

**Proposed Marine Works (Environmental Impact Assessment)  
Regulations 2007**

**A consultation document of the Department for Environment, Food and  
Rural Affairs**

**Response by  
The Joint Nautical Archaeology Policy Committee**



**March 2007**

## Introduction

The Joint Nautical Archaeology Policy Committee (“JNAPC”) welcomes the opportunity to respond to the consultation document on Marine Works (Environmental Impact Assessment) Regulations 2007

The JNAPC was formed in 1988 from individuals and representatives of institutions who wished to raise awareness of the United Kingdom’s underwater cultural heritage and to persuade government that underwater sites of historical importance should receive no less protection than those on land. Some summary information on the JNAPC and its members is attached at the end of this response.

In May 1989 the JNAPC launched *Heritage at Sea* seeking better protection for our underwater cultural heritage, and followed this in 2000 with *Heritage Law at Sea*, which called for a review of the legislation affecting the protection of historic sites underwater. In 2003 the JNAPC published *An Interim Report on the Valletta Convention & Heritage Law at Sea*, which made detailed recommendations for legal and administrative changes to protect the UK’s underwater cultural heritage. JNAPC has also made a considerable contribution to the DCMS Consultation Document *Protecting our Marine Historic Environment: Making the System Work Better* and has been represented on one of the subsequent working groups.

Undoubtedly due to its geographical position, as an island, rich in resources, sitting astride natural maritime routes to and from the European continent, the United Kingdom has an extremely rich and varied underwater cultural heritage (UCH). In English waters the latest estimate from English Heritage’s Maritime Record is that there are 36,000 wreck sites (ships and aircraft), 5,200 known wreck positions, of which only 70 are protected under one or other regime, and 27,400 wrecks recorded but whose positions have not been located. There are also 7,400 located fishermen’s ‘fastenings’, which may indicate further wrecks. There are also concentrations of wrecks in certain areas, for instance the Goodwin Sands, the Scarweather sands and the Thames estuary. The current best estimate of total shipping loss in UK waters is a few hundred thousand for England, 9,000 for Scotland, 3,000 for Ireland and 4,000 for Wales. Possibly the oldest known shipwreck in the world, provisionally dated to 3,500BC and revealing trading links with Scilly, is being investigated off the Devonshire coast, while a shipwreck dated to 500BC has provided the first physical evidence of the United Kingdom’s fabled tin trade with Mediterranean societies. Going even further back chronologically, there is very good and varied evidence of submerged landscapes from particular coastal and maritime environments. Palaeolithic remains exist in the coastal zone as much as they do on land. There are Mesolithic sites (10-5k BP) on the Dogger Bank and off Bouldnor Cliff (Solent); recent finds include worked flints off Tynemouth; drowned Bronze Age fields off the Scilly Isles; traces of prehistoric humans and animals in Morecambe Bay; Seahenge and submerged forests in the Severn estuary.

If anything, the use of the foreshore and coastal waters by mankind in previous epochs has been even more intensive than the use of what are termed ‘offshore’ waters around

the United Kingdom. The foreshore, harbours, estuaries and creeks are where all maritime activities have been, at some point in their execution, focused, in that all voyages commence and end there. They form the bridge between maritime activity and terrestrial activity. As a result the 'coastal zone' is particularly rich in the archaeology of previous epochs. The need to afford this archaeology the appropriate degree of protection, irrespective of which side it falls of the boundary between terrestrial and marine spatial planning, is therefore essential.

Over the past ten years maritime archaeology has developed rapidly to meet the challenges of changing legislative systems, growth in development led marine investigation and enhanced management structures. Although there is still much work to be done in terms of defining and characterising the UCH, maritime archaeology now has professional structures in place to address these issues and promote the place of marine heritage within cultural agendas.

