

Department for Environment Food and Rural Affairs

Second Consultation on secondary legislation under the Marine and Coastal Access Act: Part 4 Marine Licensing

Response by the Joint Nautical Archaeology Policy Committee

October 2010

Introduction

The JNAPC welcomes the opportunity to respond to this Consultation.

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 1 & 2 below.

Response to questions

Question 1:

No Comment

Question 2:

Yes. We would also draw the MMO's attention to Article 5 European Convention on the Protection of the Archaeological Heritage (Revised) (ETS 143), to which the UK is a signatory. This requires that archaeologists are involved in the entire planning process of any development. The early participation of cultural advisors ensures that ultimately costs for both the regulator and the developer are minimised and to that extent 'front loading' much of the work on applications will ensure compliance with Article 5 and minimise ultimate project costs.

Question 3

No Comment

Question 4

No Comment

Question 5

JNAPC broadly agrees with the proposals for a pre-application service but has some concerns. In particular it is concerned that for more complex marine projects the pre-application stage is

voluntary and non statutory and JNAPC would request that further consideration is given to making this stage statutory for all but the most minor projects.

The JNAPC considers that it will be most helpful for the MMO website to hold, or be able to direct applications to, existing environmental information produced previously. While it is impossible to predict with complete confidence whether material of historic importance will be encountered in any given location, some areas carry a much higher 'risk' than others. Applicants should be able to access relevant historic records, audits, desk based assessments and remote sensing surveys to assist with their applications. Such accessibility should be dealt with as part of a Memorandum of Understanding (MOU) between the MMO and English Heritage (or the relevant heritage agency in the devolved administrations). The JNAPC welcomes the inclusion of English Heritage as a necessary consultee.

Question 6

The JNAPC agrees with the proposals outlined. The JNAPC understands that that the MMO will enter into a MOU with English Heritage. By its nature much historic material is 'covert', and its existence can never be predicted completely. Consequently, the JNAPC believes that it is of fundamental importance that all licence consents should contain a standard form condition to the effect that if historic material is encountered it should be reported under Protocols dealing with unexpected discoveries within conditions provided in the National Policy Statement for Renewable Energy (EN3).

Question 7

No Comment

Question 8

The JNAPC assumes that what is intended is that the same application process, in terms of consultation and imposition of conditions, will occur irrespective of whether the application proceeds under the 2009 Act, the Harbour Act 1964 or the Electricity Act 1989. That should certainly be the case.

Question 9

The JNAPC has some concerns that the licensing process will be on a full cost basis in every case. Nautical archaeology differs substantially from terrestrial archaeology in that much, if not the majority, of such activity is carried out by amateur (non vocational) volunteers on a self funded, non-commercial basis. The costs of nautical archaeology are substantially higher in comparison with terrestrial archaeology and these costs are commonly borne by such volunteers from their own pocket. To give a scale of such costs, one volunteer group (the South West Maritime Archaeological Group) is currently investigating a Bronze Age wreck site off Salcombe, which is acknowledged to be of international importance. To deploy the entire team for a weekend, together with boats, costs over £1,500.00, all of which the Group must finance itself. If the full costs of licences are to be a further cost to such volunteer groups then they could act as a significant deterrent to such voluntary community activity, at a time when it is

government policy to encourage and facilitate such activity. The JNAPC believes that the MMO officials should, as a matter of policy, have discretion to waive or reduce fees where such non-commercial community activity is undertaken and that this discretion should be exercised on a case by case basis, if necessary in consultation with English Heritage.

Question 10

No Comment

Question 11

Yes.

