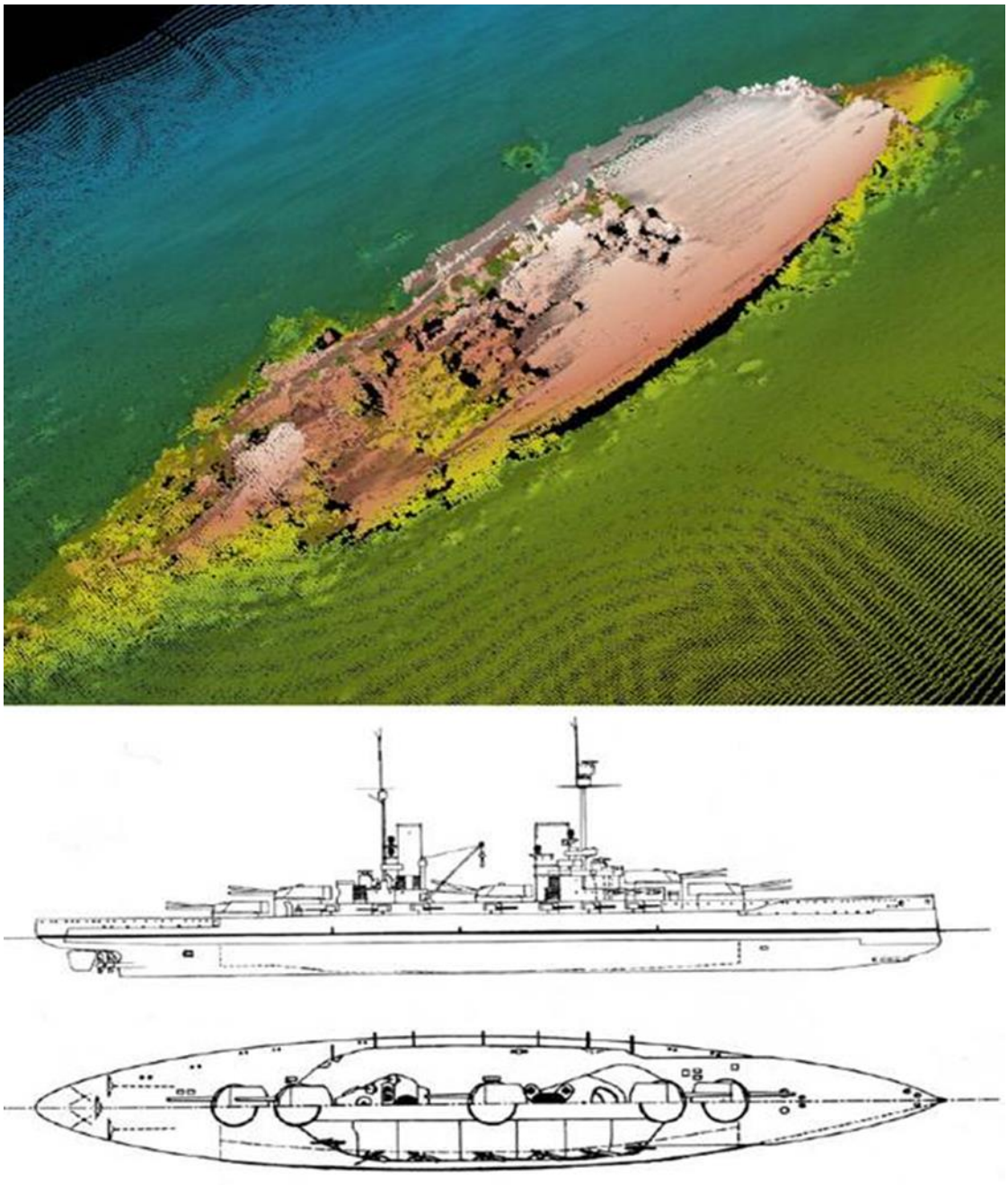
Scheduling Under the Ancient Monuments & Archaeological Areas Act 1979 in English Waters

JNAPC Discussion Paper



Konig Class Battleship: Scapa Flow (Image Courtesy of Historic Scotland)

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Introduction

In correspondence with the Nautical Archaeology Society (NAS), Historic England (HE)[1] has confirmed that it has recently taken the policy view that it will not consider scheduling as a means of statutory protection for those sites permanently submerged below mean low water. The matter first came to the attention of the marine archaeological community in the Minutes of the meeting of HE's Historic Wreck Panel on 8th June 2015[2]. Latterly concern was voiced by Ms. Alison Mayor, a NAS member, in relation to correspondence received from HE in respect of an application to schedule the wreck of HMLCT 427[3]. Both these instances indicated that HE had recently formulated a policy that scheduling under the Ancient Monument & Archaeological Areas Act 1979[4] below mean low water would not be considered irrespective of the merits of any individual application.

As this matter became more widely known within the marine archaeological community, serious concern was expressed. Eventually it was agreed with Dr. J. Flatman of HE and Mr. R. Yorke, Chair JNAPC, that a discussion paper would be prepared for JNAPC, which would also be forwarded to Dr. Flatman and that this paper would form the basis of further discussions between JNAPC and HE. This will enable Historic England to take further advice, including possibly legal advice. Dr. Flatman has also kindly offered to attend JNAPC when the Paper is eventually tabled for discussion.

The Scheduling Process

The Secretary of State for the Department of Culture, Media & Sport (DCMS) has a power under s.1(3) Ancient Monument & Archaeological Areas Act 1979 ('the 1979 Act') to schedule a monument and such scheduling is the principal mechanism for protecting a monument under the 1979 Act. As the policy guidance published by DCMS[5] makes clear, this power is discretionary, encompasses monuments located below the Mean Low Water Mark[6] (MLWM) out to the boundary of English territorial waters[7] and enables the United Kingdom (UK) to

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[1] Created by s.32 National Heritage Act 1983 (hereafter 'the 1983 Act') the Historic Buildings and Monuments Commission for England was commonly referred to as 'English Heritage'. On 1st April 2015 the Commission changed its common name from 'English Heritage' to 'Historic England'. The terms 'English Heritage' and 'Historic England' are used interchangeably in this paper.