With this mind we would also draw your attention to the *European Convention on the Protection of the Archaeological Heritage (revised)*<sup>1</sup>, which the UK has ratified. This Convention seeks to ensure that any development project must safeguard against or mitigate any damage to the archaeological heritage. In particular Article 5 of the Convention requires each State party:

**(i)** *to seek to reconcile and combine the respective requirements of archaeology and development plans by ensuring that archaeologists participate:*

**(a)** *in planning policies designed to ensure well-balanced strategies for the protection, conservation and enhancement of sites of archaeological interest;*

**(b)** *in the various stages of development schemes;*

**(ii)** *to ensure that archaeologists, [.. and ... planners] systematically consult one another in order to permit:*

**(a)** *the modification of development plans likely to have adverse effects on the archaeological heritage;*

**(b)** *the allocation of sufficient time and resources for an appropriate scientific study to be made of the site and for its findings to be published;*

**(iii)** *to ensure that environmental impact assessments and the resulting decisions involve full consideration of archaeological sites and their settings;*

The JNAPC would like to make certain comments that it believes are relevant to its area of expertise.

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<sup>1</sup> European Convention on the Protection of the Archaeological Heritage (revised) (ETS no.143). Hereafter 'the Valletta Convention'.

## Comments

**Question 1:** Are there any other consultation bodies which you think we should include in the Regulations?

Yes: English Heritage Historic Scotland, Cadw and Northern Ireland Environment and Heritage Service who are the official advisers to government on the historic environment. No other regulatory bodies have the remit and expertise to make judgements about the need to cover the architectural and archaeological heritage and other aspects of historic environment off shore. These judgements need to be made at screening (effects on areas of archaeological and historic importance is one of the possible triggers for an EIA) scoping, baseline information, impacts and appropriateness of mitigation.

**Question 2:** Should we specify in the Regulations which bodies should be statutory consultees?

Yes, including the above

**Question 3:** Is there any reason why we should not extend the existing requirement for business to pay a reasonable fee for the service that is being provided to them under the Food and Environment Protection Act 1985 to other expenses incurred under the proposed Marine Works Regulations?

No comment

**Question 4:** Do you have any views on the thresholds in Annex 3 to this consultation? Should thresholds be included in the Regulations?

The issue of the appropriateness of thresholds has to be considered alongside the environmental conditions that the Directive requires to be addressed in screening projects for whether they require an EIA. As stated in para 3.2.4, these include “any landscape of historical, cultural or archaeological significance”. Under the Directive this cultural heritage condition must be included as a criterion, (Paragraph 3.2.4 refers to them applying to projects listed in “Schedule 1” which we assume will include both Annex I and Annex II projects as defined by the EIA Directive). However, for the purposes of these particular Regulations it would be helpful to avoid any potential misunderstanding that the term ‘*landscape*’ could refer only to terrestrial areas. We therefore urge that this be amended to read “any landscape *or seascape* of historical, cultural or archaeological significance” or better, “any *area* of historical, cultural or archaeological significance” which we believe would fully comply with the requirements of the Directive.

However, the claim that “These conditions .... are usually already followed in practice within the current set up” was NOT borne out by the results of the Planarch research project into the coverage of cultural heritage in EIA<sup>2</sup> which specifically found that this criterion was hardly ever applied as a reason for requiring an EIA ([http://www.planarch.org/downloads/library/england\\_eia-report.pdf](http://www.planarch.org/downloads/library/england_eia-report.pdf) pp 28-35; 102-111). This clearly illustrates a more general problem with regard to thresholds, that other criteria based on less specific environmental sensitivity tend to be seen as less important.

The approach adopted for these Regulations seems inconsistent with the DCLG proposals to remove explicit regulatory thresholds in favour of a clearer understanding of environmental sensitivity together with more indicative guidance on thresholds. Nevertheless, size and relative complexity of a project are related to the likelihood of their causing significant environmental effects, and some indication of how this may vary from one type of development to another is helpful. However, we are not aware of any research that demonstrates this across all aspects of the environment for either terrestrial or marine projects, so the thresholds therefore appear to be rule-of-thumb rather than scientifically based.