Question 12

No Comment

Question 13

No Comment

Question 14

No Comment

Question 15

The JNAPC is very concerned that damage to the historic environment will be caused by the blanket use of exemptions for development under the Act, as these take no account of the historic environment. By its very nature marine historic material is often unknown in terms of existence and exact location. Consequently, whenever an activity, which could adversely impact upon the historic environment, is exempted from specific authorisation under a regulatory regime, a risk to that historic environment is created. The difficulty is that many of the proposed exemptions are based upon the apparent scale and complexity of the activity in question. While this creates a degree of proportionality between the scale and complexity of the operation and its regulatory cost, it does not necessarily take into account the degree of risk to the historic environment. To take a simple example: the insertion of a single pile by a harbour authority for mooring purposes is a simple process of a minor scale. Yet should that pile smash through a Bronze Age wreck, then given that only two Bronze Age wrecks have ever been discovered in the UK and only one of these had any ship's structure preserved, the damage to the UK's historic environment would be immense. The difficulty is that there is not necessarily a correlation between the risk to the historic environment and the scale and complexity of the development. The risk to the historic environment is more multi-factorial and depends upon such factors as the use the area has been put to in previous epochs, the intensity of that historic use and the likelihood of preservation in that locality. This is particularly true of areas such as historic ports. The use of broad exemptions within areas known to, or likely to, contain historic material of potential significance is considered by the JNAPC to be inappropriate and potentially very damaging to the environment. The JNAPC therefore wishes the historic context of the location of the proposed development

and the resulting probability of significant historic material being present to be factored into the use of blanket exemptions, in such a way as to restrict or remove the use of such blanket exemptions. This pattern is utilised in Town & Country Planning, where permitted development rights are restricted or entirely removed in relation to listed buildings and certain areas, such as Conservation Areas, Areas of Outstanding Natural Beauty or National Parks. Similarly, the JNAPC believes that blanket exemptions should not operate within areas where there is a high degree of probability of historic material being present, such as historic ports, former historic ports or significant estuaries such as, for example, the Thames, Humber, Severn and Plymouth Sound and areas with concentrations of shipwrecks such as, for example, the Goodwin Sands. This could be achieved by the MMO exercising a power to restrict the operation of exemptions in such locations or making their availability subject to specified preparatory surveys and assessments in relation to the historic environment.

The JNAPC believes that such an approach to exemptions would be more consistent with the approach articulated in the draft Marine Policy Statement. This recognises that it is the “sensitivity of the environment concerned ...”, as well as the scale of the project that are relevant considerations¹. The exemptions, as drafted, are of such a broad applicability that they fail to take any account of the sensitivities of certain historic environments and to that extent are inconsistent with the principle articulated in the draft Marine Planning Policy Statement.

Moreover, wherever an exemption operates it should only do so with the imposition of a standard condition that should historic material be encountered or the developer have reasonable cause to believe it has been encountered, then this should be notified to the MMO and English Heritage under Protocols dealing with unexpected discoveries within conditions provided in the National Policy Statement for Renewable Energy (EN3).

The JNAPC would urge the MMO to reconsider the use of exemptions based purely upon the scale and complexity of the proposed activity and to incorporate into the availability of such conditions criteria which bear a more meaningful correlation between development and the probability of historic remains being encountered, in order to afford effective protection to the (historic) environment.

In relation to the specific exemptions outlined in the Consultation the JNAPC wishes to make the following additional comments:

Fishing and Aquaculture

A number of significant finds have been made due to recoveries by fishing vessels. These include evidence of submerged landscapes and several significant historic wrecks. The JNAPC believes it is inadequate that the return of such items to the sea should be exempt (7,14), except where the stability of the vessels or its safety (as in the case of munitions) is threatened. The JNAPC would also point out that s.236 Merchant Shipping Act 1995 requires any person who “*finds or takes possession of any wreck in United Kingdom waters ...*” to give notice to the Receiver of Wreck and either hold it to the order of the Receiver or deliver it to the Receiver, as

¹ At page 27.

directed by the Receiver. A fishing vessel recovering wreck within UK waters and then returning it to the sea is potentially in breach of s.236. The JNAPC would have thought that the exemptions set by the MMO would have required compliance with this statutory duty under the 1995 Act and not contemplated or encouraged its breach by exempting the return of recovered wreck material to the seabed.

