

**Consultation on Draft Marine Minerals Dredging Regulations and
Procedural Guidance**

Department for Communities and Local Government

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



August 2006

Introduction

The Joint Nautical Archaeology Policy Committee (“JNAPC”) welcomes the opportunity to respond to the Draft Marine Minerals dredging Regulations & Procedural Guidance.

The JNAPC was formed over eighteen years ago 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 marine aggregates as much as terrestrial. 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; prehistoric traces of humans and animals in Morecambe Bay; Seahenge and submerged forests in the Severn estuary.

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)*¹ (“the Valletta Convention”), which the UK has ratified. This convention seeks to ensure that any development project must safeguard or mitigate against any damage to the archaeological heritage. In particular Article 5 of the Valletta 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;*

In the context of ‘development’ by marine mineral dredging these draft regulations will provide the mechanism by which the UK discharges its international obligations under the Valletta Convention. JNAPC therefore wishes to congratulate the Department for issuing this Consultation Document. We believe that this Consultation Document is a major step forward in seeking better management of marine minerals dredging and thus better protection of the marine environment, including the marine cultural, environment.

The JNAPC would like to make certain generic comments and give answers to those questions that it believes are relevant to its area of expertise.

The JNAPC strongly supports the principle of placing marine minerals dredging in English waters on a statutory footing and welcomes the inclusion of the protection of UCH as one of the objectives of this new regulatory framework. Although the control of dredging by other sectoral consent regimes is beyond the remit of this consultation, the rather Byzantine complexity of parallel and sometimes overlapping regulatory regimes in the inter-tidal and marine space is noted. To that extent the streamlining of marine consents, which was the subject of the recent consultation on the Marine Bill, is strongly

¹ European Convention on the Protection of the Archaeological Heritage (revised) (ETS no.143). Hereafter ‘the Valletta Convention’.

supported by the JNAPC and we hope that the Department for Communities and Local Government will lend its support to the streamlining proposals.

A. Draft Marine Minerals Dredging Regulations

Subject to the observations made below the JNAPC believes the scope of the regulations is broadly correct but it has reservations over the exemption granted to defence projects.

1. Questions 1 & 2 and associated comments

The regulations adopted should be uniform throughout the United Kingdom, even though there are three separate consultations.

The regulations should apply to Part 1, Introductory 2b (Harbours) as major archaeological deposits are to be found inshore and in our harbours. e.g. Princess Channel Wreck in the Thames estuary

The proposed regulations need to be flexible enough to include proposals from the forthcoming DEFRA "Marine Bill". (e.g. the possibility of marine parks and World Heritage Sites).

2. Reg. 5 Exemptions

The JNAPC notes with concern that a project that comprises or forms part of a project that serves national defence purposes would be exempt simply if the application of the regulations would have an 'adverse' effect on these defence purposes (Reg. 5 (2)).

Any regulatory framework, which by its inherent nature imposes checks and balance upon a developer's freedom of action, can be said to have an 'adverse' effect on the development project. To simply state that a development is exempt from the regulations because of an 'adverse' effect is to set the threshold far too low.

We would also draw your attention to a recent application of the Valletta Convention in the context of marine dredging. The MOD proposed dredging a deeper navigable channel in Portsmouth harbour adjacent to the site of the *Mary Rose*, a historic wreck protected under the *Protection of Wrecks Act 1973*. Acting upon legal advice the Mary Rose Trust successively required the MOD under the Valletta Convention to fund migrating works at the cost of over a million pounds sterling. We have no doubt that the MOD regarded this additional and substantial expenditure as having an 'adverse' effect upon the project.

Where interests of national defence are concerned it is clear that provision must be made for exemption, but such exemption should be made upon the basis of genuine emergency, not simply upon that of adversity. Consequently, we would wish to see Regulation 5(2) amended so that the UK continues to meet its international obligations in all circumstances except those of genuine national emergency.

3. Reg. 6 Preliminary determinations of the regulator

Reg. 6 (6) stipulates that the regulator shall have regard to selection criteria, including those set out in Schedule 2 to the regulations. Unfortunately Schedule 2 appears to contain a number of criteria, which could be usefully revised for the seabed environment. These are :

- para.2 (a) – the term ‘*existing land use*’ could be amended to say ‘*existing land or seabed use*’;
- para.2(c)(iii) –the term ‘*mountains and forest areas*’ appears not to be relevant to the seabed environment; this could be amended to say ‘*the seabed*’
- para2(c)(viii) – The term ‘*landscapes of historical, cultural or archaeological significance*’ should be expanded to include known and potential sea-bed landscapes and sites of historic importance such as wrecks of aircraft, vessels or amphibious vehicles. We suggest this terminology be amended to ‘*sea-bed landscapes and site of known and potential historical, cultural or archaeological significance*’ . Such an amendment would be in accordance with what has been termed the ‘precautionary principle’ and which is considered internationally to represent best practice in terms of mitigating the impact of development upon cultural and archaeological best practice.