We would suggest the Regulations and any supporting advice should contain a clearer explanation of how screening should be carried out, going through a whole series of steps to establish a) the sensitivity of the area in relation to any particularly important environmental constraint that might in itself trigger an EIA; b) the sensitivity of the area in terms of a combination of several significant environmental constraints; c) the character and size of the development; d) potential complexity of environmental effects and their interaction. The ‘thresholds’ in Annex 3 only indicate how c) should be judged, having little or no bearing on the other factors, though we note that there is advice that these should be considered.

Because these size thresholds are not the only considerations to be made in the screening proposals we believe they should be indicative, with more emphasis on criteria for judging the environmental sensitivity of areas affected.

**Question 5:** Do you have any comments on the procedure for requesting a screening opinion? Do you consider it appropriate for the regulator to charge a reasonable fee in respect of the expense of providing a screening opinion?

Because the requirement for statutory consultation is very weak, leaving a great deal to the discretion of the regulator, the procedure does NOT ensure that in screening a proposal the regulator will obtain expert opinion on all the specific criteria that must be considered (such as any landscape or area of historical, cultural or archaeological significance) or more generally the range of topics that must be covered by an EIA (unless scoped out) aspects of the environment. The

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<sup>2</sup> Funded by the European Regional Development Funding Interreg III programme

Planarch research into cultural heritage coverage in EIAs found that the failure to obtain expert opinion at the screening and scoping stages was a serious weakness and could lead to major omissions in EIA

([http://www.planarch.org/downloads/library/england\\_eia-report.pdf](http://www.planarch.org/downloads/library/england_eia-report.pdf) pp 28-35; 102-111).

In addition to adding the government statutory advisers on cultural heritage to the list of consultees, we strongly recommend that paragraph 3.2.8 should not leave it open to the regulator to decide which consultation bodies to ask for an opinion: the regulator is very unlikely to have the in-house expertise to judge whether or not any particular aspect of the environment might potentially be significantly affected. Instead, there should be an obligation on the regulator to obtain an expert opinion on all aspects of the environment that could be criteria for requiring an EIA or might need to be covered in one. This requirement would not add any burden to what should happen anyway if screening is done thoroughly on the basis of all relevant expertise.

We doubt that a fee for obtaining a screening opinion is justifiable. This should be covered within any general fee to cover the obtaining of permits or licences for development. A specific fee for screening would be liable to deter applicants from behaving responsibly in establishing early on whether or not an EIA is needed. Where proposals are worked up and it is only determined on submission that an EIA should have been done there is likely to be unnecessary delay and expense which would be detrimental to the whole process from everyone's point of view.

**Question 6:** Do you consider it reasonable, under any part of the proposed regulations, for the regulator to treat an application as having been withdrawn where information has not been provided within a reasonable period as specified by the regulator?

Yes: though whether the term 'withdrawn' is quite correct might be considered. For example if there is a legal process by which an application could be deemed 'invalid' that might be better. We believe there should be pressure on developers to provide all the information required, but that this should not be so strict that it merely encourages hurried, substandard work. Reasonable time should be allowed for developers to provide additional information, bearing in mind that there may be a wide range of extraneous constraints on timing of surveys etc. Where possible the time scale for provision of extra information should be agreed between the regulator and developer and the application should only be deemed to have been withdrawn or become invalid some time after that period has expired.

**Question 7:** Do you consider a period of at least 28 days as a reasonable amount of time for consultation bodies to consider a scoping opinion?

Yes: but the operative phrase is 'at least.' Scoping issues can be complicated and under these regulations there is a particular complication that developments may involve both onshore and off-shore development. This is recognised in paragraph 3.3.5 but might be stressed even more clearly because this is a key reason why consultees (eg local authority archaeological advisers, conservation officers and national agency inspectors) would need to liaise to provide coherent, consistent and comprehensive advice on what should be covered and what surveys etc may be needed. The provision makes it clear that the need for any longer period should be agreed, not leaving it open ended.

