

A SEA CHANGE: A MARINE BILL WHITE PAPER

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

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



June 2007

Introduction

The Joint Nautical Archaeology Policy Committee (“JNAPC”) welcomes the opportunity to respond to the consultation on the Marine Bill White Paper.

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 historic importance should receive no less protection than those on land. Some summary information on the JNAPC and its members is attached in appendices 1 and 2.

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 the Salvage and Reporting Working Group.

All of these reports and other documents drew attention to the deficiencies of the administrative and legislative frameworks surrounding the protection and conservation of the marine historic environment (MHE) and made recommendations to improve those frameworks and achieve comparable protection for the MHE to that enjoyed by its terrestrial counterpart. Within the UK’s commitment as a result of relevant European and international obligations¹ we would draw your attention to the *European Convention on the Protection of the Archaeological Heritage (revised)*² the *Valletta Convention*, 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;

¹ para. 1.23/p.9.

² European Convention on the Protection of the Archaeological Heritage (revised) (ETS no.143). Hereafter ‘the Valletta Convention’.

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;*

In its response to the 2006 consultation on the Marine Bill the JNAPC strongly supported the introduction of statutory Marine Spatial Planning (MSP) and a Marine Management Organisation (MMO), together with a streamlining of the present sectoral consent system. In its response to the 2006 consultation on Integrated Coastal Zone Management in the same year the JNAPC stated its belief that ICZM will be a fundamental tool of MSP and will be one of the mechanisms whereby the UK discharges its international obligations under the Valletta Convention in respect of the archaeology of the coastal zone.

If adequately resourced, the holistic principle underlying the proposals in the Marine Bill White Paper will address what many in the archaeological community presently feel is a disproportionate emphasis upon protection of the natural environment, leading to the apparent exclusion of appropriate discussion and consideration of the archaeological environment in the development of coastal policy. These proposals will also address the democratic deficit in the present marine sectoral consent system, where, in comparison to terrestrial spatial planning, there is inadequate provision for local democratic participation and accountability. In saying this, the JNAPC would not wish to be seen to be denying the importance rightly afforded to the conservation of the natural environment, but rather that appropriate protection must also be afforded to marine cultural heritage.

The JNAPC therefore wishes to congratulate the Department for issuing this White Paper and for the emphasis placed by the document on the importance of conserving the Underwater Cultural Heritage (UCH).

The JNAPC wishes to make the following comments:

Comments

Introduction

We welcome the strategic goal to increase the understanding of the marine environment including the cultural marine heritage³ and the undertaking to review the impact of the Heritage Protection White Paper⁴ on the proposed legislation.

Section 4 Planning in the Marine Area

The JNAPC strongly endorses the concept of a Marine Policy Statement agreed by all UK Government Departments, setting out clearly and concisely short and long term

³ p.6.

⁴ p.10.

objectives.⁵ The JNAPC regards it as essential that the objective of conserving the UCH is clearly stated to be one of these objectives. We believe that the conservation of UCH should be expressly articulated as an objective; not because it wishes to advance a narrow sectoral interest but because it is very much aware that the marine conservation agenda has traditionally been driven by and associated with the objective of conservation of the natural, as opposed to the cultural, marine environment. Consequently, awareness of the need and the UK's legal obligation to conserve the MHE is often lost sight of when 'holistic' objectives for the marine 'environment' are being formulated.

It is correct to state that the balance and relevant priority between different policies need to be evaluated. In this context it is important that in explaining the policies and priorities for the MHE the efficiency and low financial cost of taking UCH into account at the earliest stages in any development process is emphasised.⁶ Many stakeholders in the development process equate conservation of the MHE with major intrusive excavations, typified by projects such as the *Mary Rose*. In practice conservation of the MHE is characterised by preservation *in situ* by avoidance or mitigation strategies, with marginal costs to the development. Experience has shown that developers are content to accommodate this, often beyond their legal obligations, provided that such conservation requirements deliver certainty by being incorporated into the initial stages of the development process. This reality needs to be articulated when the marine policy for the MHE is promulgated.

