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Dear Sirs

**Marine Aggregate Dredging Application MLA/2016/00227, South Goodwin Sands, Area 521**

We are instructed by Marinet Limited ('our client').

We write primarily to seek undertakings regarding the Marine Management Organisation ('MMO')'s decision-making timetable for Marine Aggregate Dredging Application MLA/2016/00227 (the '**Licence Application**') and information about the considerations that will inform its determination in due course.

Enclosed with this letter is another of today's date that has been sent to the Secretary of State for Defence. What follows needs to be read together with that correspondence.

## Background

As you will know, Goodwin Sands is a marine area off the South Coast. It is part of the Crown Estate and well within the UK's territorial waters. Many aircraft in military service were shot down and came to rest there during the Battle of Britain. Several wrecks within the area are already designated as protected under the Protection of Wrecks Act 1973. Many other military and commissioned ships were sunk there during the First and Second World Wars. Details and sources of further information are given in our letter to the Secretary of State for Defence.

By means of the Licence Application, the Dover Harbour Board ('the Board') seeks the MMO's permission to dredge 3,750,000 tonnes using trailer suction hopper dredging from the Area 521 which is in the southern part of Goodwin Sands.

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Our client has, as you know, objected to the Licence Application as have other consultees. Our client has pointed out the number of downed aircraft and ship wrecks in the area combined with the difficulties of pinpointing their location mean they will end up being disturbed if the Application is granted, either directly, in the sense that sand containing the remains of service personnel, aircraft and shipwrecks will be removed, or indirectly, in that they will be undermined or moved about.

These concerns have not been squarely confronted by the Board's application. A 'Further Environmental Information' document of 23 September 2016 notes:

"...wrecks have been enveloped by mobile sands and subsequently covered by deeper accumulations as the bank has migrated to ensure several metres of sand coverage across the remains of wrecks..."

and:

"...the high potential for previously unidentified maritime and aviation archaeology to be present on Goodwin Sands (as a whole) and, in accordance with a realistic worst case scenario approach, identified the potential for major adverse impacts upon heritage assets that may be present within the proposed dredge area..."

adding:

"[a] precautionary approach was employed as this represents good practice in archaeological impact assessment and reduces the potential for impacts to be under-assessed..."

but it is impossible to discern from any of the Licence Application documents details of how this 'precautionary approach' will result in meaningful protection for the aircraft and shipwrecks along with bodies and other human remains within and nearby.

The parameters of the proposed dredging area appear to have been set to try to avoid a direct impact the shipwrecks protected by the 1973 Act (see the appended maps from the License Application), but even in respect of them, little or no thought has been given to the secondary impact of dredging, including on supporting plinths.

There are also further serious, indeed fatal, limitations to the assessment undertaken to date.

First, the desk based studies of the kind recommended in 2013 Crown Estates study, 'Aggregate Dredging and the Marine Environment: an overview of recent research and current industry practice', appear wholly inadequate. There has been no proper attempt to locate downed aircraft and wrecks using data of the kind held by Professor Brocklehurst, the Ministry of Defence and the forces hold. Our client understands that the MMO has made enquiries about the site with the Ministry of Defence. This is surprising as the application is made by the

Board. In any event, these enquiries have not been published and their outcome is unknown. We raise questions about this below, as you will see.

Secondly, the sonar surveys carried out by to support the Licence Application conspicuously omit to mention the depth of penetration of the sand. Our client believes this is because they are superficial and so will not have detected material more than 100cms deep. They have made this point to the MMO in their original and supplementary consultation submissions and pressed for the depth of sonar readings to be established. Enquiries have made by the MMO (see the appended letter of 20 December 2016) have yet to be answered or, if they have been, made public.

As you know, a magnetometer (magnetic) survey has been requested by Historic England and that request has been adopted by the MMO (see the 20 December letter). However, this also has limitations. It will only cover the proposed dredging site, but that ignores the secondary impact dredging will have close by. At best, it will only detect material of a ferrous nature. Aircraft frames, which were likely to have been made of aluminium or wood, will not be detected by this survey. A magnetic survey will not therefore identify the “skeletons” of aircraft, as it would in the case of ships.

In short, the combined assessment measures unequivocally recommended by Aggregate Dredging and the Marine Environment, have not been taken and there are no plans to take them.

### **The controlled area designation request and its determination**

Even if the shortcomings in the Board’s assessment of the site could be addressed, the Licence Application cannot be determined until a properly informed determination is made on whether the downed aircraft and ships wrecks within Goodwin Sands should be further protected by designation under the Protection of Military Remains Act 1986 (‘the 1986 Act’), as discussed in our letter to the Secretary of State.