In respect of paragraph 3.3.7 the same issue about seeking expert advice applies to scoping as it does to screening. It is NOT adequate merely to require the regulator to consult such bodies as it thinks fit: it must be required to obtain expert advice on all aspects of the environment that may need to be covered for an EIA, which includes the archaeological and architectural heritage. As with screening, the Planarch project found a number of cases where regulators did not obtain expert advice and the resultant EIAs were deficient. In some cases the cultural heritage had inappropriately been 'scoped out' and significant effects did later emerge ([http://www.planarch.org/downloads/library/england\\_eia-report.pdf](http://www.planarch.org/downloads/library/england_eia-report.pdf) pp 28-35; 70-82, 102-111).

**Question 8:** Do you have any comments on the regulator having the authority to direct the applicant to carry out a function that the regulator could otherwise carry out? Does this provision, where it appears in the proposals in this consultation, provide for more transparency in relation to the costs of processing an application (the cost of publicising and forwarding information to consultation bodies, for example)?

We believe that where functions are purely administrative (such as publicising or notifying bodies about a case) there is a case for certain functions to be carried out by an applicant on behalf of the Regulator provided that a) the exact requirements have been specified by the regulator, and b) the regulator is required to check that they have been fully carried out.

We are much more concerned with cases where a developer has a role in shaping policy (the Planarch study revealed a terrestrial case where a planning brief was drawn up by a developer that did not provide for adequate conservation of the built heritage, and a subsequent application was rejected by the local authority on these and other grounds).

**Question 9:** Is 42 days a reasonable timescale for making representations on an application and environmental statement? Would a different timescale be more appropriate?

The effectiveness of consultation is not just a matter of timescale, but also accessibility. There is no requirement here to make available all documentation

in digital form on request, or to publish it on the internet. It is not reasonable to expect national regional or even some local voluntary bodies with an interest in the maritime heritage to make a special journey to the offices of a regulator to inspect hard copy ESs and reports every time an EIA is carried out. We therefore suggest that there should be a requirement to publish the application and supporting ES on the internet and to make copies available on CD on request.

With these provisos, we think 42 days is a minimum, but would prefer 56 days.

With regard to paragraph 3.3.16, once again it is NOT adequate merely to require the regulator to consult such bodies as it thinks fit: it must be required to obtain expert advice on all aspects of the environment that have been covered in the ES, which will usually include the archaeological and architectural heritage. AS with screening and scoping, the Planarch project found a number of cases where ESs were deficient and that the expert advice provided to regulators was important in terms of obtaining more information and ensuring better outcomes ([http://www.planarch.org/downloads/library/england\\_eia-report.pdf](http://www.planarch.org/downloads/library/england_eia-report.pdf) pp 70-82, 102-111).

**Question 10:** Do you have any comments on the procedure for considering representations from the public?

We assume that 'the public' includes voluntary and other non-government bodies with an interest in or expertise relevant to how a project affects different aspects of the environment

We very much welcome the proposal to ensure that the regulator takes representations from the public seriously, and in particular considers whether they pertain to whether the ES covers all relevant issues, and complies with the regulations. The Planarch study, like others, found that the quality of ESs is very variable and in some cases sub-standard despite their having gone through the regulatory procedures. We believe that one way these deficiencies may be addressed is by consultation with other expert bodies.

We believe that for these provisions to be effective, regulators should publicise existing guidelines and criteria that provide the basis for judging if an ES complies with requirements, including the JNAPC Code for Practice for Seabed Development ([http://www.thecrownstate.co.uk/jnapc\\_code\\_of\\_practice.pdf](http://www.thecrownstate.co.uk/jnapc_code_of_practice.pdf)) and the 10 key principles for EIA published by Planarch ([http://www.planarch.org/downloads/library/action\\_3a\\_final\\_report\\_english.pdf](http://www.planarch.org/downloads/library/action_3a_final_report_english.pdf) p50).

