical Archaeology Policy Committee

June 2010

Introduction

The JNAPC congratulates the Ministry of Defence (MOD) and the Department for Culture, Media and Sport (DCMS) on their decision to consult the public upon the future management of this unique maritime heritage asset and welcomes the opportunity to respond to this Consultation. The JNAPC also endorses the Government's overriding aim to ensure that appropriate management options are developed in accordance with best archaeological practice, as set out in the Annex to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (the UNESCO Convention).

The JNAPC was formed in 1988 to raise awareness of the United Kingdom's underwater cultural heritage and to persuade government that underwater sites of historic importance should receive no less protection than those on land. The Committee represents a very wide range of interests in maritime archaeology including national societies, museums, archaeological associations and sports diving organisations. Observers are drawn from Government Departments, national heritage agencies, and relevant maritime organisations. Summary information on the JNAPC and its membership is attached in Appendices 2 & 3 below.

Executive Summary

In response to Question 1 of the consultation, JNAPC recommends management in situ as the clearly preferred option taking account of best archaeological practice and adherence to the Annex of the UNESCO Convention. JNAPC also recommend that English Heritage should advise DCMS, MOD and the National Museum of the Royal Navy (NMRN) on all future aspects of the site's management.

Management in situ should, however, be accompanied by a proactive programme from Her Majesty's Government to:

1. Monitor the site and develop an understanding of any dynamic process determining the depth of the covering sand layer.

2. Undertake or commission further non-intrusive surveys to determine the extent of the site and state of preservation of the wreck remains.
3. Mitigate the risks to the site from commercial fishing, salvage and intrusive diving operations, including taking measures to physically protect the site by sand-bagging or the deployment of measures to encourage sand deposition on the wreck.
4. Put in place, through DCMS, MOD and the MMO, appropriate plans and mechanisms to follow up the 'trigger' of reports of suspicious surface activity over the site.
5. Establish a public education programme designed to afford constructive, as opposed to actual, public access to this unique marine heritage asset.

In response to Questions 2 and 3 of the consultation, the JNAPC is unable, regrettably, to offer either physical or financial support but it would willingly make available its knowledge and expertise for furthering any greater public understanding of naval heritage that might be gained from the site of the Victory.

The JNAPC also recommends that:

1. HMG reviews, as a matter of priority, its predecessor's decision in 2001 not to ratify the UNESCO Convention.
2. HMG convenes a Working Group, modeled on DCMS's previous Salvage Working Group, to consider what advantages and disadvantages would stem from the UK ratifying the UNESCO Convention.
3. The UK declare a Contiguous Zone and consideration should be given to utilising Article 303(2) LOSC (UNCLOS) to confer protection upon UCH in that zone.
4. Any evaluation of the three management options identified in the Consultation should be underpinned by the precautionary principle that, wherever possible and as a preference, maritime heritage assets are best preserved in situ.
5. DCMS, MOD and NMRN investigate, through English Heritage and relevant Diving Organisations, the potential for avocational technical divers to be encouraged to engage in a monitoring programme for the site on a voluntary basis.
6. MOD reviews the date limitations upon the application of the Protection of Military Remains Act 1986, with a view to amending the Act to remove these limitations so that sites like the Victory would be covered.
7. Defra (a) reviews the interpretation of Section 5A of the Sea Fish (Conservation) Act 1967 potentially to provide protection of historic wrecks from damaging fishing activity by UK vessels in UK waters: (b) pursues the current reform of the CFP regulations to provide better protection

of the historic environment: (c) uses licensing under the Marine and Coastal Access Act 2009 to regulate archaeological excavation or disturbance of historic wrecks.

8. The educational potential of HMS Victory as a platform to inform the public of the necessity for, and principles of, in situ site management for the majority of the UK's UCH be investigated and led by English Heritage and the National Museum of the Royal Navy.

The Context

Before commenting specifically upon the three management options identified in the Consultation JNAPC considers that it would be constructive to comment upon the wider context surrounding the discovery of the wreck and within which the three identified management options exist.

The Regulatory Framework

The wreck is stated to lie beyond the 12 nautical mile territorial jurisdiction limit of the United Kingdom (UK). Presently, this makes its protection under the Protection of Wrecks Act 1973 impossible, since the UK presently has no comprehensive jurisdictional mechanism for protection of Underwater Cultural Heritage (UCH) beyond its territorial waters. The JNAPC notes that the wreck is regarded as being of international importance in cultural heritage terms and is considered in the Consultation a 'once in a generation find'. By definition the wreck is unique within the South West Approaches, since no other 18th century first rate Royal Navy warship was lost in these waters. It is also undoubtedly of international significance. However, it is questionable whether such a find is indeed a 'once in a generation' event. Given the very considerable and continuing advances in remote sensing technology and the increase in offshore seabed exploration and utilisation, there is a realistic probability, indeed arguably an inevitability, that this discovery will be the first of many culturally significant shipwreck finds in the coming years and that the UK will repeatedly face similar situations, for which, in regulatory terms, it is presently ill equipped¹.