Navigation

The JNAPC considers it highly inappropriate that harbour and navigation authorities should have an unfettered power to remove sunk or stranded vessels without consideration of their historic environmental value (7.24) unless it is an immediate threat to shipping. Two extremely significant medieval wrecks have been discovered during the process of improving navigational channels by harbour authorities (the Princes Channel wreck in the Thames estuary and the Swash Channel wreck Poole Harbour). Under this proposed exemption these wrecks could be removed without regard to their high degree of historic significance. This exemption, as outlined in the Consultation, is far too broad and needs amendment to take account of the need to protect the historic environment. At the very least the exemption should require that the authority in question must first consult with English Heritage and implement any advice they receive in order to avail themselves of the exemption.

The JNAPC also believes that the exemption relating to swinging moorings and piles used for fore and aft moorings are inappropriate. In particular piles can be very destructive, relying as they do upon penetration into the substrata of the seabed. Many harbours are exactly the environment in which one can expect with a high degree of probability to encounter historic material (as evidenced by the Mary Rose, and the Princes Channel and Swash Channel wrecks and the Sunderland flying boat in Milford Sound). As pointed out above, the scale of the project has no bearing on the degree of probability that historic remains are present. This is determined by other factors and this exemption, as presently configured, takes no account of this and is, in the opinion of the JNAPC, inappropriate in its blanket application.

The JNAPC is extremely concerned that collectively, the exemptions, as presently envisaged, are depriving the historic environment of much of the protection that the legislature sought to confer upon it within the 2009 Act. Consequently, the JNAPC would welcome the opportunity to discuss the issue of exemptions and the historic environment with the MMO, possibly in conjunction with English Heritage and other historic environment stakeholders.

Pollution Control & Litter

The foreshore is often the location of historic material, be it past inhabitation or wrecks. Any exemption for use of vehicles for removal of material should be subject to a standard condition relating to historic material, as outlined above.

Maintenance of harbours (other than dredging)

The JNAPC welcomes the proposal that such minor works will have been agreed by the licensing authority and will take account of the (historic) environment, notwithstanding that a

marine licence will not be required. This mechanism could usefully be utilised in relation to other potentially exempt works in historically sensitive areas, as discussed above.

International Law

It should be made very clear that activities associated with the removal of items of historic or cultural interest – such as the deposition or removal of sediment – fall within the authority of the coastal state and remain subject to licensing, even where conducted using third party vessels.

The JNAPC would be grateful for an explanation and examples of the likely events or activities that are not in conflict with international law to which the exemption does not apply and whether there are any cases that include the historic environment (7.59).

The JNAPC understands that the UK may consider declaring a Contiguous Zone under UNCLOS. This would extend UK jurisdiction from 12 nautical miles to 24 nautical miles for certain purposes, including control over the removal of underwater cultural heritage from the seabed (under Article 303 UNCLOS). The JNAPC presumes that should such a zone be declared by the UK, the marine licensing scheme will be amended to reflect this extension of jurisdiction in relation to underwater cultural heritage.

Maintenance Dredging

Such dredging has been responsible for the discovery of a number of historic wrecks (Princes Channel, Swash Channel, Sunderland flying boat in Milford Sound) and it poses a particular threat to the marine historic environment. While it is recognised that ports need to be economically sustainable, are often vital to the regional and national economy and do face competitive pressures, historic ports are the depository of significant historic material. A simplified licensing process is not inappropriate, but should encompass appropriate standard conditions in respect of historic material. In addition consideration should be given to requiring historic ports to undertake an audit of historic material within their harbour boundaries, including appropriate remote sensing, as part of a simplified licensing process. This would enable such a process to proceed upon an informed basis in future years.

Deposit of sediment resulting from archaeological exploration

The JNAPC is pleased that the deposit of sediment resulting from archaeological exploration has not been included in the suggested exemptions following representations from the sector.

Question 16

The JNAPC believes that it is important that any conditions attached to a licence are clearly recorded on the register so that local and national stakeholders are fully informed as to what protection has been afforded to the environment, including the marine historic environment.

JNAPC

October 2010

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 Historic 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
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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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