It is important to note the relationship between the functions of the MMO and the Ministry of Defence, now a designation request has been made.

Goodwin Sands are part of the Crown Estate. The MMO’s key licencing functions in respect of such territory are set out in the Marine and Coastal Access Act 2009 (‘the 2009 Act’). Under the Act, the responsibility of granting marine licenses, including those needed for aggregate dredging, falls, in the first instance, on the Secretary of State, but these have been delegated to the MMO: see ss.66(1), 98 and 113(8 of the 2009 Act and articles 2-4 of the Marine Licencing (Delegation of Functions) Order 2011.

By s.69, when determining an application for a marine licence (including the terms on which it is to be granted and what conditions, if any, are to be attached to it), the MMO must have regard to the need to protect the environment, protect human health and to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant.

It must also take into account guidance issued by the Secretary of State including the Marine Policy Statement 2012. It says, materially:

“2.6.6.4 Some heritage assets have a level of interest that justifies statutory designation, the purpose of which is to ensure that they are protected and conserved for the benefit of this and future generations. In coastal/intertidal zones and inshore/offshore waters designated heritage assets may include scheduled monuments (designated under the Ancient Monuments and Archaeological Areas Act 1979), protected wreck sites (designated under the Protection of Wrecks Act 1973) and sites designated under the protection of Military Remains Act 1986. In Scotland they may also include Historic Marine Protected Areas designated under the Marine (Scotland) Act 2010.

2.6.6.5 Many heritage assets with archaeological interest in these areas are not currently designated as scheduled monuments or protected wreck sites but are demonstrably of equivalent significance. The absence of designation for such assets does not necessarily indicate lower significance and the marine plan authority should consider them subject to the same policy principles as designated heritage assets (including those outlined) based on information and advice from the relevant regulator and advisors.”

It follows that the presence of one or more sites designated (or automatically protected) under the 1986 Act or any other statute in an area for which a dredging license is sought is a relevant factor to take into account when the MMO determines an application for such a licence.

However, the MMO has no other functions related to the 1986 Act. It is for the relevant Secretary of State to determine controlled area designation requests i.e. the Secretary of State for Defence. His functions are not delegated to the MMO, nor could they be as the 1986 Act contains no delegation scheme.

Logically, and as a matter of policy, controlled area designation determinations must precede decision-making by the MMO on dredging licence applications. If it were possible for dredging that would be prohibited under the 1986 to be licenced and proceed while a designation request is pending, the policy of the 1986 Act and Parliament’s intention in making it law would be undermined.

This is confirmed in the April 2014 policy document ‘Protection and Management of Historic Military Wrecks outside UK Territorial Waters’.

Although it is not directly applicable to Goodwin Sands, it observes at paragraph 2 (our emphasis):

“It is UK Government policy to ensure our historic military wrecks are offered appropriate protection and management. If a military wreck is discovered it should remain undisturbed and a ‘look but don’t touch approach’ respected until options on future protection or management have been determined by the Ministry of Defence (MoD).”

### **Undertakings sought**

Bearing the above in mind, we ask you to confirm within the next 14 days that:

1. the MMO accepts the requests set out in our letter of 21 February 2016 ought to be properly determined by the Secretary of State before making any final decision on the Licence Application;
2. the MMO will therefore not determine the Application until the controlled area designation request is determined; and
3. it will review the application full in the light of that determination, having regard to the factors set out in s.69 of the 2009 Act and the Marine Policy Statement 2012.

If you are unwilling to provide this confirmation, please explain why not, giving full reasons. Our client will then want to take our advice on its position.

### **Other requests**

Our client is concerned about the MMO’s own approach to these issues to date. Please address the following requests using the enumeration below. If you are unable or unwilling to do so, please state why, giving full reasons.

Please:

1. provide all correspondence with the Ministry of Defence and the forces, and any with the Board, about the presence of aircraft and ship wrecks, bodies and other human remains in Goodwin Sands and the application of the 1986 Act to them;
2. indicate what knowledge the MMO has of any assessment, if any, there has been of the Goodwin Sands area for the purposes of the 1986 Act;
3. indicate what, if any, steps have been, and are to be, taken to establish and eliminate the risks to the ship wrecks within Goodwin Sands that are designated under the Protection of Wrecks Act 1973; and

4. provide any correspondence received to date that purports to address the queries raised in the MMO's 20 December 2016 letter.

We look forward to hearing from you substantively by 8 March 2017.

Please acknowledge receipt of this letter by return.

Yours faithfully,

*Bindmans LLP*

**Bindmans LLP**

Encs.