Given this probability, it is regrettable that there is a lacuna in the regulatory framework for protecting UCH beyond 12 nautical miles from the UK's baseline. The JNAPC accepts that the Sovereign Immune status of the wreck confers a degree of civil law protection to the wreck² but in the absence of a more comprehensive regulatory framework further protective measures are not possible.

¹ For example Odyssey Marine Exploration (OME) is known to be seeking the wreck of the Merchant Royall, a merchantman that sank in 1641 in the SW Approaches. As a merchant vessel with no Sovereign Immunity, she would be vulnerable to immediate commercial salvage.

² It should be noted that, contrary to the statement in the Consultation document, the Sovereign Immune status of the wreck does *not* arise because title to it is vested in the Crown. Crown ownership *per se* does not confer Sovereign Immunity. Such immunity arises from *both* Crown ownership (a State owned or operated vessel) and the fact that the vessel, as a Royal Naval warship, was a State vessel being used for non-commercial purposes. A Crown vessel used for commercial purposes, or the wreck thereof, would not enjoy such immunity.

Consequently the JNAPC would urge Her Majesty's Government (HMG) to review, as a matter of priority, its predecessor's decision in 2001 not to ratify the UNESCO Convention. It is disappointing that the 'Coalition: our programme for government', published on 20th May 2010 is notably silent on the broader heritage cultural issues facing the Government. Nonetheless, the JNAPC would request HMG to convene a Working Group to consider what advantages and disadvantages would stem from the UK becoming a signatory to the UNESCO Convention and exactly what obligations this would place upon the UK. Such a Working Group could take a similar form to the Salvage and Reporting of Discoveries Working Group convened prior to the formulation of the provisions of the recent draft Heritage Protection Bill. We would suggest that its membership comprises representatives from DCMS, MoD, Foreign & Commonwealth Office (FCO), relevant Executive Agencies (Heritage Agencies and the Maritime & Coastguard Agency) and the nautical archaeological and museum communities. The JNAPC would be pleased to assist by lending its expertise to such a Working Group.

The JNAPC also notes that while it is clear that the wreck is located beyond the 12 nautical mile limit for territorial jurisdiction, it is not clear whether it lies within the 12 – 24 nautical mile limit that would encompass a Contiguous Zone, were the UK to declare such a zone. The JNAPC would like to see the United Kingdom declare a Contiguous Zone so that it could then make use of the provision in Article 303(2) of the United Nations Law of the Sea Convention (LOSC)³ to protect UCH in that area. The JNAPC considers that it would have been useful to consultees to have known whether the wreck is indeed located within such a potential contiguous zone and whether potentially Article 303(2) could be utilised to confer additional protection.

Risks to the Site

Natural Processes & Physical Damage–

It is apparent from the report by Wessex Archaeology (WA) that there is insufficient evidence to assess how dynamic the site is and what changes may be occurring to the covering sand layer⁴. Consequently, it is impossible at this point to fully assess the threat to the site and this aspect is discussed further below in relation to the three management options. It is also apparent from the report that both dredging for shellfish and trawling (arguably the two commercial fishing practices that pose the most risk to the site) are not confirmed as a major threat to the site⁵. However, the JNAPC considers that other forms of commercial fishing, such as potting, should also be considered when quantifying the risk to the site. Potting in deep waters comprises the laying of numerous pots connected by a line, stretching over a considerable distance and this has the potential to ensnare objects exposed on the surface and to displace them, possibly causing localised instability in surface

³ Often also referred to as 'UNCLOS'.

⁴ Paras. 4.5.5 & 4.5.21.

⁵ Para. 5.2.21.

layers. That said, it would appear on present evidence that the risk to the site from commercial fishing remains relatively low.

Unlicensed Salvage

The JNAPC notes that this is considered the greatest threat to the site. However, while this may be relatively true, the JNAPC does not consider this threat to be high in absolute terms. The recovery of bronze cannon from a depth of approximately 80 metres would be a considerable task, requiring a relatively large vessel with lifting equipment. Such a vessel would have to be of a size that required the mandatory fitting of Automatic Identification System (AIS)⁶, which would enable the vessel's movements to be monitored both at the time and retrospectively. Additionally, the landing of one or more bronze cannons is unlikely to go unnoticed. All in all such an undertaking would not be a 'low profile' activity and is likely to come to the attention of competent authorities.

Perhaps a more likely occurrence would be the diving of the site by divers using advanced gas mixtures and re-breathing equipment, so called 'technical diving'. A diving vessel chartered for such advanced, recreational diving would be likely to be below the size for mandatory fitting of AIS, but equally both such a vessel and such divers would unlikely to be equipped to salvage large bronze cannon. However, such divers could conduct a search on the surface and within the sediments for smaller items, to be collected as personal 'souvenirs'. Such small-scale recoveries would be entirely unsystematic in archaeological terms, almost certainly would be unreported to the authorities and would result in the loss of potentially important cultural artefacts and contextual information. It is also possible that such activity could destabilise the sedimentary layer in particular locations. However, while such a threat clearly exists, the JNAPC is informed by the diving organisations that the number of technical divers who are capable of safely executing such a dive is relatively limited, perhaps as few as 100 individuals in the UK. Whilst we recognise that technical diving communities have been involved in the Respect Our Wrecks campaign over the last few years and many would not consider taking items from the site knowing its significance, proactive steps could be taken to mitigate and manage this possible risk and these are discussed below in relation to the three management options.