The JNAPC notes with interest that spatial planning would extend from Mean High Water Springs (MHWS) to the limits of the United Kingdom's (UK's) Continental Shelf.⁷ This is appropriate but unfortunately such spatial planning will, in terms of conservation of the MHE, be somewhat handicapped by the fact that the UK has, to-date, declined to adopt any of the mechanisms brought to its attention for exercising jurisdiction over UCH beyond 12 nautical miles from the UK's baseline, including the application of the Valletta Convention to such waters. The UK appears to be putting itself in the somewhat perverse situation that it is spatially planning for waters from 12 nautical miles out to, in some areas, 200 nautical miles and this spatial planning will include the objection of conserving the MHE, yet it is electing not to apply a significant international Convention, to which it is a party, beyond 12 nautical miles. The inconsistency of this approach is a matter, which the JNAPC would wish Defra to consider in conjunction with DCMS.

Paragraph 4.52 gives examples of issues to be considered in future plans. We think it is very important that the definition of marine historic assets should include reference to submerged land sites and cultural deposits on the seabed, and not just be focused on wrecks.

⁵ paras. 4.15 & 4.18 – 4.23/pp. 21-22.

⁶ The JNAPC endorses the statement to this effect in para. 4.55/p.30.

⁷ para. 4.45/ p.27.

In relation to marine plans, the White paper states that “ ... relevant Ministers and government departments ... ” will have an input.⁸ The JNAPC is concerned about how the marine plans will be interpreted by other Government Departments and how they will sit alongside their other priorities. The JNAPC recommends that the Heritage Agencies and the Crown Estate should be statutory consultees and should have an input at the earliest opportunity. The JNAPC also assumes that the consultation of ‘stakeholders’ in respect of marine plans will include non-governmental organisations (NGO’s).⁹ The JNAPC welcomes Defra’s intention to consult DCMS, Crown Estate and English Heritage in drawing up plans.¹⁰

It is unclear from the White Paper whether there would be consultation on the economic, environmental and social appraisal of sustainability during the preparation of a draft plan, as well as on the draft plan itself.¹¹ Since the appraisal will greatly influence the substance of the draft plan it would seem advisable that there is the fullest consultation on the appraisal itself. Such early consultation will inform the planning process and avoid having to revisit issues at the later stage of consultation on the resulting draft. Not only would this lead to greater efficiency and cost savings in the planning process but would also greatly strengthen both the credibility of the Government’s strategy of stakeholder consultation and the sense of ‘ownership’ of the marine plans by stakeholders and local communities. There is also an issue of the integration of the marine plans alongside other plans and how potential conflicts will be dealt with, especially in the coastal zone.¹²

The JNAPC is of the view that the UK Marine Policy Statement and relevant marine plan should be a statutory material consideration for the purposes of decision making in any licensing regime affecting the marine environment¹³, in a similar manner to development plans in terrestrial land use planning. In determining any application for consent a regulator should be under a statutory duty to have regard to both the provisions of the Statement and any relevant plan and the desirability of conserving both the natural and historic marine environments. Unless such robust statutory duties are placed upon regulators, in a similar manner to those already imposed upon local planning authorities in a terrestrial context, it will be difficult for the Government’s proposals to enjoy a comparable level of confidence amongst stakeholders to that which the terrestrial land use planning system currently enjoys. The JNAPC also considers that such statutory obligations should be extended to all regulators across all consent regimes in the marine environment and not just those indicated in para. 4.90 /p.36.

In relation to guidance to the MMO, the JNAPC believes there is a need to ensure that the importance of conservation of the MHE is adequately reflected in such guidance. It is also important that stakeholders from the marine historic community are represented on planning steering groups, alongside other stakeholders.¹⁴

⁸ para.4.57/p.30. See also para.4.64.

⁹ para.4.58/p.30.

¹⁰ para.4.64/p.31.

¹¹ para.4.60/p.31.

¹² para.4.75 – 4.83/pp34 – 35.

¹³ para.4.85/p.35.

¹⁴ See further paras.4.101-4.104/pp.38-39.

Section 5 Licensing in the Marine Area

The JNAPC endorses the principle of ‘*one project: one licence*’¹⁵, which is economically and administratively efficient for all regulators, developers and stakeholders. The JNAPC has already drawn attention to the importance of ensuring that the desirability of conserving the MHE is a statutory material consideration to which all regulating authorities must have regard when determining consent applications in the marine area. Such a duty would not be one of *preservation*, but of *conservation*. As opposed to *preservation*, which requires that something is retained in its original state, *conservation* requires that an object may be kept in an altered state or indeed that the information from the object, but not the object itself, is retained and made available. Conservation would therefore encompass alternative strategies such as avoidance, mitigation of disturbance or recording, and is correspondingly less demanding of resources.

