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Rt Hon Sir Michael Fallon MP, The Secretary of State for Defence
Ministry of Defence
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cc: Third Sector Team, Command Secretary, Navy Command Headquarters;
Defence Business Services, Joint Casualty and Compassionate Centre (SO3
Commemorations & Licensing); The Marine Management Organisation; and
Dover Harbour Board

Dear Secretary of State,

Designation of Goodwin Sands as a controlled site under the Protection of Military Remains Act 1986

We write on behalf of our client Marinet Limited ('our client') in order to formally request designation of the marine area just off the South coast known as Goodwin Sands as a controlled site under ss.1(4) and 1(5) of the Protection of Military Remains Act 1986 ('the 1986 Act'). The request is made because there are a large number of downed aircraft and ships in that area that, on any sensible view, which ought to be properly protected under the 1986 Act. Given the difficulties of establishing the precise location of all aircraft that are already protected places and ships that could be designated as such under s.1(3), controlled site designation is the most appropriate means to protect the remains of service personnel within from disturbance and desecration.

If, for any reason, you decide not to designate the site in this way, we ask that you then consider taking appropriate steps to ensure the location of all downed aircraft and ship wrecks are established and then designate individual ships within the scope of the 1986 Act as protected places.

Regrettably, this matter has become urgent because in May 2016 Marine Aggregate Dredging Application MLA/2016/00227 (the 'License Application') was submitted to the Marine Management Organisation ('MMO') by the Dover Harbour Board ('the 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 South Goodwin Sands. As discussed below, it appears highly likely that the dredging proposed will unlawfully disturb wrecks that are already designated for the

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purposes of the Protection of Wrecks Act 1973 ('the 1973 Act'). It appears inevitable that aircraft and ships that fall within the scope of the 1986 Act will be disturbed.

We understand that the MMO has been in correspondence with the Ministry of Defence about this matter. Below, we make a series of requests for information and documents related to that correspondence. Once these are answered, we may want to supplement the representations made below in this letter and so ask that the requests above are not determined until we have had a reasonable opportunity to do so.

Please ensure that receipt of this letter is confirmed within seven days and confirm that it will be formally determined in due course. It would be helpful were the timescale and names of the officials likely to be involved confirmed at the same time.

Facts

The policy of the 1986 Act

The 1986 Act came about as a result of a campaign instigated by the Friends of War Memorials Maritime Division. It had highlighted concerns that maritime 'war graves' - in effect the burial sites or final resting places of those onboard ships and aircraft lost at sea - were being desecrated. Sites were also being damaged as items were removed.

In response, the Ministry of Defence adopted a long-standing and firm policy of using the statutory powers Parliament granted under the 1986 Act to ensure that the final resting places of service personnel are respected in a way commensurate with the sacrifice they made.

For example, a Parliamentary statement in 2000 (Hansard, Official Report, 1 November 2000, column 246) confirmed that the Government:

“shared the widely held view that war graves should remain undisturbed and protected so far as is practicable.”

In 2001 the Ministry of Defence consulted on whether the statutory framework needed to be strengthened in a document entitled 'The Military Maritime Graves & the Protection of Military Remains Act 1986'. The then Under Secretary of State's forward begins:

“I am determined to do all that practicably can be done to offer protection of wrecked military vessels. These are sensitive matters.”

Paragraph 3.1 Adds:

“There is increasing public and Parliamentary concern that wrecked military vessels, which sank with the loss of human life, are being disturbed by the activities of recreational divers

and other sea users. The Government is being asked to take steps to stop this interference.”

That document also describes the matters then taken into account in considering designation:

“(a) whether or not human remains are known or likely to be present;

(b) whether or not there is evidence of sustained disturbance and looting (and the strength of such evidence);

(c) whether or not designation is likely to curb or put a stop to such disturbance and looting; and

(d) whether or not diving on the vessel or site attracts sustained and significant public criticism or approval”

The Consultation document added:

“Designation where these criteria are not met is unlikely unless some other compelling reason for designation exists.”

Comments on these criteria were invited from a wide range of organisations and individuals.

The Ministry of Defence considered the consultation responses and then announced that it would carry out a rolling programme of assessment of all British military wrecks to criteria consistent with those quoted above: whether the wreck represents the last resting place of servicemen; whether the wreck has suffered sustained disturbance and looting, and whether designation is likely to stop such disturbance; whether diving on the wreck attracts public criticism. A fifth criterion was added: whether the wreck is of historical significance. It was also announced that if a wreck designated as a protected place suffers sustained disturbance it will be designated as a controlled site.

The products to date of this programme are the statutory instruments of 2002 (amended 2003), 2006, 2008 and 2009 each of which was made under the 1986 Act. Our understanding is that the assessment programme is ongoing. Indeed a new statutory instrument, the Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2017/147 (**‘the 2017 Order’**) was recently laid before Parliament to that end. It comes into force next month.