The Present State of Knowledge of the Site

The JNAPC has carefully studied the comprehensive desk based assessment by WA. The JNAPC considers the assessment to be exemplary in terms of its structure, the degree of its examination and analysis of the issues and the clarity of the analysis and explanation, especially in the context of time constraints. Accordingly the JNAPC wishes to place on record its appreciation of the excellent work conducted within a very difficult time frame by WA.

⁶ This system provides real time and recorded location information for vessels fitted with the system. Fitting is mandatory for fishing vessels over 15 metres and commercial vessels over 300 tons. This would include most fishing vessels operating that distance offshore and vessels large enough to engage in salvage of heavy items, such as cannon.

For the purposes of this Consultation, the JNAPC considers the most salient points of the assessment to be⁷:

1. Only limited information is available on the extent and character of the wreck site (5.2.1) and the size of the site is currently unknown (4.5.2). In particular, full recording of visible wooden objects has not yet occurred (4.5.23), the site plan includes only fully exposed objects (4.5.25), it is not clear if some wooden objects are attached to other timbers and therefore in situ (4.5.26) and the extent to which HMS Victory survives within the seabed is unclear (5.2.4).
2. The depth and character of the stratigraphy of the site remains largely unknown (5.3.1), there is insufficient evidence to assess how dynamic the site and the covering sand is (4.5.5) and while there is evidence to support changes to the depth of the sand layer over short periods, further evidence is required to understand this process (4.5.21).
3. No bathymetric survey has yet been conducted so the precise form of the seabed and sea surface is unquantified (4.5.9).
4. While there is potential for the whole length of the vessel being present, it is unclear to what extent the wreck survives on or beneath the seabed and this demonstrates how uncertain the current archaeological evidence is (5.2.4 & 5.2.6). Until the extent of remains on the site can be reliably established, an accurate assessment of the level of survival and the potential for other artefacts to be discovered cannot be made (6.1.4).
5. Consequently, further investigation needs to be undertaken to fully understand the full context and extent of the site (page 25).

Evaluating the three Management Options

The JNAPC believes that any evaluation of the three management options identified in the Consultation should be underpinned by the precautionary principle that, wherever possible and as a preference, maritime heritage assets are best preserved in situ. This principle is articulated in Rule 1 of the Annex to the UNESCO Convention⁸.

Question 1: What are your views on the options for management of this wreck site in the light of the evaluation produced by Wessex Archaeology?

Applying this precautionary principle and in view of the limited nature of our knowledge about the site, especially:

- i. The extent and character of the wreck site;

⁷ Numbers in brackets refer to paragraph numbers or page numbers of the Archaeological desk Based Assessment by WA.

⁸ While the UK is not a signatory to the Convention it has stated its intention to abide by the terms of the Annex in managing the Underwater Cultural Heritage.

- ii. Its dynamic characteristics;
- iii. The depth of the sand layer;
- iv. The need for further evidence to understand whether sand movement is occurring and if so the process thereof;

The JNAPC believes that at this point in time any intrusive operations directed at the site, whether in the form of surface recovery or more extensive excavation, would be premature and unjustified. Accordingly, the preferred management option of the JNAPC is that of management in situ, combined with a proactive programme by HMG to:

- i. Monitor the site and develop an understanding of any dynamic process determining the depth of the covering sand layer;
- ii. As part of the monitoring programme undertake or commission further non-intrusive surveys to determine better the extent of the site and state of preservation of the wreck remains;
- iii. Mitigate the risks to the site from commercial fishing, salvage and intrusive diving operations;
- iv. To establish a public education programme designed to afford constructive, as opposed to actual, public access to this unique marine heritage asset.

If the wreck of HMS Victory had been found in territorial waters there is no doubt it would have been designated under the Protection of Wrecks Act 1973 and managed archaeologically under the systems that have been developed by the national heritage agencies in England and the devolved administrations. As a very important heritage asset, it is totally logical that the same archaeological standards and methodologies should be applied to management of the Victory site although it is beyond 12 nautical miles. Why should there be a change at 12 nm? The JNAPC recommends that English Heritage, through the Advisory Committee on Historic Wreck Sites, should advise DCMS and MOD on all future aspects of the site's management.

Furthermore MOD has recently established the National Museum of the Royal Navy (NMRN) as its lead body for naval heritage and JNAPC recommends that NMRN takes a lead role in the future management of Victory, advised as necessary by English Heritage.

The potential for programmes to mitigate the risks to the site and afford public educational opportunities is discussed further below.

In reaching this conclusion the JNAPC has had regard to the options of surface recovery of some artefacts (with in situ management for the remainder of the site) and of full archaeological evaluation and excavation. The JNAPC's reasons for rejecting at present both of these options are stated below.