[2] Minutes of the 9th meeting HISTORIC WRECKS PANEL held at 11am on Monday 8 June 2015 in Kenilworth and Stokesay Meeting Rooms, Waterhouse Square, London, EC1.

[3] His Majesty's Tank Landing Craft (LCT) 427 sank at 03:03 on 7th June 1944 at Spitbank Gate as she approached Portsmouth after delivering a cargo of Sherman duplex drive (DD) tanks to Gold Beach on D-Day. As she approached Portsmouth she was in collision with the battleship HMS Rodney. The LCT was sliced in two amidships as she collided with the bow of HMS Rodney. All thirteen crew of LCT 427 were lost in the tragedy. http://www.southseasubaqua.org.uk/diving-projects/kedge-hook-lct-427 retrieved 13.1.2016.

[4] Hereafter 'the 1979 Act'.

[5] Scheduled Monuments & nationally important but non-scheduled monuments: DCMS October 2013. This document sets out DCMS policy on Scheduled Monuments. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249695/SM_policy_statement_10-2013__2_.pdf

[6] Ibid. p.11

[7] i.e. 12 nautical miles from the UK's declared baselines.

discharge its international obligations[8], under both the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972[9] and the European Convention on the Protection of the Archaeological Heritage 1995[10]. It is also noteworthy that DCMS' policy guidance contains no caveats as to the inadvisability of scheduling monuments below the MLWM.

As the policy guidance from DCMS also makes clear, "*In practice, the Secretary of State usually considers recommendations put forward by [Historic England] together with the implications of designating Scheduled Monuments."*[11] While the Secretary of State's discretion cannot be exercised exclusively or automatically upon the basis of HE's advice, since that would be an unlawful fettering of the discretion[12], nevertheless the recommendations from HE are likely to be highly influential, if not predominantly so, upon the exercise by the Secretary of State of this discretion whether to designate or not. Indeed the courts have consistently recognised that specialist agencies, such as Historic England, possess an expertise with which the Courts should be very "*slow to interfere*" [13] and doubtless this approach would also be applied by the Secretary of State when considering HE's recommendation as to whether or not to schedule. Consequently, as an expert body, HE's advice, while neither binding nor unquestionable, would usually be accepted. Moreover this caution by the courts not to substitute its judgement for that of a discretionary decision maker is reflected in the fact that they will afford both HE and the Secretary of State a '*margin of appreciation*' when evaluating the lawfulness of any exercise of statutory discretion in a specialist field[14]. However such latitude has its boundaries. The discretion in question must be genuinely exercised in evaluating each application on its merits[15].

DCMS & HE Policy Guidance

Before exercising this discretion to schedule, the Secretary of State will have regard to a number of non-statutory criteria[16]. These are set out in DCMS' policy guidance document and it is acknowledged that they are not definitive and that the Secretary of State must take into account any other material considerations. In turn the rationale for English Heritage's recommendations on scheduling is set out in its Scheduling Selection Guides. These cover a range of differing heritage aspects, the most appropriate in this context being '*Designation Scheduling Selection Guide Maritime and Naval*'[17] and '*Designation Scheduling Selection Guide Ships and Boats: Prehistory and Present*'[18]. Again these guides are intended only to be

[8] Op.cit. . page 3

[9] http://whc.unesco.org/en/conventiontext/

[10] ETS 143

[11] Op.cit. page 4 para. 8

[12] See, for example, *Stringer v MHLG [1970] 1 W.L.R. 1281*

[13] *Levy v. The Environment Agency* [2002] EWHC 1663 (Admin) per Silber J. at 78 – 80; see to same effect *R. (on the application of Edwards) v. The Environment Agency* [2005] EWHC 657 (Admin) per Lindsay J. para 92 where the Court noted its entitlement to give "real weight" to the evidence of the statutory agency "in the absence of a clear refutation"; *R. v. Inland Revenue Commissioners ex parte Preston* [1985] AC 835 per Lord Templeman at 864 E-F; *R. v. Social Fund Inspector ex. Parte Ali* (1994) 6 Admin LR 205 per Brooke J. at 210E-F;.

[14] *Levy v. The Environment Agency* ibid. per Silber J. at 23; *R. (on the application of Edwards) v. The Environment Agency* ibid. per Lindsay J. at para 92

[15] This aspect is discussed further below.

[16] These non-statutory criteria are Archaeological and Historic interest; Period; Rarity; Documentation and finds; Group value; Survival / condition; Fragility / vulnerability; Diversity and Potential

[17] English Heritage February 2013

[18] English Heritage May 2012

indicative of the broad approach of HE to advising the Secretary of State on applications for scheduling. They also specifically caution that they are subordinate to DCMS' policy on scheduling and that scheduling is not intended to produce a complete compendium of nationally important sites[19] but rather to capture a representative sample of such sites[20]. The guides also acknowledge that monuments vary considerably in character and that they can be protected by a variety of mechanisms, including arrangements with stakeholders and that HE's objective is to recommend the most appropriate mechanism for protection for each asset[21]. Indeed identifying the best form of management for any particular site is expressly stated to be the "*primary concern*" when considering how management of the site in question can best be achieved[22]. This clearly implies an individual assessment by HE as to the most appropriate mechanism for protecting a site, using in this individual assessment the broad approaches identified in the selection guides and contemplates scheduling as a potential management tool[23].