4. Reg. 7 Opinion of the regulator as to the content of the environmental statement

Reg. 7 and Parts 1 and 2 of Schedule 1 govern the contents of the environmental statement. Part 2 of Schedule 1 sets out particular aspects of the project that must be described in the statement. Para. 3 of Part 2 refers to, inter alia, “ ... *material assets, including the architectural and archaeological heritage, landscape ..* ”.

We are of the opinion that, given the marine context, this section should be revised as follows: “ ... *material assets, including the architectural heritage, known and potential archaeological heritage, landscape and sea-bed landscape ..* ”. We also feel that reference should be made to the potential of undiscovered elements of the archaeological heritage being present. For instance, this is particularly important when considering works affecting offshore sandbanks which have posed navigational hazards throughout time, as typified by the Goodwin, Helwick and Scarweather sands, to name but a few, which undoubtedly contain many undiscovered wrecks and sites of great historic significance.

5. Reg. 12 Decisions on applications

Regulation 12 (7) permits the imposition of conditions upon any grant of permission. We assume that in relation to UCH that there will be a form of generic conditions, which will be imposed in every grant and that the Secretary of State will take advice from the relevant Heritage Agency in formulating such conditions. In addition, we assume that specific conditions, tailored to the particular project in case will be imposed from time to time.

The imposition of conditions will be one of the principal means by which the UK discharges its international obligations under the Valletta Convention. Consequently, the terms of such conditions must be sufficiently comprehensive and robust so as to confer effective protection upon the UCH and to permit the UK to discharge these obligations. In the particular context of conditions attaching to permissions for marine mineral dredging we would draw your attention to the following provisions of the Valletta Convention:

Article 2iii

A system must be provided for the mandatory reporting to the competent authorities chance discoveries of elements of the archaeological heritage;

Article 3

- a procedure must be provided for authorising and supervising archaeological excavations and other activities to prevent illicit removal of the archaeological heritage (*Art. 3(i)(a)*);
- it must be ensured that archaeological excavations are undertaken in a scientific manner using non-destructive methods wherever possible and that elements of the archaeological heritage are not left uncovered or exposed during or after excavation without provision being made for their proper preservation, conservation and management (*Art. 3(i)(b)*);
- excavations and other potentially destructive techniques can only be carried out by qualified, authorised persons (*Art. 3(ii)*).

Article 4

Provision must be made for:

- the conservation and maintenance of the archaeological heritage, preferably in situ (*Art.4(ii)*);
- the appropriate storage for archaeological remains which have been removed from their original location (*Art.4(iii)*);

Article 5

The UK is required:

- to seek to reconcile and combine the respective requirements of archaeology and development plans by ensuring that archaeologists participate in the various stages of development schemes (*Art.5(i)(b)*);
- to ensure that archaeologists and planners] systematically liaise to permit the modification of developments likely to have adverse effects on the archaeological heritage and that sufficient time and resources are allocated for the appropriate scientific study of any archaeological heritage (*Art.5(ii)(a),(b)*) ;
- to make provision, when elements of archaeological heritage have been found during development, for their conservation in situ when feasible (*Art. 5 (iv)*);

Articles 6 & 7

The UK has undertaken to:

- increase material resources for rescue archaeology (*Art. 6(ii)*);

- ensure provision is made, from either public or private funds, to cover the total costs of archaeological rescue operations (*Art. 6(ii)(a)*);
- take all practical measures to ensure a scientific summary record is made publishable (*Art. 7(ii)*);

What in essence the Valletta Convention requires, in the context of marine mineral dredging, is that protection of underwater cultural heritage by making it an integral part of the development process and that provision is made for full cost funding of the archaeological process, from initial planning through to study of any discovered UCH, its conservation, either in situ or by removal, and publication of the results of that study. This has the potential to impose significant costs as a price of the development and these are highly unlikely to be met by public funds. Consequently, it is assumed that these obligations will need to be discharged by the imposition of conditions upon the developer, presumably on the basis that the ‘developer pays’, in a similar manner to that for terrestrial development under PPG 16. The use of conditions attaching to permissions will therefore be a strategic element in protecting the UCH in marine mineral dredging development schemes, thus facilitating the UK’s discharge of its international obligations.