Surface Recovery

Surface recovery would not simply involve removal of objects visible on the surface of the seabed, but could be a substantial operation. Substantial and partly buried objects, such as cannon, would require disturbance of surrounding sediments by excavation. In the case of visible timbers it is not known if these are attached to further, possibly substantial, structural remains, which would then involve either disarticulation or further, more intrusive excavation and recovery. In all cases disturbance of surrounding sediments would be inevitable and given our lack of the knowledge of the dynamics of the site, especially that of the covering sand layer, there is a presently unquantifiable risk of destabilising the site. Recovery of surface artefacts is likely to result in the disturbance of the delicate dynamic equilibrium a wreck site such as this has reached with its environment. The result will be changes to the processes on the site, which may precipitate or increase sand movement, change current patterns across the site, and is likely to lead to exposure of currently buried elements of the site, exposing them to physical and biological erosion, corrosion damage, and potentially, destruction.

Surface recovery will lead to the exposure of further objects, which would in their turn require recovery and cause further sediment disturbance. In this manner, what commenced as a very limited recovery operation could set up a chain reaction whereby increasing intrusion into the site's sediments became necessary, possibly leading unintentionally to a substantial excavation programme, the costs of which may not be sustainable.

Nor would potential financial and curatorial difficulties end with recovery. The recovered artefacts would require ongoing conservation and appropriate deposition in an accredited museum, in accordance with the principles of best practice as stated in the Annex to the UNESCO Convention. Conservation of even a relatively modest number of artefacts would have potentially significant financial implications, while curatorial facilities are already under considerable pressure.

Based on discussions with maritime archaeological organizations and experienced practitioners JNAPC has calculated that the potential cost of surface recovery could be in excess of £6 million (see Appendix 1 - column 1)) compared to the £1,000,000+ indicated in the Consultation Document. This assumes recovery of the remaining 39 guns, the rudder and other visible objects, full conservation, display in a small museum and full publication and archive. It is felt that there would be a very low probability of raising this level of funding for surface recovery.

The study also explored the potential additional cost of undertaking trial trenching to ascertain the overall size and stratigraphy of the site in order to inform future management decision making (Appendix 1 – column 2). This extra cost was conservatively estimated at over £2.2 million to bring the total cost to an estimated region between £8-9 million.

For these reasons, the JNAPC considers that even a limited surface recovery programme presently represents a significant and unjustifiable archaeological, financial and curatorial risk.

This money (or even just a portion thereof) would be better spent on acquiring the necessary baseline knowledge of the site and its condition, and on implementing measures to ensure the physical stability

and protection of the site until such time as there is a valid archaeological reason to intervene in the site.

Full Archaeological Evaluation and Excavation

All of the considerations that apply to surface recovery apply with even greater vigour to this option. Conducting a full archaeological evaluation and excavation at this depth to prevailing standards of best practice, while not unprecedented, would be an extremely challenging and costly operation. In order to attempt to quantify the potential scale of costs involved in such an extensive operation, an illustrative estimate of equivalent current day costs for the Mary Rose project have been provided by the Mary Rose Trust (Appendix 1 – column 3). It is recognised that there is currently limited information as to the extent of the site and of surviving remains. It is also recognised that it is unlikely that an equivalent degree of preservation to that of the Mary Rose has occurred at the Victory site. Conversely, the Mary Rose excavation took place in relatively sheltered coastal waters at a very modest depth. The equivalent current day Mary Rose excavation, conservation and display costs are currently estimated at an illustrative £70 million (circa US\$100 million) based on ROV operations (instead of divers) and estimated Mary Rose conservation and new museum costs. While an exact financial comparison is not possible, it is not unrealistic to estimate that the cost of such a major excavation on the Victory site could be at least £40 million and as high as £70 million. Given the complexities, both physical and financial, of such an operation the JNAPC does not believe it will be a viable option for the foreseeable future.

As stated already, the JNAPC does not believe there is currently a valid archaeological reason for embarking on an intervention in the site.

Question 2: Would you seek to offer any support, whether physical or financial, towards the future management of the site and its artefacts?

The JNAPC is unable, regrettably, to offer either physical or financial support

Question 3: Would you seek to offer any support, whether through expertise, interpretation or funding, towards furthering public understanding of naval heritage which may be gained from the site?

The JNAPC would willingly make available its knowledge and expertise for furthering any greater public understanding of naval heritage that might be gained from the site of the Victory.

Further observations on the mitigation of risks to the site from commercial fishing and intrusive diving operations, the coordination of resources for monitoring and the educational potential of HMS Victory.

Commercial Fishing

Attention has already been drawn to the present lacuna in the regulatory framework for the protection of UCH beyond 12 nautical miles from the UK baseline. Should the wreck lie within 24 nautical miles from that baseline then the declaration of a Contiguous Zone by the UK would enable, under Article 303(2) of the LOSC, further regulatory measures to be introduced. The UK becoming a party to the UNESCO Convention would also assist protection of the site.

The JNAPC was somewhat surprised that the Consultation did not discuss how existing assets might be coordinated and deployed to secure protection for the site from commercial fishing, salvage and intrusive diving operations.