Further, in April 2014 the policy document ‘Protection and Management of Historic Military Wrecks outside UK Territorial Waters’ was issued. Although it is not directly applicable to Goodwin Sands, it observes at paragraph 2:

“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).”

We mention this because it makes the obvious but important point that a Ministry of Defence decision under the 1986 Act on appropriate protection and management has to precede any disturbance of a military wreck, otherwise the policy of the Act would be defeated.

Goodwin Sands

As mentioned above, 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.

Downed aircraft in Goodwin Sands

The exact number and location of downed military aircraft within Goodwin Sands is unknown, however it is generally reported that remains of around 60 British RAF and German Luftwaffe aircraft crashed and remain in this region following the Battle of Britain. It is also reported that the remains of Polish pilots flying alongside or with the British RAF are also located in this area.

In 2013, the last surviving Dornier World War Two bomber was raised from the Goodwin Sands, where it had been shot down during the Battle of Britain. This German aircraft is now undergoing restoration work at RAF Cosford. This exercise would have had to have been licensed under the 1986 Act. It may well be that you were presented with information about the locations of other downed aircraft at the same time.

More recently, the curator of the Kent Battle of Britain Museum, David Brocklehurst MBE, spent several months compiling a list of 60 lost planes and their crews that were shot down and never recovered in the Goodwin Sands area in and around 1940. His list of 60 lost planes includes Spitfires and Hurricanes, as well as German Messerschmitts, Dornier Do 17s and Junkers Ju 88s. See further:

<http://www.bbc.com/earth/story/20161118-the-place-where-1000-ships-were-sunk>

The BBC reports there that:

“Air Force historians are double-checking the accuracy of Brocklehurst’s list, which could upend the plans to dredge. Under the terms set out in The Protection of Military Remains Act (1986), it is an offence to disturb a site where there is military aircraft wreckage and likely human remains.”

Professor Brocklehurst has been very vocal about this himself, for example:

“I can tell you with my hand on my heart that there are missing airmen out on the Goodwins. We must commemorate and protect the last resting place of our heroes.”

See:

<http://www.dailymail.co.uk/news/article-3794712/Battle-Goodwin-Sands-Fury-plan-dredge-sandbank-remains-RAF-heroes-laid-76-years.html#ixzz4XKx1jh3s>

We have contacted Professor Brocklehurst for a copy of his list as it may of help in identifying the location of some of the drowned aircraft in the Goodwin Sands area. However, it is important to keep the circulatory, closed morphological nature of the sand volume which constitutes the Goodwin Sands in mind. The sands are dynamic, not static, and so the place where an aircraft hit the water will not necessarily be where it now is, indeed that is unlikely.

Shipwrecks in Goodwin Sands

There are varying reports on the precise number of shipwrecks in the Goodwin Sands area. It is generally accepted that there are a great number. Many of their locations are known or suspected. Historians have suggested that the number may well be in excess of 1000 ships, see for example the map appended which is copied from Richard and Bridget Larn's 'Shipwrecks of the Goodwin Sands'.

The License Application accepts that there are hundreds of wrecks, a conclusion the Board has evidently reached on the basis of a report produced by Wessex Archaeology.

Several maps have also been produced in connection with the application. The most important ones are appended to this letter for ease of reference. These show the proximity of the proposed dredging area to the known wreck locations, as well as proximity to Archaeological Exclusion Zones and Protected Wreck Exclusion Zones.

As you will see, some of these maps identify the 'Zone of Influence' ('ZOI') and Primary Impact Zones ('PIZ') and Secondary Impact Zones ('SIZ') that extend beyond the proposed dredging area. These are areas where although it is not planned that dredging will take place, these areas may nonetheless, be indirectly affected by the impact of the dredging in the proposed area.

Although, none of the maps provided in support of the Licence Application show any wrecks to be within the proposed dredging area, there are six 'anomalies' shown there which may well be shipwrecks or downed aircraft. It is also important to note the limitations of the technology used to create the accompanying maps (see further below).

In addition, one Archaeological Exclusion Zone falls within the proposed dredging area; the Britannia wreck, also an Archaeological Exclusion Zone is a mere 15m away from the proposed dredging area. The Admiral Gardner and Northumberland which are Protected Wreck Exclusion Zones fall within the ZOI, and another Protected Wreck Exclusion Zone, the Restoration, is located very close by. There are several wrecks less than a kilometre or two away from the proposed dredging area that do fall within the ZOI and secondary impact zone.

Marine aggregate dredging

Marine aggregate dredging is a process for the extraction of sand, gravel and crushed rock from the sea bed. It has become increasingly popular because the construction industry requires large quantities of aggregates mainly for use in land reclamation and as a raw material in the manufacture of concrete (as is contemplated in the Licence Application). It is also controversial because of the impact on the marine environment.

