ENGLISH HERITAGE

Marine and Coastal Access Bill Licensing Team
Department for Environment, Food and Rural Affairs
Area 2C, Nobel House
17 Smith Square
London SW1P 3JR

21st September 2009

Dear Sir/Madam,

Consultation on secondary legislation for England and Wales under the Marine and Coastal Access Bill: Part 4 Marine Licensing

Thank you for this invitation to comment on the proposed framework for secondary legislation to deliver the revised marine licensing regime under the Marine and Coastal Access Bill.

Introduction

English Heritage is the UK Government's statutory adviser on all aspects of cultural heritage including the English area of the UK territorial seabed, as provided for under the National Heritage Act 2002. English Heritage is an Executive Non-Departmental Public Body sponsored by the Department for Culture, Media and Sport and we report to Parliament through the Secretary of State for Culture, Media and Sport. In the delivery of our duties we work in partnership with central government departments, local authorities, voluntary bodies and the private sector to conserve and enhance the historic environment; broaden public access to the heritage; and increase people's understanding of the past.

We aim to carry out our duties within the framework of a set of *Conservation Principles*. These principles apply equally to the marine as to the terrestrial sphere and can be summarised as follows:

- The historic environment is a shared resouce
- Everyone should be able to participate in sustaining the historic environment
- Understanding the significance of places is vital
- Significant places should be managed to sustain their values
- Decisions about change must be reasonable, transparent and consistent
- Documenting and learning from decisions is essential

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Our responsibility under the Protection of Wrecks Act 1973, within the English area of the UK Territorial Sea, is to consider applications and recommendations for designation, re-designation and de-designation of shipwreck sites. On the basis of our advice the Secretary of State is responsible for designating restricted areas around sites which are, or may be, shipwrecks (and associated contents) of historic, archaeological or artistic importance. The Secretary of State is also responsible for the issuing of licences to authorise certain activities in restricted areas that otherwise constitute a criminal offence. At the end of the Committee's reporting year in March 2009 there were 46 sites designated within the English area of the UK Territorial Sea. Further information on the designated sites is available on the English Heritage web site: www.english-heritage.org.uk/maritime.

The Marine Historic Environment

The number of protected historic shipwrecks is very small (ranging from possible prehistoric seafaring craft with associated cargos through to prototype submarines) and they are only one aspect of English Heritage's interests in promoting the understanding, management and public enjoyment of the historic environment. It is therefore important for us to describe the marine historic environment as also comprising submerged and often buried prehistoric landscape areas and elements, together with archaeological sites and remains of coastal activities (e.g. fish traps) dating from all eras of history. As on land, notably through spatial planning, we consider it essential to ensure the management and use of the full range of the historic environment, is conducted in a manner that best serves the public understanding and enjoyment of the whole, and not just of the designated and protected sites.

We must add that we are supportive of the High Level Marine Objectives (*Our seas – a shared resource*) published in 2009 by the UK Government and Devolved Administrations which demonstrates a commitment to an "effective, integrated and strategic management of human activities in the marine environment…" We see these objectives as an essential step in the process of actively seeking a holistic approach to marine management which is central to a Marine Policy Statement. Consequently, we value the attention paid to marine cultural heritage and that a long term view is taken to promote appropriate management of this resource as a component of a healthy, productive and biologically diverse marine environment. In this regard we are pleased to see compatibility between these high level objectives and Defra's Strategic Goals for the Marine Environment "to increase our understanding of the marine environment, its natural processes and our cultural marine heritage and the impact that human activities have upon them" (source: Defra, 2005 *Safeguarding Sea Life: the joint UK response to the Review of Marine Nature Conservation*).

Summary of response

We support the Government in its ambition to amend the present marine licensing legal regime to deliver a mechanism which draws together the requirements of the Coast Protection Act 1949 and Food and Environment Protection Act 1985 with the Marine Works (Environmental Impact Assessment) Regulations 2007 and the Environmental Impact Assessment and Natural Habitats (Extraction of Minerals by Marine Dredging) Regulations 2007. We also support the opinion of the Government to initiate a separate consultation exercise for any modification of the Harbours Act 1964 and Electricity Act 1989. However, we have identified a number of important matters to do with licensing activities directed at the marine historic environment which we would like to discuss further; these matters are identified as follows:

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- In the text under "routes through pre-application" reference is made to 'regulatory requirements…to be satisfied before the application can be properly considered…' by this statement it would seem that once any form of 'regulatory requirement' is trigged the case should be considered an application. The only matters that should be considered 'pre-application' should be general enquires about whether a licence is actually required in the first place i.e. an applicant checking if their proposed works are exempt or in accordance with the plan etc.