In terms of fishing the assessment by WA concludes the risk from trawling is low. It is well known that commercial trawling vessels are ‘risk adverse’ in terms of the possibility of snagging their gear on seabed obstructions, whether natural or manmade. This may explain why impressions in the seabed from trawling appear near to but not actually on the site and why there is little evidence of recent disturbance from trawling. There is a very real possibility that the existence of the site as a potential ‘snag’ is well known to the trawling industry, who take measures to pass near but not through it. Ensuring that the site, marked as an obstruction, is promulgated on appropriate charts and brought to the attention of the industry could secure adequate mitigation in this respect. In addition attempts could be made to negotiate a voluntary exclusion zone for fishing of an agreed size in the area of the wreck.

Commercial fishing in terms of potting for crustaceans is more problematic. Such fishing often targets wrecks, since they provide a congenial habitat to such creatures and modern hydraulic winches are capable of physically ripping pots free of obstructions in many instances. This has the potential to disturb even large items on the site, such as cannon. Arguably such activity is a trespass to Sovereign Immune property and could be restrained by a competent court both in the UK and in foreign jurisdictions. Practically, such restraint would only be feasible in the case of known, repeated violations by identified individuals and be unlikely to provide an effective deterrent, except in the case of known repeat ‘offenders’. However, in the light of the assessment by WA that disturbance to the site appears to have been slight, one should be careful of overstating this risk and continued monitoring of the site should be an adequate mitigation for the present. The arrangement and coordination of resources for surface monitoring is discussed further below.

There are other potential avenues to explore in protecting the site from fishing. Section 5A of the Sea Fish (Conservation) Act 1967 provides for protection of historic wrecks from damaging fishing activity by UK vessels but the Act is currently interpreted by Defra as being applicable only out to 12

nautical miles. It is understood that this narrow interpretation is only of recent standing. A review of this interpretation might show that the Act could apply out to 200nm as the draughtsman intended in 1967 and so cover the location of HMS Victory. This would be of great assistance in protecting the wreck from UK fishing vessels.

The current reform of the basic CFP regulation (due for completion on 31 December 2011) provides the opportunity to integrate fisheries management with international marine environmental commitments. Recognition in the basic fisheries regulation that EU fisheries regulations could be used to protect historic sites in the marine environment from damage by fishing would be extremely valuable. This would be the first concrete step to providing protection for the enormous cultural, social and environmental value of the historic environment as recognised in the UK's high level marine objectives published in April 2009. Defra and other government departments should actively pursue this aspect of CFP reform.

The Marine and Coastal Access Act 2009 provides for a new licensing system to regulate all deposits and removals on the sea bed within UK waters (out to 200nm) which could cover archaeological excavation or disturbance of historic wrecks such as HMS Victory. The potential application of this legislation should be investigated with Defra and the Marine Management Organisation.

Intrusive 'Technical Diving'

As noted above, the threat to the site from such diving is extant but is relatively limited. The technical diving community is by its nature very small and it is likely that knowledge of any sustained diving activity on the site by UK nationals is likely, sooner or later, to come to the attention of the authorities. Moreover, a degree of surface monitoring is likely to reveal any sustained diving activity on the site and act as a deterrent to such activity. This is discussed further below.

The JNAPC is also of the opinion that the 'technical diving' community should be seen as a potential resource, as well as a potential threat. Avocational divers have made significant contributions to the protection, monitoring and understanding of UCH within the UK's territorial waters. Some avocational groups have engaged in sustained and dedicated archaeological work on specific sites over years, while schemes such as the Nautical Archaeology Society's 'Adopt a Wreck' scheme has involved more main stream recreational divers in monitoring and surveying a specific site on a more intermittent basis. In both cases such activity has served not only to monitor seabed conditions but also, and perhaps equally importantly, to instil a sense of 'public ownership' in UCH sites, that has facilitated their protection. The JNAPC considers that it would be advantageous for DCMS and MOD to investigate, through the National Museum of the Royal Navy, English Heritage and relevant Diving Organisations the potential for avocational technical divers to be encouraged to engage in a monitoring programme for the site on a voluntary basis. Such divers could, for example, place sediment level indicators into the seabed, as diving groups have done on inshore sites; such indicators are extremely cheap to manufacture (most groups make their own on a DIY basis) and the

engagement of such divers in helping to secure the future of the site may well foster a protective sense of ‘public ownership’, which in such a small, close knit recreational community could do much to ensure ‘self regulation’ and prompt disclosure to the authorities of any unauthorised and intrusive diving activity by a UK based group. The JNAPC would be pleased to assist in facilitating any such engagement in any way that it can.