HE's Current Policy

At the June 2015 meeting of HE's Historic Wreck Panel the Panel was informed that
" *[Historic England] will not be promoting the scheduling of permanently submerged wrecks in the marine zone.*"[24]. It was not all together clear exactly what this denoted, in that '*not promoting*' scheduling could simply mean taking a passive, reactive stance rather than a proactive one in considering the possibility of scheduling. However correspondence received subsequently by Ms. Alison Mayor in respect of her application to schedule LCT 427 provided greater clarification. On 9th November 2015 Ms. Mayor received an email from HE's Designation Team Leader (South) Listing Group apologising for the delay in responding to her application but stating that :
" *… this case then got caught up in a much wider discussion at Senior Management level about the appropriateness of scheduling in the sea. This has only very recently resulted in a Historic England policy that we will not recommend the scheduling of such assets. This therefore means that we are not able to recommend LCT427 for scheduling either.*"[25]

This clearly indicates that HE would not recommend scheduling a site below the MLWM in any circumstances, irrespective of the merits of the individual application. This interpretation was confirmed when subsequently Ms. Mayor received a copy of HE's recommendations to the Secretary of State in respect of her application to schedule LCT 427[26].

[19] In the authors' experience this limitation on scheduling is not widely understood and this misapprehension may have gone some way in fuelling the widespread concern expressed in the marine archaeological sector over this issue.
[20] '*Designation Scheduling Selection Guide Maritime and Naval'* op.cit pp.9-10
[21] Ibid. p.9
[22] 'Designation *Scheduling Selection Guide Ships and Boats:Prehistory and Present'* op.cit. p.7
[23] The *Maritime and Naval guide* also states that scheduling can extend out from the coast to the limit of UK territorial waters while acknowledging that the difficulties of monitoring and managing such sites has meant that scheduling has not been "*widely used"* but that it may be pursued in the future. *Designation Scheduling Selection Guide Maritime and Naval'* op.cit p.9
[24] The Panel asked for the policy to be reconsidered.
[25] The authors are grateful to Ms. Mayor for making this correspondence available to them.
[26] The authors are grateful to Ms. Mayor for making this document available to them.

The advice, dated 18th November 2015, confirmed that consideration of the matter had been completed in May 2014 but the matter had been placed on hold pending a wider policy discussion within HE considering scheduling below the MLWM and that as those discussions had now concluded the application could be determined. Having identified potential threats to the site from dredging and fishing[27], the site was assessed against the non-statutory criteria as set out in the DCMS policy guidance and HE's selection guide on '*Designation Scheduling Selection Guide Ships and Boats: Prehistory and Present*'[28]. The advice concluded that the wreck meets the criteria for scheduling but "… *as it is HE policy not to apply the 1979 Act to remains below Mean Low Water Mark it cannot be recommended for scheduling*"[29]. The advice then goes on to state that amongst the reasons for the decision, under the criterion '*Policy*' that "*It is HE policy not to use the 1979 Act to schedule below the Mean Low Water Mark and therefore the wreck cannot be scheduled*"[30]. This would appear to establish beyond doubt that HE's policy of not scheduling below the MLWM was being treated as an absolute bar to scheduling, no matter what the merits of the individual application and that no exceptions were being contemplated. The advice was then subject to an internal review, presumably as part and parcel of a normal HE process and in case any doubt remained as to the correctness of this interpretation, the 'Countersigning Comments' seem to have placed the matter beyond disputation by stating, inter alia, that "*After discussion with colleagues across the organisation it has now been agreed that we will not consider scheduling sites that are permanently submerged for the time being*"[31].

The reasons for this policy were iterated in the 'Countersigning Comments'. These were that the 1979 Act had not previously been used below the MLWM so there is no precedent for such use, that there is no appetite in NPCD[32] for such scheduling, that it is unhelpful to introduce another level of protection in a '*complex zone*' where HE's focus is the application of the Protection of Wrecks Act 1973[33], that scheduling duplicates the Protection of Military Remains Act 1986[34], the high costs of assessment and post-designation management, that Marine Planning is beyond the terrestrial planning system and approaches are different and that protection for such sites is being sought through entry on the Marine Record and the development of a protocol with the Marine Management Organisation (MMO).

The cogency of this reasoning is considered below but from the above statements it would not be unreasonable to draw the conclusion that the previously undisclosed policy therefore amounts to an absolute prohibition upon consideration of scheduling, irrespective of the circumstances of each application. HE has effectively adopted a pre-determined decision that no site will be scheduled below the Low Water Mark, notwithstanding that its published policy, which is not limited to terrestrial application by the 1979 Act or its published policy guidance, is to recommend the best form of management for a site as a "*primary concern*"[35] .

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[27] At p.1
[28] Op.cit.
[29] At p.3
[30] Ibid.
[31] Ibid. at p.4.
[32] HE's National Planning & Conservation Department, now called the Planning Group.
[33] Hereafter 'the PWA 1973'.
[34] Hereafter 'the PMRA 1986'.
[35] '*Designation Scheduling Selection Guide Ships and Boats:Prehistory and Present'* op.cit. p.7

Therefore what appears to have occurred is the evolution of a policy, as yet unstated, by HE of not considering scheduling any monuments underwater, irrespective of the merits of the application to schedule, existing within a stated policy of the Secretary of State of contemplating scheduling such monuments and which makes no mention of this restrictive policy outlook now taken by HE. To say that there appears to be a substantive dichotomy of policy between DCMS and its statutory advisors would perhaps be an understatement. In part this dichotomy appears to have been driven by financial resource implications for HE in that it not only acts as a statutory advisor to the Secretary of State as to whether scheduling of a site is advisable but also, should such scheduling occur, then acts as the executive body responsible for assessing and monitoring the scheduled ancient monument. HE is thus in an invidious position in that its purely advisory functions on scheduling have potentially adverse financial implications for it as an executive agency. To that extent HE's concerns for its financial resources as an executive agency have, perhaps inevitably, tainted its advisory function to the Secretary of State. The question then arises as to whether this fettering of its discretion by HE has legal implications for the validity of advice proffered by HE on scheduling applications and what, if any, are the policy implications?