- It should also be considered that classing an area of work as "pre-application" might generate an attitude where such participation is considered of lesser importance, or even voluntary, and that with limited time and resources the effort of consultees will become focused on dealing only with 'applications'.

- We noticed under "Role of marine planning in pre-application" the following statement: "If the development is in a region that has a marine plan in place then the plan will play an important part in pre-application." We must therefore ask if there will be regions where there is no marine plan by design, and if so what is the relevance of a 'pre-application' stage for such regions?

- Under "What else should be exempt?" the text states that the UK is not permitted "…to license removal of underwater cultural heritage from specific sites and beyond 12 nautical miles…" we recommend that this position is clarified because we understand that the UK is fully entitled to licence removal of 'underwater cultural heritage' from specific sites, such as those designated under the Protection of Wrecks Act 1973 within the UK Territorial Sea. We also require further clarification on any exemptions that might be applicable to "State vessels and aircraft".

We have set out in the following appendix our responses to the consultation questions and we look forward to working further with the Government to help ensure effective delivery of the proposed new marine licensing system.

Yours faithfully,

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Marine Planner

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APPENDIX 1: Responses to the consultation questions

Question	Comment
1	Yes – the requirements of the Environmental Impact Assessment Directive should be transposed into the main marine licensing process.
2	Yes – if practical to do so an attempt should be made to transpose the requirements of the Habitats and Birds Directive into the main marine licensing process.
3	We participate in the process as a consultee to the regulator and we find the open exchange regarding the setting of licence conditions, under the Food and Environment Protection Act (FEPA) 1985 regime, to be an essential part of the process.
4	We participate in the process as a consultee to the regulator and we consider the some key weaknesses in both Coast Protection Act (CPA) 1949 and FEPA to have been addressed in primary legislation through the Marine and Coastal Access Bill.
5	Our response to this question is subject to determining if certain licenses granted under Section 1 of the Protection of Wrecks Act 1973 should be regarded as exempted activities. For example, if it is concluded that a licensee under the 1973 Act requires a marine licence then we would wish to see an application process co-ordinated by the licensing authority.
6	The licensing authority must direct the entire process from the very early stage of preliminary discussions and throughout the process once any form of regulatory requirement is trigged to the point of licensing (and subsequently as directed by the conditions of any licence granted). The applicant must be given confidence that the licensing authority will co-ordinate the participation of all relevant parties. The importance of this co-ordination is that it will also give confidence to the consultees in terms of how there advice is used through the licensing process.
7	Other 'interested parties' should be involved in the pre-application stage as directed by the licensing authority subject to the detail of case in question.
8	Yes it would be beneficial for regulators to use a Memorandum of Understanding or Service Level Agreement with the marine licensing authority to encourage effective working practices.
9	The requirement for consultation activities should be related to the type of development proposed and its relevance for assessment as required by the EIA Directive. Resources will therefore be a crucial matter to address to ensure effectively delivery of advice.
10	Any 'standard format' for environmental statements must be derived from the EIA Directive. We add also that developments that span an area that may be considered terrestrial must be addressed in a way that supports environmental evaluation of the entire proposed project.
11	Yes. A clear explanation should also be provided to applicants about the areas of specialist expertise that will be addressed by advisors (e.g. whether this is inclusive of historic environment parameters).
12	Yes, but subject to identifying the types of licensing applications that would benefit.

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13	Yes, but there will be resource implications which require assessment. It is also very important to distinguish between 'pre-application' discussions, which should only involve the marine licensing authority and other proposed project discussions which could involve other interested parties, such as English Heritage.
14	Yes in general, but we note that in the accompanying text to this question mention is made of public consultation, involving 'key bodies' and formal consultation involving 'bodies that will have expertise' and we are therefore concerned about overlap and replication in consultation requests that we may receive.
15	(b) 42 days minimum. We make this choice in consideration of the resource requirement to service this consultation requirement.
16	In the first instance a category of 'key consultee' must be clearly defined and published. With regard to failure to respond within deadlines, then unless a holding response is issued by the consultee and acknowledged by the licensing authorities then there should be capacity in the system to accept a 'nil response'.
17	We believe that secondary legislation should be used to formalise the requirement to consult bodies, such as English Heritage. In addition the Secretary of State should be empowered to produce an order to amend this list as necessary.
18	No comment.
19	Informal hearings could be beneficial, but the basis for triggering such a hearing must be clearly explained and published.
20	We accept that inherently the process is risk-based, but that clear parameters must be set out to inform the process of decision-making. We also require an explanation of the difference between "due regard" as used in the consultation document and "must have regard" as stipulated in clause 69(3) of the Bill.
21	The licensing authority should do the risk the assessment. It is for the licensing authority to form an opinion on the advice we provide.
22	It should provide a framework for decision making that includes all relevant factors and associated spatial and temporal relationships.
23	Yes and there should be a facility whereby an applicant can receive an update on the status of an application from the licensing authority. We add further that any reference to 'public consultation' must also explain the timeframe for 'formal consultation' as described on page 20 of the consultation document.
24	Yes. If an applicant were to fail to respond by a deadline without reasonable explanation then the licensing authority should be able to exercise discretion to consider the application suspended.
25	Yes there should be a right of appeal and the nature of the appeal should be consistent with the approach in the Planning Act 2008.
26	It depends on the case, but it would seem appropriate that such a mechanism is used as a matter of last resort and depending on the complexity of the issue.
27	The first two bullet points should be discounted as they are procedural matters that should be the subject of judicial review proceedings (e.g. an error of law and/or procedural error). Grounds for appeal do include relevant policies; incorrect evaluation or assessment; and unreasonable/disproportionate conditions. Further clarification of the 6th bullet point (refusal to grant licence) as a ground for appeal is required i.e. what is the threshold for application?