Coordination of resources for monitoring

The location of the site makes constant, intensive surface monitoring of suspicious activity on or over the site quite difficult. However, the site is not completely remote, in that it is not far from a shipping route and encompassed within both a Royal Navy Exercise Area and a fishing area. This means that on occasions the UK has resources physically present in the area in the form of Fisheries Protection vessels and Royal Navy warships on exercise. Presumably the latter would also involve over flight by Royal Air Force maritime reconnaissance aircraft. Additionally, the Marine Management Organisation (MMO) has a programme of aerial surveillance of fishing activity conducted under contract for the purposes of monitoring and enforcement of fishing regulations. The MMO also operates a satellite based vessel monitoring system (VMS) from its fisheries monitoring centre (FMC), which tracks the positions of fishing vessels exceeding 15 metres in length every two hours. While such resources have other, primary, taskings that must take priority, their utilisation or presence in the area for these other purposes provides an opportunity for a secondary, opportunistic tasking of monitoring any surface activity over the sea which raises a suspicion that an intrusive activity is being conducted. Such activity, be it commercial fishing or unauthorised salvage, would not constitute a criminal action which would warrant immediate physical intervention⁹. Any intervention could only be restricted to advising the vessel in question of the location of the site, that any disturbance of the site could amount to a breach of the UK’s sovereignty and the collection of evidence that could enable the relevant UK authority to take, or to ask another State to take, whatever action is considered appropriate to subsequently enforce, as far as possible, the Sovereign Immunity of the wreck. MOD has on several previous occasions taken action, principally administrative and / or diplomatic, to protect Sovereign Immune wrecks in international waters and the intermittent surface monitoring of the site as a secondary and opportunistic tasking by such resources could facilitate such a process. While such actions do not result in high profile criminal prosecutions¹⁰, active

⁹ Though this may change if the UK declares a Contiguous Zone within which the wreck site is located and introduces legislation for controlling removal of UCH from the seabed under Article 303 LOSC (UNCLOS).

¹⁰ At present the site cannot be protected under the Protection of Military Remains Act 1986 as a ‘Protected Place’ as the vessel sank prior to 4th August 1914 (s.1(3)(a)); nor may it be designated as a ‘Controlled Site’ as more than 200 years have elapsed since the sinking (s.1(4)(a)). Remote sensing technology has advanced considerably since 1986 and the discovery of HMS Victory arguably illustrates that the 1986 Act is now somewhat limited in its ability to protect offshore military remains, which previously were inaccessible and almost undiscoverable. In the light of the UK’s experience with the discovery of HMS Victory and the present state of offshore technology, DCMS and MOD may wish to review these limitations upon the application of the 1986 Act, perhaps with a view to amending the Act to remove these limitations. However, it should be borne in mind that were the Act to be made applicable to the site it would, in the absence of a Contiguous Zone and appropriate legislation, only impose limitations upon UK nationals and flagged vessels.

administrative and / or diplomatic responses by MOD do have a deterrent effect, especially in a relatively small recreational community such as that of technical diving¹¹.

Given a varying degree of availability of these resources, the JNAPC is advised that for them to be effectively utilised in conferring a degree of protection to the site, what is required is coordination between the varying departments and agencies in government. This coordination would provide secondary tasking for resources physically present and an appreciation of the nature of the threats to the site and of its cultural importance. Such coordination would also put in place ‘triggers’ which would result in further proactive investigation when suspicious activity on or over the site was observed. Since such tasking would be ‘secondary’, in that it would depend upon the resource being present in the area for other, primary, purposes it should not involve additional expenditure of resources and would therefore be on a ‘sunk cost’ basis and revenue neutral.

On this basis it is recommended that DCMS, MOD and NMRN investigate, together with the MMO, the possibility of putting in place appropriate plans and mechanisms to provide a degree of coordination between the various departments and agencies and an agreed procedure to follow up the ‘trigger’ of reports of suspicious surface activity over the site.

HMS Victory as an educational resource

The JNAPC is somewhat surprised that the Consultation document does not contain any reference to the educational potential of the site of HMS Victory, especially if the first option of management in situ is pursued. It appears to the JNAPC that the site has considerable educational potential, both in terms of the specific vessel and in terms of in situ management of the UCH.

In terms of the specific vessel, the JNAPC believes that an interesting and informative display, focusing on the story of the vessel, its construction and use, as well as the discovery and present nature of the wreck site, could be created. Both photographic and historical documentary data exist (including an original ship model at the National Maritime Museum), as well as two salvaged bronze cannon now in the possession of the NMRN. The photographic data is presumably the property of OME, who may be prepared to donate or license its use for a museum display. This data, which could be narrated, would illustrate the site as it presently is and combined with textual sources, could explain its cultural significance. The JNAPC believes that the National Museum of the Royal Navy should lead on this initiative.

However, the educational potential of the site extends beyond merely the vessel itself. Management in situ is the preferred option for all UCH and this principle is enshrined in the European Convention on the Protection of the Archaeological Heritage (Revised)¹² (Valetta Convention), to which the UK

¹¹ It should also be remembered that a further resource applicable to protection of the site is AIS. Constant surveillance of AIS is not realistically possible in resource terms and vessels have been known to turn it off for clandestine purposes. However, it is another evidentiary resource applicable in some situations.