**Question 11:** Do you have any comments on the proposed offences?

No

**Question 12:** Do you have any comments on the economic costs and

benefits of the proposed Regulations?

The unexpected discovery of maritime heritage can lead to serious problems of costs/ and/or delays. The discovery of an unexpected Elizabethan wreck during dredging for the Port of London is a case in point. It is now widely recognised – as the fundamental objectives of the EIA Directive have always stated – that it is much better to identify and plan for the environmental effects of development at an early stage than to try to rectify them later on. A key part of this is the power of EIA to avoid and/or reduce the costs of dealing with unanticipated problems. This is especially important in the case of maritime cultural heritage where the cost of investigating analysing and conserving important remains can be very substantial.

These points are very clearly set out in the JNAPC guidance for seabed development which has been endorsed by the Crown Estate and several other government bodies ([http://www.thecrownestate.co.uk/jnapc\\_code\\_of\\_practice.pdf](http://www.thecrownestate.co.uk/jnapc_code_of_practice.pdf)).

**Question 13:** Do you have any comments on the social impact of the proposed Regulations?

The regulations are likely to lead to better conservation and understanding of the maritime environment including maritime and coastal heritage. Experience shows that significant public interest and enjoyment and educational benefits can come from the knowledge gained from the results of development-led archaeology that is communicated in accessible ways. Many of the companies that carry out this work have the status of non-profit making charitable bodies which tends to ensure that these social benefits are secured.

**Question 14:** Do you have any comments on the environmental impact of the proposed Regulations?

The environmental impact of the regulations will be intrinsically highly beneficial because they will help to ensure that significant environmental effects of development are avoided, reduced or mitigated, while also providing opportunities to secure environmental benefits.

**Question 15:** Do you have any comments on the impact that the proposed Regulations might have on small businesses, and on how they might affect competition in the industry?

They are likely to provide worthwhile business to a moderate number of small and medium sized heritage related businesses and other environmental consultancies.

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**March 2007**

# 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 historical 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 has been presented to Government.

## **Joint Nautical Archaeology Policy Committee**

### **Members**

#### **Chairman**

Robert Yorke

#### **Organisations**

Association of Local Government Archaeological Officers

Paul Gilman

British Sub Aqua Club

Jane Maddox

Council for British Archaeology

Gill Chitty

Hampshire & Wight Trust for Maritime Archaeology

Garry Momber

Institute of Conservation

Institute of Field Archaeologists, Maritime Affairs Group

Julie Satchell

ICOMOS

Chris Dobbs

National Maritime Museum

Gillian Hutchinson

National Museums & Galleries of Wales

Mark Redknap

National Trust

David Thackray

Nautical Archaeology Society

George Lambrick

Professional Association of Diving Instructors

Suzanne Pleydell

Shipwreck Heritage Centre

Peter Marsden

Society for Nautical Research

Ray Sutcliffe

Sub Aqua Association

Stuart Bryan

United Kingdom Maritime Collections Strategy

Chris Dobbs

Wessex Archaeology

Anthony Firth

Wildlife and Countryside Link

Annie Smith

#### **Individual representation**

#### **Affiliation**

Sarah Dromgoole

Nottingham

University

Steve Waring

Michael Williams

Wolverhampton

University

#### **Observers**

Advisory Committee on Historic Wreck Sites

Tom Hassall

Cadw

Sian Rees

Department for Culture, Media and Sport

Lizzie West

The Crown Estate

Carolyn Heeps

English Heritage

Ian Oxley

Environment Service, Northern Ireland

Ken Neill

Historic Scotland

Philip Robertson

Maritime and Coastguard Agency, Receiver of Wreck

Sophia Exelby

Ministry of Defence

Peter MacDonald

Ministry of Defence

Bob Stewart

Royal Commission on the Ancient and Historical

Monuments of Scotland

Robert Mowat