The JNAPC particularly welcomes the proposal to regulate all forms of dredging.¹⁶ In August 2006 the JNAPC responded to the Consultation on Draft Marine Minerals Dredging Regulations & Procedural Guidance, issued by the Department for Communities and Local Government. In its response the JNAPC strongly supported the principle of placing marine minerals dredging in English waters on a statutory footing and welcomes the inclusion of the protection of the MHE as one of the objectives of this new regulatory framework. The control of dredging by other sectoral consent regimes was beyond the remit of that consultation but the proposal to streamline the rather Byzantine complexity of parallel and sometimes overlapping regulatory regimes in the inter-tidal and marine zone is most welcome.

The JNAPC welcomes the changes to the scope of marine licensing.¹⁷ In relation to licensing applications the JNAPC would reiterate the view that the Heritage Agencies should be statutory consultees and all regulators in the marine area should be under a statutory duty to have regard to the desirability of conserving the MHE when determining licence applications.¹⁸ The JNAPC also recognises that licensing decisions must be made in a timely and cost effective manner, in order not to stifle the economic environment, upon which all activities in society, including the conservation of the MHE, ultimately depend.¹⁹ Experience and dialogue with maritime developers has consistently demonstrated that conservation of the MHE and speed of development are not incompatible objectives; indeed they are perfectly compatible when considerations relating to the MHE are taken into account during the planning and outset of the development process. What is both time consuming and costly for developers is when there is a failure to do this, leading to unexpected discoveries, unplanned delays, additional costs and resulting uncertainties over the subsequent timescale. Ensuring that it is mandatory for the MHE is taken into consideration as an initial process provides

¹⁵ para. 5.17/p.45.

¹⁶ paras.5.31-5.32/p.47.

¹⁷ para.5.73/p.53.

¹⁸ See further para.5.42/p.49.

¹⁹ para.5.45/p.49.

protection and certainty for developers as well as the MHE. For this reason it is important to ensure that when creating exemptions from the licensing process²⁰, that environmental protection, including that for the MHE is adequately incorporated, if necessary by way of deemed conditions operative in every exemption.

In its response to the 2006 consultation on the Marine Bill the JNAPC, in common with many stakeholders, strongly supported the concept of a single licensing scheme for all sectors, including the oil and gas regime. It therefore notes with disappointment that the Government proposes to continue with a separate consent regime for oil and gas.²¹ It appears to the JNAPC that all the considerations which supported the combining of the various sectoral consents apply with equal vigour to the oil and gas sector and there appears to be no compelling reason why, short of narrow sectoral interest on the part of the industry and the DTI, why this sector should not be combined with other sectors in a common regulatory mechanism. The difficulties of providing a holistic regulatory environment and ease of access and participation for stakeholders will not be eased by this decision and the JNAPC would urge that this proposal be reconsidered.

The proposed reforms to the licensing system seem compromised by the extent of the exclusions, especially those by Harbour Authorities and the Department for Transport. The JNAPC considers that it is essential that statutory undertakers and authorising bodies, such as Harbour Authorities, are placed under a statutory duty to have regard to the desirability of conserving the MHE when either undertaking or authorising works.²² The JNAPC is conscious of the fact that many private harbour Acts already impose such statutory duties in relation to the natural marine environment but have no equivalent provision in relation to the MHE. The Marine Bill and the new regulatory provisions for local harbour authorities represent an opportunity to address this deficiency, placing protection for the MHE on an equivalent footing to that enjoyed by the natural marine environment. The JNAPC also considers it advisable to make the Heritage Agencies statutory consultees in respect of new legislative arrangements for harbours.

In respect of the operation of the Transport and Works Act 1992 the JNAPC notes the proposal that this legislation is to remain in place²³. The JNAPC strongly endorses the department's caveat that "... equivalent consideration of environmental ... issues ..."²⁴ must be made and anticipates that such issues would encompass the MHE. The JNAPC would wish to have an opportunity to comment upon the draft of any guidance that it is proposed to issue in respect of the future operation of the 1992 Act.

²⁰ paras.5.49-5.50/p.50.

²¹ paras.5.90-5.93/p.56.

²² paras.5.105-5.108/pp.59-60.

²³ paras. 5.112-113/p.60.

²⁴ *ibid.* para.5.113.

Section 6, Marine Nature Conservation

Whilst the JNAPC welcomes the introduction of Marine Conservation Zones (MCZs) we are disappointed that no effort has been made to integrate marine cultural heritage in these zones. This is a missed opportunity to take the holistic approach to protect both the natural and the historic marine environments. It is most important that the presence (or potential presence) of marine historic assets be considered in MCZs and that any legal restrictions imposed on MCZs should not discriminate against underwater archaeology or limit recreational diving (unless already restricted as a result of designation under the Protection of Wrecks Act 1973 or the Protection of Military Remains Act 1986).