¹² ETS 143.

is a signatory, and in the Annex to the UNESCO Convention. As such it will be the management strategy adopted for the vast majority of the UK's UCH sites. Unfortunately, the principle of management in situ is regarded by the UK recreational diving community as having little credibility. This regrettable state of affairs stems largely from the management of the wreck of HMS Stirling Castle, an 18th century warship lost on the Goodwin Sands in the Great Storm of 1703. The wreck emerged from the sand virtually intact, though structurally very weak. A strategy of in situ management was pursued, despite increasing evidence that tidal action was removing much material from the site. The result was the loss of material, without the opportunity to recover and record it. To the diving community this was a unique opportunity lost through what was perceived as strict adherence to archaeological principles and this attitude has done much to foster reservations, even hostility, to the principle of in situ management amongst the UK's recreational diving community. In terms of the general public there appears to be little or no awareness of the existence of the principle, yet alone the reasons justifying its application. This lack of understanding is perhaps not difficult to understand. The majority of the public probably access nautical archaeology through television documentaries, newspaper and magazine articles and items on the internet. Typically these will feature the discovery of previously unknown archaeological remains, which are then intrusively investigated, recovered, analysed and conserved and deposited in a museum. Current documentaries and articles are principally there to entertain and education is a secondary objective. Understandably, it is hard to make an entertaining programme or write such an article about in situ management and non-intrusive monitoring. Therefore what is presented to the public is almost exclusively an archaeological process that consists of intrusion, recover, analysis, conservation and display. While this process accurately reflects the management of some sites, these are a minority and will remain so, especially for maritime heritage assets. Yet the impression fostered with the public is that 'archaeologists dig things up, which is what archaeologists do'. Such a public understanding will probably be reflected in the public's response to the site of HMS Victory and any decision by DCMS and MOD to manage the site in situ will meet with a lack of understanding as to why excavation is not occurring. In fact, in situ management will be the inevitable management strategy for the majority of the UK's UCH, since the lack of resources in the foreseeable future will dictate it.

The discovery of HMS Victory and the adoption of a management strategy of in situ preservation present an opportunity to educate the public as to the realities facing the management of the UK's UCH. A display on the subject of HMS Victory could provide a platform and context to educate the public in terms of the destructive nature of excavation, the difficulties of conserving objects which have been submerged for extended periods in a maritime environment, the formidable resource implications and the necessity for a very selective use of intrusive investigations. This would help to adjust the public's distorted perception of the archaeological and maritime heritage management processes and would make public acceptance of and acquiescence in future management decisions easier to achieve. To that extent HMS Victory can provide a possibly significant educational contribution while remaining undisturbed.

Conclusions and Recommendations

It is the conclusion of the JNAPC that the preferred management option is that of management in situ and that English Heritage should advise DCMS, MOD and the National Museum of the Royal Navy on all future aspects of the site's management.

In addition the JNAPC makes the following recommendations:

1. That management in situ should be combined with a proactive programme by HMG to:
 - i. Monitor the site and develop an understanding of any dynamic process determining the depth of the covering sand layer;
 - ii. As part of the monitoring programme undertake or commission further non-intrusive surveys to better determine the extent of the site and state of preservation of the wreck remains;
 - iii. Mitigate the risks to the site from commercial fishing, salvage and intrusive diving operations, including taking measures to physically protect the site by sandbagging or the deployment of measures to encourage sand deposition on the wreck.
 - iv. Put in place, through DCMS, MOD and the MMO, appropriate plans and mechanisms to follow up the 'trigger' of reports of suspicious surface activity over the site.
 - v. Establish a public education programme designed to afford constructive, as opposed to actual, public access to this unique marine heritage asset.
2. That HMG reviews, as a matter of priority, its predecessor's decision in 2001 not to ratify the UNESCO Convention.
3. That HMG convenes a Working Group to consider what advantages and disadvantages would stem from the UK ratifying the UNESCO Convention and exactly what obligations this would place upon the UK. Such a group could be modelled on DCMS's previous Salvage Working Group.
4. That should the UK declare a Contiguous Zone, consideration should be given to utilising Article 303(2) LOSC (UNCLOS) to confer protection upon UCH in that zone.
5. That any evaluation of the three management options identified in the Consultation should be underpinned by the precautionary principle that, wherever possible and as a preference, maritime heritage assets are best preserved in situ.
6. That it would be advantageous for DCMS, MOD and NMRN to investigate, through English Heritage and relevant Diving Organisations, the potential for avocational technical divers to be encouraged to engage in a monitoring programme for the site on a voluntary basis.

7. That MOD reviews the date limitations upon the application of the Protection of Military Remains Act 1986, with a view to amending the Act to remove these limitations (see footnote 10). At present the Victory site cannot be protected under Act as a 'Protected Place' as the vessel sank prior to 4th August 1914 nor may it be designated as a 'Controlled Site' as more than 200 years have elapsed since the sinking.

8. That Defra (a) reviews the interpretation of Section 5A of the Sea Fish (Conservation) Act 1967 potentially to provide protection of historic wrecks from damaging fishing activity by UK vessels in UK waters: (b) pursues the current reform of the CFP regulations to provide better protection of the historic environment: (c) uses licensing under the Marine and Coastal Access Act 2009 to regulate archaeological excavation or disturbance of historic wrecks in UK waters.

9. That the educational potential of HMS Victory as a platform to inform the public of the necessity for, and principles of, in situ site management for the majority of the UK's UCH be investigated and led by English Heritage and the National Museum of the Royal Navy.

The JNAPC trusts that this response will be of assistance to DCMS and MOD. Should DCMS and MOD wish to discuss further any of the matters touched upon above or if it is felt that the JNAPC could be of any further assistance, the JNAPC would be pleased to do all it could to assist.