Subsequently, on the 3rd December 2015 Ms. Mayor received an email confirming that having considered HE's recommendation, the Secretary of State for DCMS had decided not to add HM Landing Craft Tank 427 to the Schedule of Monuments. The decision letter gave no express reasons for this decision but presumably the reference to HE's recommendations was intended to convey the explanation that the Secretary of State had adopted HE's reasoning.

The Legal Framework

The Duty to Consider each Application on its Merits

The fundamental principles of the exercise of a statutory discretionary power have been long established and, while this area of law remains one of the most kinetic, these basic tenets can be regarded as well settled. A decision maker, charged with a statutory discretion, must consider each issue upon its individual merits. A policy can be legitimately developed and that policy may set an extremely high bar against a particular authorisation being granted but the policy on a discretionary judgement cannot amount to an absolute prohibition in all circumstances or a refusal to consider an issue upon its individual merits as a potential exception to the established policy norm. In short, a discretionary decision maker may develop a policy but cannot close its mind to considering departure from that policy in each individual case. This principle is simply illustrated by the case of *R. v. London County Council ex.p. Corrie*[36]. A local Bye-Law required written permission from the Council for the sale of articles in any public park. The Council adopted a policy, by way of resolution, of refusing all applications for permission to sell articles. Mrs Corrie, who wished to sell pamphlets, sought judicial review of the Council's refusal, relying on this policy, to consider her application for permission. The Court held that the Council had a discretion whether or not to grant permission for such sales. While the Council could lawfully adopt such a policy nevertheless that policy could not be used to fetter its discretion. The Council's use of the policy to refuse to contemplate ever granting permission fettered its discretion to such an extent that there was in

[36] [1918] K.B. 68

reality no possible exercise of discretion whatsoever[37]. Each case, while it must be measured against the existing policy, had to be considered on its merits and the policy could not be used to justify refusal in all circumstances without consideration of each application[38].

An even closer analogy can be found in the recent case of *R (on the application of McMorn) v Natural England*[39]. The case concerned a challenge to Natural England's refusal to grant a license to kill a small number of Buzzards and to destroy four nests. A licence is required to kill or capture them according to the Wildlife and Countryside Act 1981, and the claimant applied to Natural England (NE) for such a licence on five separate occasions between 2011 and 2014. The basis of these applications was the claim that the buzzards were causing significant damage to his pheasant 'poults' by killing and disturbing them. By way of background Ouseley J. pointed out that the Claimant had been granted licences by NE to kill a number of herring and great black-backed gulls on the farms in 2011 and 2013, and, also in 2013, to kill three cormorants, in respect of damage done to partridge and fishing interests respectively.

While NE had a discretionary power to refuse or grant a licence, the generic policy on culling birds was set by the Department for Environment, Food and Rural Affairs (DEFRA). DEFRA had a specific policy on culling certain birds but not on raptors, such as Buzzards. The applicable policy guidance was therefore the generic one on birds. This contemplated culling where appropriate. In the absence of a specific raptor policy by DEFRA, NE developed an undisclosed policy which, in effect, amounted to a mind-set where culling raptors could not be contemplated. Thus a policy dichotomy opened up where DEFRA policy contemplated culling in certain circumstances whereas NE's undisclosed policy did not contemplate such a possibility. NE's policy was both undisclosed and differed substantially from DEFRA's publicly stated policy position, which was intended to be the dominant policy statement. Furthermore the Court held that NE had acted unreasonably, in a *Wednesbury*[40] sense, in fettering the exercise of its statutory discretion.

The analogy of the *McMorn* case to the policy dichotomy between DCMS and HE on scheduling below the MLWM is clear. DCMS' stated policy on scheduling expressly contemplates scheduling below the MLWM, as indeed does HE's publicly stated policy in its Selection Guides. Neither policy guidance draws any distinction between scheduling above the MLWM (terrestrial and foreshore) and below it. However HE's hitherto undisclosed and currently unstated policy is not to consider the possibility of scheduling below the MLWM, notwithstanding its own policy position stated in its Selection Guides and the fact that HE's policy is intended to be subordinate to DCMS' policy statement[41]. HE, in formulating its advice to the Secretary of State, is therefore relying upon an unstated policy, which it has

[37] Per Avory J. at 74; see too the same effect *Stringer v. Minister of Housing and Local Government* [1970] 1.W.L.R. 1281 per Cooke J, at 1289.
[38] Per. Darlington J. at 73.
[39] [2015] EWHC 3297 (Admin), High Court, Ouseley J, 15 November 2015
[40] So named after the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 K.B. 223 which established the principle that a decision is unreasonable when it is one no rational person could have made in the circumstances.
[41] Thereby depriving an applicant of information relevant to the formulation of the application, as in *McMorn*.

formulated itself, which fundamentally counters the policy of DCMS, to which it is meant to be subordinate, in that it differentiates between scheduling above and below the MLWM and refuses to countenance the possibility of the latter. HE's policy is thus entirely inconsistent with that of DCMS and its own publicly stated policy and fetters its discretionary judgement in formulating that advice by refusing to contemplate scheduling below the MLWM.

Alternatively it could be argued that in rigidly applying its policy of not considering scheduling below the MLWM without giving any consideration to whether the circumstances of the application merited a departure from that policy, HE had in effect predetermined its advice upon the application. Predetermination has been described as "… *a surrender by a decision maker of its judgement by having a closed mind and failing to apply it to the task.*"[42]. In determining whether predetermination has occurred one must be careful to distinguish between predetermination and predisposition. Where, as here, a policy exists, an administrative decision maker will be naturally predisposed to applying that policy. This is quite legitimate and indeed to do otherwise would in effect negate the whole purpose of developing a policy framework. What is not acceptable is that the decision maker makes its mind up at too early a stage without balancing the policy against the merits of departing from that policy in the circumstances of the individual application[43]. It would appear that once HE had decided to introduce this new policy that no scheduling below the MLWM would occur, all applications for such scheduling were to be rejected, irrespective of their merit. That would constitute predetermination. Accordingly HE appears to have failed to exercise correctly its statutory function of advising the Secretary of State fairly.

