Marine Licensing & Diving / Nautical Archaeology:
Meeting with DEFRA & MMO: 8th January 2013 : Nautical Archaeology Society Response

The Nautical Archaeology Society (the Society) is grateful for this resumed dialogue with DEFRA and the MMO and the opportunity to continue to feed into the processes of clarifying the interpretation of the Marine Licensing provisions of the 2009 Act and of refining the exemptions to be made available under it.

The Society represents a wide range of different constituencies and interests including Heritage managers, professional and avocational underwater archaeologists. The activities and objectives of the Society are carried forward within the framework of the Society's Statement of Principles which amongst other things state that the Society
'*supports* the '*…recording, preservation and responsible management of the cultural heritage*' (Principle 2)
and
'*does not endorse intrusive archaeological work wherever situated, unless satisfied that*

(i) such intrusion is justified by sound archaeological imperatives
(ii) the persons undertaking such work are qualified and competent to undertake it'

For the removal of doubt the Society wishes to state unambiguously that it supports in principle the objectives of a marine licensing regime for the protection of both the natural and the historic environment. Furthermore, the Society has a legitimate expectation that its members will abide by such a regulatory framework and will view any intentional transgression as potentially bringing the Society into disrepute.

The Society also endorses the observation made by Mr. D. Pascoe that most nautical archaeology in the UK, including that conducted on designated or scheduled historic inter-tidal or underwater heritage sites, is conducted by avocational teams on a self funding basis. Consequently, these avocational teams are poorly resourced in terms of finance and time. Inevitably, a regulatory regime which is intended to encompass activities ranging from multi-million off shore developments to small heritage sites has a potential, perhaps even a tendency, to impact disproportionately and adversely upon such avocational activity by adding additional regulatory and financial burdens on this voluntary sector. Such an adverse impact would not be in the public interest and we welcome the assurances from DEFRA and the MMO that such unintended consequences will be mitigated as far as possible in order to facilitate such voluntary work which is clearly in the public interest. To this end the Society welcomes the continued effort by DEFRA and the MMO to achieve such mitigation wherever possible, including doing so by the introduction of a fast track application process and a process of licensing by notification where appropriate.

In respect of the specific issues that were raised at the meeting, the Society would make the following comments:

Lifting Bags:
The Society, having considered this issue at its January Executive meeting, finds itself faced with differing views amongst its membership in respect of lifting bags. It is universally agreed that the criterion of cubic capacity bears little or no relationship to the potential damage that can be inflicted on the Underwater Cultural Heritage (UCH) by use of a lifting bag. This is because the heritage value of an artefact is not necessarily related to its weight. Consequently, a blanket 25 cu. lt. exemption for use of a lifting bag could result in small items being inappropriately removed from underwater cultural heritage assets, thereby destroying much of their heritage value and significance through loss of context. For this reason some Society trustees favoured an exemption comparable to that adopted by Marine Scotland, where the exemption for use of a lifting bag was not limited to cubic capacity of the bag but rather to the time the item had been present on the seabed e.g. less than 12 or 24 months.

Conversely, other trustees, who were in the majority, felt that the flexibility offered by the ability to use a small lifting bag without the necessity to apply for a Marine Licence was an important facility in both enabling the recovery of small artefacts in immediate danger and reducing the already considerable administrative burden on poorly resourced avocational teams. Despite considerable discussion at the Society's Executive Committee meeting no consensus could be reached and it was felt that the most responsible course of action was to acknowledge that the arguments were finely balanced. Accordingly both viewpoints have been recorded in this document, with a majority of trustees favouring the proposed exemption for lifting bags of up to 25cu.lt. .

Should an exemption be introduced using the criterion of 25 cu.lt., then the exemption should be drafted so as to be applicable to a single object only. If the exemption operates so as to allow an individual to use a single 25 cu. lt. bag then several divers could each attach a 25 cu. lt. bag to the same object, until sufficient buoyancy had been achieved to lift the object. We would also reiterate our view that whatever the final outcome, there is a critical need for a fast track licensing mechanism in order to facilitate the public interest in both encouraging voluntary heritage engagement and enabling rapid 'rescue' of underwater heritage discovered to be in immediate peril from either natural or human forces.

The Society will continue to give this matter further consideration and we shall continue to keep the MMO apprised of our deliberations.

Temporary Marker Buoys

Temporary marker buoys are used for a number of functions on an archaeological site, including enhancing the safety of diver access and egress, site survey and dive boat mooring in benign conditions. They thus fulfil a number of functions, often simultaneously.

The Society has considerable reservations that the proposed exemption for the deposition of temporary marker buoys for recreational activity, which would encompass avocational archaeology, is to be limited to 28 days. While such a time frame may seem adequate, in practice most avocational archaeological teams are limited to weekend activity. This is especially true of inland teams that have to travel to the coast. Furthermore, most teams would struggle to deploy for more than two weekends in a calendar month and again this is especially true of inland teams. The consequence is that in any 28 day period only around 4 to 5 working days are likely to be available to an avocational team. This makes the proposed exemption of very limited utility to avocational archaeology, which is the predominant form of nautical archaeology in the UK.

In the light of these constraints and in order to avoid the burden of excessive licence applications, the Society would request that the time limit stated in the exemption be increased to three months.