**HMS Victory (1744)
Illustrative Recovery Estimates**

Option	1	2	3
	Victory Surface Recovery	Victory Surface Recovery and trial trenching	Excavation Based on Mary Rose (see note 1&2)
	£million	£million	£million
Compilation of site data	0.5	0.5	0.5
Excavation & raising of artefacts	2.1	2.1	24.7
Exploratory trenches to define site	-	1.0	-
Conservation of artefacts and hull	0.7	0.7	15.8
Contingency for additional artefacts	0.5	1.5	-
Museum and display	2.0	2.0	27.0
Publication and archive	<u>0.5</u>	<u>0.7</u>	<u>2.0</u>
Total estimated cost	<u>6.3</u>	<u>8.5</u>	<u>70.0</u>

Notes:**1) Conservation, Museum and Publication:**

Estimate based on Mary Rose costs supplied by Mary Rose Trust

2) Excavation and raising of artefacts:

Illustrative cost estimate using ROV crew for equivalent dive time taken by Mary Rose divers, mainly volunteers

JOINT NAUTICAL ARCHAEOLOGY POLICY COMMITTEE

THE JNAPC - PAST, PRESENT AND FUTURE

The JNAPC was formed in 1988 from individuals and representatives of institutions who wished to raise awareness of Britain's underwater cultural heritage and to persuade government that underwater sites of historic importance should receive no less protection than those on land.

The JNAPC launched *Heritage at Sea* in May 1989, which put forward proposals for the better protection of archaeological sites underwater. Recommendations covered improved legislation and better reporting of finds, a proposed inventory of underwater sites, the waiving of fees by the Receiver of Wreck, the encouragement of seabed operators to undertake pre-disturbance surveys, greater responsibility by the Ministry of Defence and the Foreign and Commonwealth Office for their historic wrecks, proper management by government agencies of underwater sites, and the education and the training of sports divers to respect and conserve the underwater historic environment.

Government responded to *Heritage at Sea* in its White Paper *This Common Inheritance* in December 1990 in which it was announced that the Receiver's fees would be waived, the Royal Commission on the Historical Monuments of England would be funded to prepare a Maritime Record of sites, and funding would be made available for the Nautical Archaeology Society to employ a full time training officer to develop its training programmes. Most importantly the responsibility for the administration of the 1973 Protection of Wrecks Act was also transferred from the Department of Transport, where it sat rather uncomfortably, to the then heritage ministry, the Department of the Environment. Subsequently responsibility passed to the Department of National Heritage, which has since become the Department for Culture Media and Sport.

The aim of the JNAPC has been to raise the profile of nautical archaeology in both government and diving circles and to present a consensus upon which government and other organisations can act. *Heritage at Sea* was followed up by *Still at Sea* in May 1993 which drew attention to outstanding issues, the *Code of Practice for Seabed Developers* was launched in January 1995, and an archaeological leaflet for divers, *Underwater Finds - What to Do*, was published in January 1998 in collaboration with the Sports Diving Associations BSAC, PADI and SAA. The more detailed explanatory brochure, *Underwater Finds - Guidance for Divers*, followed in May 2000 and *Wreck Diving – Don't Get Scuttled*, an educational brochure for divers, was published in October 2000.

The JNAPC continues its campaign for the education of all sea users about the importance of our nautical heritage. The JNAPC will be seeking better funding for nautical archaeology and improved legislation, a subject on which it has published initial proposals for change in *Heritage Law at Sea* in June 2000 and *An Interim Report on The Valletta Convention & Heritage Law at Sea* in 2003. The latter made detailed recommendations for legal and administrative changes to improve protection of the UK's underwater cultural heritage.

The JNAPC has played a major role in English Heritage's review of marine archaeological legislation and in DCMS's consultation exercise *Protecting our Marine Historic Environment: Making the System Work Better*, and was represented on the DCMS Salvage Working Group reviewing potential

requirements for new legislation. The JNAPC has also been working towards the ratification of the UNESCO Convention with the preparation of the *Burlington House Declaration*, which was presented to Government in 2006.

The JNAPC continues to work for the improved protection of underwater cultural heritage in both territorial and international waters.

Joint Nautical Archaeology Policy Committee

Members

Chairman

Robert Yorke

Organisations

Association of Local Government Archaeological Officers
 British Sub Aqua Club
 Council for British Archaeology
 EMU Ltd
 Hampshire & Wight Trust for Maritime Archaeology
 Institute of Field Archaeologists, Maritime Affairs Group
 ICOMOS
 National Maritime Museum
 National Museums & Galleries of Wales
 National Trust
 Nautical Archaeology Society
 Professional Association of Diving Instructors
 RESCUE
 Shipwreck Heritage Centre
 Society for Nautical Research
 Sub Aqua Association
 United Kingdom Maritime Collections Strategy
 Wessex Archaeology
 Wildlife and Countryside Link

Paul Gilman
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 Christopher Dobbs
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 Department for Culture, Media and Sport
 Department for Transport
 The Crown Estate
 English Heritage
 Environment Service, Northern Ireland
 Foreign and Commonwealth Office
 Historic Scotland
 Maritime and Coastguard Agency, Receiver of Wreck
 Ministry of Defence
 Ministry of Defence
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 Peter MacDonald
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