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28	Yes. Any time limit should not be less than presently followed by the present licensing regime.
29	Any consultee that contributed advice that is challenged by the applicant should be notified, but the consultee should be able to exercise discretion over any further involvement.
30	Whoever is responsible for the appeals process should notify the licensing authority, the appellant and key consultees. The appeals body should also ensure information is posted on a website.
31	Information that explains the appeals process and other details specifically related to the nature of the appeal, but relevant to public interest.
32	Yes there should be a right of appeal and the nature of the appeal should be consistent with the approach in the Planning Act 2008.
33	Yes – new evidence should not be allowed.
34	Yes because they appear to mirror conventional public inquiry procedures.
35	The appellate body (or person appointed) should have the power to recommend that a licence be awarded or not, but also that specific conditions be attached to any licence, should one be awarded.
36	Yes – they should be able to withdraw an appeal.
37	No – to ensure consistency in decision-making and maintain confidence.
38	The licensing authority's decision must be upheld until the conclusion of the appeals process.
39	Yes – as a starting point.
40	The key considerations are international obligations and domestic legislation with the others capturing all other pertinent matters.
41	We are prepared to agree the list of exemptions in Table 1 with the exception of the following: • ID 27 – We question that given the purpose of licensing to deliver adequate and proportionate protection of the 'marine environment' (as defined in Clause 115(2)) that only specific works or activities should be subject to exemption (i.e. emergency response to ensure safety of life) and not just 'anything'. • ID 32 – We accept that a harbour authority or a navigation authority should be empowered to take all necessary action to remove obstructions that are an immediate danger to navigation. However, it is our advice that this power is specifically directed at emergencies that could affect safety of life at sea. The qualification that we recommend is in connection with planned works. For example, a licence will be necessary (subject to an assessment of 'environmental risk') in a situation where a capital dredge is planned by a harbour authority or navigation authority and which requires the removal of 'obstructions' where safe access is not presently possible. • ID 33 – We find this unclear and further explanation would be much appreciated. For example, could this include the present licensing regime under Section 1 of the Protection of Wrecks Act 1973? In particular could the licensing mechanism under the 1973 Act include agreed conditions that satisfy marine licensing requirements and thereby allow for an exemption?
42	Yes we agree, but some modification is needed in Table 1. Also in paragraph

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	number 2 (International agreements impacting on activities carried out inside and outside the UK marine licensing area) under 'Modifications to exemptions in Table 1' we require the first part of the final sentence to be amended as follows: "We will also need to consider the exemption of the removal of underwater cultural heritage from specific sites that are designated under Section 1 of the Protection of Wrecks Act 1973…"
43	We are prepared to accept an exemption on the basis of "deposit of sediment resulting from archaeological exploration", but with exploration amended to "excavation" this request is predicated on the principle that any excavation will be subject to marine licensing and it is therefore unnecessary to apply any separate licensing requirement for any deposit arising from that excavation.
44	No further comment to offer at present, but we may subsequently issue further advice.
45A – F	No further comment to offer at present, but we may subsequently issue further advice.
46	Yes, but subject to determination of 'low-risk' and to which potential receptors
47	We advise that criteria should include proximity to features of historic environment interest (i.e. underwater cultural heritage) which may be affected (e.g. destabilised) by an on-going maintenance dredging regime
48	A combination of the definitions offered should capture the principles of 'maintenance dredging', but adapted to reference a horizontal extent of influence of the dredging regime e.g. "…the dredging proposed is not lower or the horizontal width of the maintained channel is no greater, than it has been at any time during the preceding 10 years."
49	No further comment to offer at present, but we may subsequently issue further advice.
50	No further comment to offer at present, but we may subsequently issue further advice.

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