However, when considering the legality of the application of this policy position by HE, the matter is not quite a straightforward comparison to the above principles. Had HE been making the scheduling decision, its refusal to consider even the possibility of scheduling LCT 427 due to the wreck's location below the MLWM would clearly be an unlawful fettering of its statutory discretion[44] and a predetermination of the application. However it is the Secretary of State for DCMS who makes the decision whether or not to schedule[45], HE merely having a statutory advisory role. Thus, while HE may have fettered its discretion and predetermined its advice, it is not the decision maker, the Secretary of State is. Consequently two questions arise. First, is HE's blanket application of policy in itself ultra vires its statutory duties under the 1983 Act ? Second, can this fettering of discretion and predetermination by HE therefore taint the Secretary of State's decision of whether or not to schedule?

Under the 1983 Act[46] HE has a statutory duty, so far as practicable, to secure the preservation of ancient monuments in England[47]. Before scheduling any monument the Secretary of State is required to consult HE[48]. There is no corresponding express statutory duty on HE to advise the Secretary of State in response to this consultation but arguably such a duty can be implied

[42] *R. (Persimmon Homes) v. Vale of Glamorgan Council* [2010] EWHC 538 per Beatson J. at 116.
[43] *R.(Lewis) v. Redcar and Cleveland BC* [2008] EWCA Civ 747 per Per Longmore LJ at 107.
[44]Compare *R (on the application of McMorn) v Natural England* per. Ouseley J. at para.208.
[45] S.1(1).
[46] S.33(1)
[47] By virtue of s.1(1) National Heritage Act 2002 this duty is extended to ancient monuments located within territorial waters adjacent to England.
[48] S.S.33(3)(b) 1983 Act

from HE's statutory duty to secure the preservation of ancient monuments in England. Given HE's policy decision not to consider the possibility of scheduling any sites below the MLWM, irrespective of the merits of each application for scheduling, it can be argued that HE has not discharged this duty under the 1983 Act to secure the preservation of ancient monuments in England and has additionally fettered its discretion in such a manner as to undermine the purpose of the power given to it by that Act to advise the Secretary of State[49]. Additionally its reliance upon an undisclosed policy in formulating its advice may constitute unreasonableness or irrationality within a *Wednesbury* sense. To that extent it may be argued that HE has potentially not properly exercised its statutory duties in formulating its advice to the Secretary of State.

To what extent could such an improper exercise of advisory functions potentially taint the Secretary of State's decision[50] ? In deciding whether or not to schedule a monument of accepted national importance, the court in *R. v. Secretary of State for the Environment ex. p. Rose Theatre Trust Co*[51]accepted that the Secretary of State has a very wide discretion, stretching beyond the stated non-statutory criteria [52]. Moreover, it has been noted above that the advice of a specialist statutory advisor carries significant, if not predominant weight, since the courts acknowledge their expertise in the matter and afford considerable latitude to discretionary decisions based on such specialism. Nevertheless, to the extent that the Secretary of State relied upon HE's advice, formulated on an inconsistency with his own policy, he may thus have been departing from that policy without a reasoned justification for so doing. If it could be established that the Secretary of State had afforded such predominance of weight to HE's recommendation, based as it was on a previously undisclosed and contradictory policy to his own and a refusal to consider the application individually, then it is arguable that the Secretary of State had taken into account advice which was indeed legally flawed. In turn this may vitiate his own decision[53]. Conversely if the Secretary of State could demonstrate that HE's refusal to countenance scheduling below the MLWM had been discounted and regard paid purely to HE's evaluation of the merits of the application, if any, then the decision could be upheld[54]. As ever in a judicial review of administrative decisions much would turn upon interpretation of the wording of the decision letter[55].

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[49] Compare *R (on the application of McMorn) v Natural England* per. Ouseley J. at para.208

[50] The Secretary of State could not simply accept HE's advice without conducting his own evaluation, since that would not be an exercise of his discretion but rather an ultra vires substitution of HE's judgement for his own; see further *Stringer v. Minister of Housing and Local Government* op.cit per Cooke J, at 1289

[51] [1990] 1 Q.B. 504

[52] Per Schiemann J. at 515

[53] The court in *R. (Persimmon Homes) v. Vale of Glamorgan Council* op. cit clearly accepted this was possible in the context of advice by the local authority planning officer to its planning committee, though in the event it was found not to have occurred.

[54] A further issue arises as to whether members of the public could bring judicial review proceedings. In the Rose *Theatre* case op.cit. Schiemann J.ruled that a member of the public lacked standing (*locus standi*) to bring proceedings. However later case law would suggest that this was an overly restrictive approach and that society's interest in the Rule of Law that decision makers cited within their statutory powers conferred standing upon individuals with the knowledge and experience to contest the matter; see further *Rv. H.M. Inspector of Pollution Ex. P. Greenpece Ltd.* (no.2) [1994] 3 All E.R. 329; *R. v Secretary of State for Foreign and Commonwealth Affairs Ex.p. World Development Movement* [1995] 1 W.L.R. 386.