The point has also been made to the Society that the proposed exemption for 28 days could apparently be complied with by raising the temporary marker after 28 days, recording such removal, and then immediately reinstating it or reinstating it at a position very close to but not exactly at the original deposition. Since no mandatory time interval is stated between recovery and reinstatement and / or a ‘new position’ (perhaps by a metre or two) would have been used, further compliance with the exemption for another 28 days would be secured. Such ‘technical’ compliance is indicative of the difficulties the MMO will face if insufficient allowance is made for the undue difficulties avocational teams will face by what is perceived as excessive or unsympathetic regulation.

Should the exemption for only 28 days be introduced then a ‘fast track’ application process for seasonal buoys should be utilised, with application being determined within no more than 14 days.

Anchoring / Temporary Moorings / Temporary Marker Buoys

Inadequate consideration appears to have been given as to how legally a distinction can be drawn between these three categories and how an exemption for temporary marker buoys would operate in practice.

Some years ago the Marine Division of the Crown Estate commissioned research into whether the law distinguished between anchoring and mooring. The reason for this was that the Crown Estate could charge a fee for mooring but not for anchoring, which was a component of the public right of navigation. The research failed to reveal any case authority for drawing a distinction between anchoring and mooring. Written advice was submitted by Mr. Paul Fletcher – Tomenius and the writer, as legal advisers to the Crown Estate and the point of contact with the Marine Division was Mr. Neil Jacobson.

The situation is somewhat different here. The Crown Estate was seeking to rely upon case law, whereas the MMO could presumably introduce within a Statutory Instrument a definition differentiating between anchoring and mooring. Presumably the distinction could turn upon the fact that with anchoring the vessel recovers the weight securing it to the seabed and stows it aboard, whereas with a mooring this is left in place on the seabed, the vessel not recovering it and stowing it. Thus it may be possible to draft a definition distinguishing between anchoring and mooring, but this will need to be done, as DEFRA and the MMO would be unable to rely upon any existing distinction within the law of England and Wales.

However it may be more difficult to distinguish between a temporary mooring and a temporary marker buoy. A temporary marker buoy, which we assume means a ‘shot line’, consists of a weight which is dropped to the seabed, with a rope and buoy attached. Divers will then descend and ascend that rope. This facilitates the divers arriving on the seabed at a desired location and the making of safer descents and ascents.

A temporary mooring is a weight, which can include an anchor, being placed on the seabed with a rope and buoy attached. A vessel will then tie up to the buoy temporarily. This enables a vessel supporting diving operations to remain at the diving location, reduces fuel consumption and mitigates the risk of a vessel being in motion while near divers in the water. The last point is a major safety consideration, since any contact between a diver and a rotating propeller invariably results in personal injury and fatalities have occurred.

The difficult with the MMO’s proposals is that a temporary mooring is licensable and not exempted, while a temporary marker buoy is licensable but exempted for 28 days. However, the two activities can be indistinguishable. It is fairly common practice in nautical archaeology for a weight to be dropped with a buoyed line, which is then used both for divers to descend and ascend, as well as for the diving boat to tie up to. Consequently, the weighted buoyed line is acting simultaneously as both a temporary marker buoy and a temporary mooring. Such a practice considerably enhances diver safety. The divers have a descent / ascent line and can be placed on the seabed precisely, while the vessel is at hand to assist in emergencies but is not underway, with the consequential risk of striking divers with its hull

or propeller(s). In such circumstances into which category would the activity fall i.e. use of a temporary mooring or a temporary marker buoy ?

In resolving this conundrum the MMO should bear in mind that the practice of combined temporary mooring / marker buoy considerably enhances diver safety.

Sampling

The Society would concur with the view that the exemption for sampling needs to be extended to incorporate other types of sampling for testing and analysis. Such an extension could include the forms of sampling conducted for inter tidal (foreshore) and underwater cultural heritage purposes.

Streamlining of Licence Applications

For the reasons set out above the Society believes that it is important to streamline licensing procedures, especially for the voluntary heritage sector. For designated sites (under the Protection of Wrecks Act 1973 or the Protection of Military Remains Act 1986) or scheduled sites (under the Ancient Monuments & Archaeological Areas Act 1979) any intrusive activity, including surface recovery, will already have been licensed by a heritage agency or MOD. It is accepted that these regulatory regimes derive from different legislation and have different aims and objectives. Nevertheless the extent to which administrative processes could be streamlined should be explored, in order to reduce the regulatory burden, especially upon the poorly resourced voluntary heritage sector.

Deposit of an Object by Hand

Greater clarity is required in respect of this activity. At the meeting the MMO stated that it did not regard the use of a vessel as being intrinsic to this activity. On this basis transport of survey lines, datums and / or survey grids, poles etc to a site would not be a licensable activity.

However divers rarely transport such items to the seabed. Principally this is due to their weight and bulk. It is safer to either lower larger and / or bulkier items to the seabed or drop them down a buoyed line from a vessel. The diver then descends, collects them and places them in the required position on the site.

Does the lowering or dropping from a vessel become a licensable activity ? The danger is that if it does then divers will be tempted to take the items to the seabed themselves, with attendant safety risks.