B. Draft Procedural Guidance (Marine Mineral Guidance Note 2)

1. Para.2.7(viii) of the Guidance Notes requires that the Environmental Statement should contain a detailed analysis of the potential effects of the proposed development upon ‘archaeological sites’. As observed above, much of the UK’s extensive UCH remains to be located. The use of the term ‘archaeological sites’ may lead the reader into concluding that attention should only, or predominantly, be paid to known UCH deposits or even designated or scheduled sites. In fact the reverse is true, in that where the presence of UCH is already established appropriate account can be made of it. By far the greater challenge for the statutory framework surrounding marine mineral dredging is protecting hitherto undiscovered UCH. The JNAPC considers that the wording in Para. 2.7(viii) should be amended to encompass the potential for previously unknown UCH. We should suggest that the wording in question be amended to “*the existence or likely existence within the area of elements of the historical, cultural or archaeological heritage and their significance*”. This would also reflect best practice in terms of the application of the precautionary principle, referred to above in the JNAPC’s observations on draft Regulation 6.

2. Para.3.2(i) reflects the present wording of Regulation 5(2). If the JNAPC’s observations on the exemption for defence projects are accepted a consequential amendment will be required to Para. 3.2(i) of MMG2.

3. Reference to Question 6

The JNAPC does not agree that extraction of less than 5,000 tonnes should automatically not require dredging permission. The current proposal to allow this unless within 5km of an ancient monument or an identified wreck has a number of problems. As pointed out

earlier there are only 70 protected wreck sites (the equivalent of ancient monuments) and thousands of historic wreck locations are not known. The current proposal, therefore, will provide little or no protection for the UCH. The proposal also does not take into account the potential existence of submerged land surfaces and prehistoric human habitations on the seabed. We do not believe that a dredging operation that does not take account of UCH should be permitted.

At the current time the heritage agencies only have a remit out to the 12 mile limit and the regulations will go out to the 200 mile limit. The responsibility for, and the process of, assessing the UCH for dredging application beyond the 12 mile limit needs to be addressed and the maritime aspect of the National Monuments Record of English Heritage needs to be extended along with the equivalent records of Scotland, Wales and Northern Ireland.

4. Para.3.10 of MMG2 states that the Secretary of State is likely to take the view that most dredging proposals of less than 5000 tonnes are not likely to require an EIA and dredging permission unless the dredging is, inter alia, located within 5 kms of “ a designated ancient monument or identified wreck site”. In view of the likely extent of the UK’s UCH that remains unlocated, the JNAPC recommends that a formal assessment should be made of the archaeological potential of the proposed dredging area to contain previously undiscovered UCH and that this assessment should be used by the authorities in determining whether specific permission is needed for dredging operations of less than 5000 tonnes. The incorporation of such an amendment would also reflect best practice in respect of the precautionary principle, referred to in the JNAPC’s observations on draft Regulation 6.

5. Para. 7.1 indicates why a dredging permission might be varied or revoked by the Secretary of State. One of the illustrative reasons given is “any other unforeseen reason.”. The JNAPC considers that it may be helpful to elaborate this reason by giving illustrative examples e.g. the discovery of previously unknown UCH.

6. The JNAPC wishes to make two further observations in relation to MMG 2.

6.1 The JNAPC considers that it may be useful to developers and other persons engaged in formulating marine dredging proposals if MMG 2 were to contain a clear and succinct explanation of the provisions of the Valletta Convention, the UK’s obligations there under and the resulting need to protect UCH and for developers to fund the archaeological process through from survey to, if applicable, conservation and publication. Such knowledge has not, to-date, been widely disseminated by relevant government departments. Participants in the development of marine minerals dredging proposals cannot necessarily be taken to be aware of the reason for such obligations. Support for and compliance with such obligations will be strengthened by an understanding and appreciation of the UK’s international obligations.

6.2 In this context reference might also usefully be made to the recently developed Code of Practice for Seabed Development, which was developed by the JNAPC, published by the Crown Estate and endorsed by the British Marine Aggregate Producers Association.

6.3 It may also be helpful to participants in the formulation of development proposals for marine minerals dredging if MMG2 were to draw attention, in a brief and succinct manner, to those parts, together with their functions, of the principal legislation relating to UCH i.e. Protection of Wrecks Act 1973, Ancient Monuments and Archaeological Areas Act 1979, Protection of Military Remains Act 1986 and Part IX Merchant Shipping Act 1995. Several short but informative outlines already exist, many of which the JNAPC has drafted or assisted with their drafting, but they are perhaps are not conveniently accessible to such a specialised audience. The JNAPC would be pleased to assist the Department with the identification of such texts and their variation for this purpose.

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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 for the Protection of the Underwater Cultural Heritage with the preparation of the *Burlington House Declaration*, which has been presented to Government.

Joint Nautical Archaeology Policy Committee

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Chairman

Robert Yorke

Organisations

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 Hampshire & Wight Trust for Maritime Archaeology
 Institute of Conservation
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