[55] Unfortunately the somewhat terse explanation in the decision letter that" *Having considered [HE's] recommendation, the Secretary of State for Culture, Media and Sport has decided not to add HM Landing Craft*

The Duty to give Reasons

The 1979 Act does not expressly provide for the giving of reasons for the Secretary of State's decision whether or not to schedule. Nor generally does the Common Law imply such a duty in respect of administrative decisions[56]. However there has been a discernible drift by the Courts towards increasingly requiring reasons to be given for administrative decisions in a variety of circumstances[57]. This drift has predominantly centred upon decisions adversely impacting personal liberty, the environment or economic benefits or obligations. While the decision not to schedule this site involves no adverse impacts upon such interests or obligations, nevertheless there is a clear public interest in securing appropriate conservation of underwater cultural heritage[58]. In particular the courts have increasingly required the stating of reasons where their absence would render any right of review nugatory. As the Supreme Court has recently stated, the right to make representations, which the Secretary of State's decision letter conferred upon Ms. Mayor by inviting a request to review the decision not to schedule, is somewhat valueless unless one has advance knowledge of the considerations that may lead to an adverse administrative decision[59]. This judicial drift has possibly now reached its zenith when the Court of Appeal recently affirmed that the enhanced margin of appreciation afforded by the courts to specialist public bodies when evaluating the lawfulness of their decision making in technical or scientific matters carries with it a corresponding burden to provide a full and accurate explanation of all the relevant facts[60]. Although this duty was articulated in the context of a duty to assist the court by with a "*full and accurate explanations of all the facts relevant to the issue [of lawfulness of the decision]*"[61], it is submitted that, in the light of the Supreme Court's observations that advance knowledge of the reasons underpinning an administrative decision is a prerequisite of an appeal, this duty to provide a clear and accurate explanation of reasoning must logically also extend to a recipient of such an administrative decision. Otherwise any right of appeal may indeed be rendered nugatory.

Additionally the courts have also required the provision of reasons on the basis of the Common Law presumption that where an Act confers a discretionary administrative power it will be exercised in a manner which is fair in all the circumstances[62]. This presumption has been justified as leading to better decision-making by ensuring the decision maker receives all relevant information, that it is properly tested and that it requires decision-makers to listen to persons who have something relevant to say, thereby promoting congruence between the

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Tank 427 to the Schedule of Monuments" makes it difficult, if not impossible, to discern whether the Secretary of State did indeed conduct his own evaluation of the merits of the application.

[56] *R. v. Secretary of State for the Home Office Ex. Parte Doody* [1994] 1 AC 531 at 564 per Lord Mustill.

[57] For a comprehensive discussion of this process see Craig, P. *Administrative Law* 7th ed. Sweet & Maxwell London 12-028 - 12-035.

[58] The public interest in conserving underwater cultural heritage is recognised by its inclusion in environmental protection legislation e.g. Art. 3 EIA Directive 2011/92/EU; s.1(2) Environmental Protection Act 1990; s.54(2)(a), s.117(8), s.151(8)(a),s.186(1), s.197 & s.225(2) Marine & Coastal Access Act 2009..

[59] *R. (on application of Bourgass) v. Secretary of State for Justice* [2016] 1 All ER 1033 at 1058 pre Lord Reed; see also to the same effect *R. v. Secretary of State for the Home Office Ex. Parte Doody* [1994] 1 AC 531 at 563 per Lord Mustill.

[60] *R. (on application of Nigel Mott) v. The Environment Agency* op. cit. per Beatson L.J. at paras 56 & 63-64..

[61] Ibid. at para. 56

[62] *R. (on application of Bourgass) v. Secretary of State for Justice* op.cit at 1058 per Lord Reed.

decision-makers and the law which governs their actions[63]. This Common Law duty of procedural fairness will extend to provision of reasons, where their absence means worthwhile representations cannot be made without knowledge of such reasons[64].

Where reasons must be provided they should at least constitute a genuine and reasoned discussion in sufficient detail to enable a response to be formulated[65]. It is not necessary that all the reasoning behind the decision is revealed but the grounds on which the decision is reached should be set out clearly[66]. It would appear that the Secretary of State's decision letter, accompanied by HE's Advice by way of explanation, falls far short of this standard in both cases. In such circumstances this might well lead a court to requiring sufficient reasons to be adduced that would enable an effective review of scheduling decisions to be conducted. Such an approach would be contrary to that taken in *R. v. Secretary of State for the Environment ex. p. Rose Theatre Trust Co*[67] but as noted above subsequent cases are strongly indicative of a significant change in judicial attitudes.

Rationale

While it is not possible to disentangle the full rationale for HE's change of policy towards the use of the 1979 Act below MLWM, since this has been not fully publicly articulated, some observations can be usefully made on the reasoning set out in the Counter Signing Comments. The most striking comments were that the 1979 Act had not previously been used below the MLWM so there was no precedent for such use and that scheduling duplicates the PMRA 1986.

The former comment is inaccurate as the Act has been used to schedule wrecks in both England, Scotland and Wales. It was first used underwater in Scotland for the protection of seven wrecks of the German High Sea Fleet in Scapa Flow, scheduled as two groups of 3 and 4 wrecks on 23rd May 2001[68]. The 1979 Act was chosen specifically as a protection mechanism as the sites were robust and the administrative complications of licensing the many divers that visit each of the wrecks would have been prohibitive. The Scottish experience has been largely positive and no more expensive that protecting the sites under the Protection of Wrecks Act 1973. In Wales the wreck of the *Louisa* located within Cardiff Bay was scheduled on 27 December 2001, over 2 years after it became submerged at all times by the impoundment of Cardiff Bay in November 1999[69]. When English Heritage published its initial policy for management of

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[63] R. (Osborn) v. Parole Board [2014] AC 1115 at 1149 – 1150 per Lord Reed.

[64] *R. v. Secretary of State for the Home Office Ex. Parte Doody* op.cit. at 560 per Lord Mustill.