We understand that the aims of MCZs are directed to sustaining marine biodiversity and ecosystems and clearly this will be their principal purpose. However we do have concerns about the 'gap' in protection for the marine historic environment and that its contribution to marine ecosystems is not recognised in the White Paper. The measures to protect 'marine historic assets' proposed in the Heritage Protection White Paper will not extend outside the 12 nautical mile limit and will not provide protection, for example, for extended areas of buried prehistoric landscapes. Some marine activities, such as certain types of fishing, dredging and other activities on the sea bed, could adversely affect vulnerable sites and submerged landscapes and should be excluded from their vicinity. It will be extremely difficult to monitor or regulate some of these activities on a site by site basis but their inclusion within MCZs offers an alternative mechanism, and in some case the only one, for managing their conservation. Cultural features of the seabed, such as groups of wrecks and submerged harbour structures, offer unique ecosystems in their own right and can make an important contribution to biodiversity. The White Paper notes²⁵ that if an area is also important for reasons such as special archaeological or historic interest this may be a relevant factor in the selection for protection. We are pleased to see this and would very much like to see it more explicitly stated as making a net contribution to biodiversity and marine ecosystems as well.

Section 8 A Marine Management Organisation

The JNAPC welcomes the proposal to establish a MMO and would wish to see stakeholders with an interest in the MHE represented on the Marine Planning Steering Groups²⁶ and on the MMO Board itself.²⁷ The JNAPC also believes that in exercising its functions and powers the MMO should be under a statutory obligation to have regard to the desirability of conserving both the natural and the historic marine environment, in a similar manner to comparable duties already placed upon other statutory regulatory bodies and statutory undertakers. Otherwise, being a statutory body, such considerations would be *ultra vires* and the MMO could not lawfully take such matters into consideration.

²⁵ para 6.43/pp.74 – 75.

²⁶ para.8.36/p.131.

²⁷ para.8.103/p.142.

The success of the Marine Planning carried out by an MMO²⁸ will depend on the availability of high quality data from a comprehensive seabed mapping programme. Planners and regulators should have access to the best available information since management of the natural and historic environment resource cannot realistically be undertaken until planners know exactly what is on the seabed. The rapid development of a comprehensive seabed mapping programme is therefore a pre-requisite for effective marine planning. The technology currently exists to do this and the work needs to be carried out to a level of resolution that will capture archaeology on the seabed, be it wreck or potential prehistoric land surfaces.

The JNAPC welcomes the confirmation that the MMO will take advice from the relevant Heritage Agencies when discharging its functions.²⁹ Again, the JNAPC notes with interest that the MMO will require advice from the Heritage Agencies in relation to the MHE situated beyond the 12 nautical mile limit, in order to “... *ensure that protection of the historic environment is given adequate consideration ...*”³⁰. Defra will be aware that English Heritage has no remit beyond 12 nautical miles and that there is no Government body or department that has responsibility for the MHE out to the limit of the UK’s jurisdiction. Furthermore the Government, through DCMS, has elected not to apply the Valletta Convention beyond the 12 nautical mile limit in respect of the MHE, and the JNAPC seeks clarification as to exactly what protective powers it is envisaged that the MMO will possess, given that the UK government presently appears to have none.

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²⁸ para.8.30 -8.38/pp.130 – 131.

²⁹ para.8.124/p.145.

³⁰ para.8.125/p.145.

Appendix 1

JOINT NAUTICAL ARCHAEOLOGY POLICY COMMITTEE

THE JNAPC - PAST, PRESENT AND FUTURE

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

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

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

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

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

recommendations for legal and administrative changes to improve protection of the UK's underwater cultural heritage.

The JNAPC has played a major role in English Heritage's review of marine archaeological legislation and in DCMS's consultation exercise *Protecting our Marine Historic Environment: Making the System Work Better*, and was represented on the DCMS Salvage Working Group reviewing potential requirements for new legislation. The JNAPC has also been working towards the ratification of the UNESCO Convention with the preparation of the *Burlington House Declaration*, which has been presented to Government in 2006.

Appendix 2

Joint Nautical Archaeology Policy Committee

Members

Chairman

Robert Yorke

Organisations

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

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 Gill Chitty
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