[65] *R. (on application of Bourgass) v. Secretary of State for Justice* op.cit. at 1058 per Lord Reed

[66] *R. (on application of Alconbury Developments Ltd.) v. Secretary of State for Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1442 per Lord Clyde; see also *Levy v. The Environment Agency* op.cit. per Silber J. at para. 21. The appropriate time for assessing the lawfulness of the reasoning is that of the making of the decision and a court should guard against any *ex post facto* evidence or explanation being advanced by way of subsequent explanation; *R. (on application of Nigel Mott) v. The Environment Agency* op. cit. per Beatson L.J. at para. 39 & 56-57.

[67] Op.cit.

[68] See http://portal.historicenvironment.scot/designation/SM9298

[69] http://www.coflein.gov.uk/en/site/405916/details/LOUISA/ The wreck, which is located on the river Taff, was scheduled because impoundment for a land reclamation scheme for Cardiff Bay removed the site from UK waters such that the site could not be designated under the PWA 1973. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197296/SEA6_Archaeology_Wessex.pdf

marine archaeology in 2001[70], it noted that whilst the Act could be used to protect monuments on the seabed, it had not yet been used to this effect[71]. However it did note that Historic Scotland had made it their policy to use the 1979 Act in preference to the 1973 Act where marine sites are established diver attractions that provided local economic benefits or where the 1973 Act would be restrictive in a way counter-productive to the long term wellbeing of the site[72]. It also stated that it would monitor the success of the application of the Act in Scotland and will consider its use as part any review of the statutory and management framework[73]. This monitoring would appear to have confirmed the Scottish success because on 8th November 2013 English Heritage scheduled a 'Phoenix Caisson' that formed part of the 'Mulberry' floating harbour which is located in the Straits of Dover, approximately 660m to seaward of the low water mark[74].

The latter comment (i.e. that scheduling duplicates the PMRA 1986) reveals a profound misunderstanding of the origins and objectives of the 1986 Act. The objective of the 1986 Act is to protect the last known resting place of military personnel lost in the service of their country from unauthorised disturbance[75]. Beyond that it has no heritage management objectives or powers. Consequently the Ministry of Defence (MOD) undertakes no monitoring, surveys or archaeological assessments of such military remains designated under the Act, nor does it currently have the capacity to do so[76]. Consequently the Act, as presently administered, provides no heritage management facilities beyond this prohibition and MOD does not see either the Act or indeed itself as having a proactive heritage management function beyond this prohibition of unauthorised disturbance. Consequently MOD cannot be viewed as a capable heritage management organisation for in situ Underwater Cultural Heritage[77]. It is also worth noting that, while in this specific instance LCT427 could be protected under the 1986 Act, that Act has no application to wider UCH Cultural Heritage such as civilian vessels[78] and aircraft or manmade flooded structures such as caves. All in all it is difficult to avoid the conclusion that the assertion that the 1986 Act simply duplicates the 1979 Act (and presumably the PWA 1973) appears to have its foundation more in a desire to pass the costs of heritage management

[70] '*Taking to the Water: English Heritage's Initial Policy for The Management of Maritime Archaeology in England'* Roberts, P. and Trow, S. 2001

[71] Ibid. para 7.1

[72] Ibid. para 7.8

[73] Ibid. para 7.9

[74] The unit was scheduled because of it connection to Operation Overlord and that operation's significance to national and world history and also because it was a component of an innovative feat of engineering that made Overlord possible and because of it is is remarkably intact.https://historicengland.org.uk/listing/the-list/list-entry/1415588

[75] For the origins of the Act and subsequent development of policy see '*War Graves and Salvage: Murky waters?*' Williams, M. International Maritime Law (2000) 7(5), pp.151-158 and '*Protecting Maritime Military Remains: A New Regime for the United Kingdom*' Williams, M. International Maritime Law (2001) 8(9) pp.288-298.

[76] The only published archaeological assessment of a wreck protected under the Act was conducted on HMSub A7 by civilian volunteers under the SHIPS project (http://www.promare.co.uk/ships/) See further Holt, P. '*HM Submarine A7 An Archaeological Assessment*' BAR British Series 613 2015 Archaeopress Oxford.

[77] Hereafter 'UCH'.

[78] The 1986 Act can be applied to merchant vessels lost in convoy due to enemy action but not otherwise. See further *R (on the application of Fogg and another) v Secretary of State for Defence* [2006] EWCA CIV 1270 per Sir Anthony Clarke MR at paras. 30 – 37 and Williams, M. '*Merchantman or Quasi-Warship?*' International Maritime Law (2007) 13(2) pp.112-124.

onto another government department rather than in a studied appraisal of the heritage management capacities of the two Acts.

It is also difficult to understand the rationale behind the comments that "… *it is unhelpful to introduce another level of protection in a 'complex zone' where HE's focus is the application of the Protection of Wrecks Act 1973 …* "*and* that there are " … *high costs of assessment and post-designation management*". While the PWA 1973 differs from the 1979 Act in that the former prohibits unauthorised diving or salvage operations directed to the exploration of a designated wreck, the latter does not prohibit access by divers. However both Acts prohibit unauthorised intrusive or damaging activities and in recent years English Heritage sought to increasingly afford public access to wrecks designated under the PWA 1973 by facilitating the grant of Visitor Licences, a policy HE is continuing. Thus in practice the regulatory objectives of the two Acts have increasingly coincided. It is thus difficult to understand why the use of the 1979 Act, on suitably robust sites that can sustain public access, should be any more disadvantageous than use of the PWA 1973. Equally, control of any intrusive activities on scheduled monuments could be regulated by Scheduled Monument Consent, with conditions attached, in the same manner as Licences are granted with conditions under the PWA 1973. Indeed, in that the 1979 Act does not require the processing of Visitor Licences as the PWA 1973 does, the burden of heritage management on HE is eased, while prohibition of intrusion or damage is achieved.

Nor, despite the reference to '*the high costs of assessment and post-designation managemen*t' does there appear to be any significant disparity of costs between the two statutory mechanisms. HE receives archaeological assessments from its diving contractor for archaeological support[79] but it is difficult to see how the costs would not be identical for sites protected under the PWA 1973 or the 1979 Act. Furthermore it would appear that HE has failed to consider how monitoring and survey for Scheduled Monuments could be achieved by use of avocational archaeological volunteers. HE, through its predecessor English Heritage, has considerable experience of using avocational archaeological divers to monitor, survey and even investigate sites designated under the PWA 1973[80]. Avocational teams, licensed annually by HE, conduct such archaeological operations and submit annual reports. Indeed HE can be said to be a world leader in the utilisation of avocational teams, some of whom have achieved results of international significance[81]. Such avocational monitoring and surveying could similarly be utilised in respect of Scheduled Monuments underwater. Monitoring would require no authorisation, while surveying and any intrusive activity could be authorised by Scheduled Monument Consent with conditions attached for submission of annual reports in a comparable manner to the PWA 1973[82]. This avocational resource is of considerable benefit to HE, much more so in the age of public funding austerity which the United Kingdom is currently enduring, and HE's apparent failure even to contemplate its utilisation for Scheduled Monuments below MLWM is all the more disappointing given its extensive use for designated wreck sites under the PWA 1973.

[79] https://historicengland.org.uk/advice/hpg/consent/marinelicensing/

[80] See further Parham, D & Williams, M. '*Public Involvement in Maritime Archaeology*' Proceedings of 3rd International Congress on Underwater Archaeology Henderson, J. (ed.) pp.470-474 RGK: Bonn 2012

[81] As evidenced by the work of the South West Maritime Archaeology Group (http://www.swmag.org/).

[82] S.2(4) permits the attachments of conditions to Scheduled Monument Consent.

Finally the comments that '… *the Marine Planning is beyond the terrestrial planning system and approaches are different*' and that '*protection for such sites is being sought through entry on the Marine Record and the development of a protocol with the Marine Management Organisation*[83]*'* are highly suggestive of an unnecessarily limited and terrestrially focused vision for the use of the 1979 Act. That the legislature intended the 1979 Act to be utilised underwater is beyond disputation[84]. Furthermore the Marine and Coastal Access Act 2009[85], which introduced the new marine planning system, did not in any way amend this intention. Thus the utilisation of scheduling under the 1979 Act is not solely predicated on the nature of either the terrestrial or the marine planning systems and is clearly intended to continue to operate in both the terrestrial and marine spheres, notwithstanding the introduction of the new regulatory framework for marine planning[86]. Nor can it be said that this new marine planning system affords the same degree of protection as scheduling. Marine planning is given effect primarily through the accompanying marine licensing system. A marine licence is now required for a 'marine licensable activity'[87]. While such licensable activities encompass development projects[88], they are subject to a number of significant exceptions[89], such as navigational maintenance dredging by Harbour Authorities[90] and do not encompass damaging activities such as anchoring or the recovery of objects by hand. Consequently the marine planning system, the marine licensing system and the development of protocols with the MMO do not afford the degree of protection that scheduling would do. Furthermore even if damaging or intrusive activities were prohibited by designation under the PMRA 1986, that Act would not provide for heritage management through site monitoring, so unauthorised intrusion or environmental threats such as erosion of the seabed would not be detectable. In short neither entry on the Marine Record nor the development of protocols with the MMO can provide the degree of protection or site management that a more imaginative use of the 1979 Act could afford.

Conclusion

It would appear that as a result of budgetary pressures HE has attempted to amend its policy in relation to scheduling below MLWM so as to use a blanket refusal to consider such an option, irrespective of the individual circumstances of the site in question or the merits of the application to schedule. In doing so HE evolved a policy within a policy, HE's new policy being seemingly based primarily upon the perceived implications for its resources. The resulting dichotomy of policy between DCMS and its statutory advisers is at best confusing to both the marine archaeological community and the public, at worst it may be ultra vires. At times of unprecedented public funding austerity, statutory agencies such as HE need to build support amongst their public constituencies. Formulating such potentially alienating dichotomies of policy does not seem well designed to achieve this.

[83] Hereafter 'the MMO'.
[84] S.61(7)(c).
[85] Hereafter 'MACAA 2009'.
[86] By way of contrast Part II of the 1979 Act, the designation of Areas of Archaeological Importance, applies only to a terrestrial context.
[87] S.65(1) MACAA 2009..
[88] S.66(1).
[89] See further Marine Licensing (Exempted Activities) Order S.I. 2011/409, as amended by Marine Licensing (Exempted Activities) (Amendment) Order 2013 S.I. 2013/526.
[90] Article 18A Marine Licensing (Exempted Activities) Order S.I. 2011/409, as amended.

The 1979 Act also appears to offer a versatile instrument for managing underwater sites. Indeed on suitably robust sites the 1979 Act may fit HE's public access agenda better than the PWA 1973, delivering the public access that HE desires, without the resources that Visitor Licences under the PWA 1973 demand. Moreover there seems little reason why it could not be used in conjunction with avocational resources in a similar manner to the PWA 1973 This then throws into question HE's 'focus' on the PWA 1973 below the MLWM. The potential of the 1979 Act below the MLWM may have been inadvertently overlooked and a comparative reappraisal of the two Acts by HE may now be appropriate.

Finally both this matter and the *McMorn* case have revealed a surprisingly and somewhat disturbing lack of awareness in statutory agencies of the constraints imposed upon the formulation of policies by the basic principles of Administrative Law (the Law of decision – making). This is a disturbing lacuna with civil and public servants which the authors have noticed in other contexts. As austerity continues and public funding becomes even more restricted, stakeholders are likely to turn even more frequently to a potential judicial review process to protect what they view as priorities for continued funding. Such challenges, based upon Administrative law, to policies driven by financial constraints may therefore become even more prolific. It may well be the case that staff development programmes in the public sector could beneficially incorporate awareness training in the basic tenets of Administrative Law.