This is discussed in some detail in the 2013 Crown Estates study 'Aggregate Dredging and the Marine Environment: an overview of recent research and current industry practice'. This document was intended to gather and present in accessible and reliable form the current evidence on the impact of dredging so as to inform decisions such as that the MMO, and now you, are asked to take.

Page 57 discusses the difficulties of precisely locating and identifying particular types of wreck:

“In many cases, the presence of a wreck may be known but its identity - which may have a major bearing on its importance - is not. Such wrecks may also be less prominent because structural remains have been heavily disrupted by the original wrecking process or by subsequent damage, by clearance for navigation, for example. Even substantial metal wrecks may be covered by mud or buried by mobile sediment such as sand waves. Also, the wrecks of recent centuries are not always big and metal; smaller wooden boats and ships remained an important component of maritime traffic through the first half of the C20th, including fishing boats and local vernacular forms. Wrecks of such ships are much less well-known and are less visible to the main methods of hydrographic and geophysical survey. In particular, wooden ships will usually collapse and degrade down to the level of the seabed, unless they have become buried. In either case, wooden ships generally have only low relief at the seabed and generate ephemeral anomalies. Notwithstanding, wooden remains below the surface can be very substantial and long-surviving where they have reached a degree of equilibrium with their environments, as demonstrated by various well-known centuries-old wrecks in UK waters. Discoveries elsewhere around the world, and from bits of the sea that have been reclaimed around Britain, demonstrate the potential for substantial wrecks of very much

older boats and ships to survive in the seas around the UK, stretching back even into prehistory.

... it can be difficult to tell whether an item on the seabed is an isolated find, or the first sign of a debris field linked to a more substantial wreck. Distinguishing between isolated finds and more coherent sites has become an important concern because modern geophysical survey and interpretation is capable of identifying ever smaller anomalies on the seabed, and because of the amount of ship-related finds being made through the Marine Aggregate Industry Protocol.”

It notes at page 58:

“As has been recognized of wartime sites on land, wrecked ships are monuments of those cataclysmic events that are important for what they can tell beyond words, pictures and documents, as physical reminders of our recent past, and as memorials to the many thousands of peoples whose lives were lost.”

adding (our underlining):

“With such wide variety in the wrecks of boats and ships, it is unsurprising that their sensitivity to aggregate dredging varies widely also. But it is worth noting that aggregate dredging is also sensitive to shipwrecks: the draghead and pipe is sensitive to debris and collision, and the load may become contaminated by the former contents of the wreck such as coal. It is in the clear interest of aggregate companies, therefore, to identify the presence and precise location of any wrecks, including the debris around them, and to seek to avoid them.

Greater difficulty arises from less prominent, wooden wrecks, which are both difficult to identify in advance and more susceptible to impacts from dragheads. That said, the substantial structural timbers of a wooden wreck may be resistant to impact and could jeopardise dredging equipment, so again there is a mutual interest in locating even ephemeral sites before dredging commences. If the draghead passes sufficiently close, small finds and wreck debris will undoubtedly be disturbed and probably lost from their original context - to be found caught in the draghead, within the load or on the electromagnets used at the wharf to remove ordnance. Dredging may uncover material that was previously buried and stable, exposing it to renewed physical, chemical and biological degradation. Dredging might also undermine wreck material either directly or as a consequence of a general lowering of seabed level by dredging. One particular concern has been that wrecks within exclusion zones could be subject to longer term destabilization if dredging around the zone causes the remaining ‘plinth’ around the wreck to slump, which is a question that has been subject to specific research.”

Next the study discusses how risk of contact with wrecks may be reduced by a combination of desk-based studies, then a suite of geophysical studies, noting at page 6:

“The best approach to evaluation is usually to combine all the available tools - geophysics, ROVs and divers - to make the best of their respective strengths and weaknesses.”

It then explains:

“...avoidance is the clearly preferred method for mitigating potential impacts from dredging on known shipwrecks. Avoidance is typically achieved through the use of exclusion zones within which dredging is not allowed to take place. Exclusion zones encompass both the known wreck material itself and an area beyond, to provide protection for any debris field or buried items, to prevent undermining of the wreck by the effects of dredging, and to provide a margin for navigation that will avert accidental impacts. The main innovation in the use of exclusion zones - other than the quality of baseline data available - has been in their form. Whereas exclusion zones used to be defined typically by a radius around a single position more or less centred on the wreck, it is more usual for them now to be drawn as a polygon buffering the actual extents of the wreck. This means that the extremities of a wreck receive the same protection as the central portion, but without precluding access to substantial areas of seabed that can be safely dredged.”

It follows that the recommended approach has three stages: identification of an area as one where there are shipwrecks; locating them, if practical, using a variety of methods in combination; then prohibiting dredging not only in the wreck locations, but also in a buffering area extending outwards from the extremities of each wreck so that both the wreck itself and the supporting plinth remain undisturbed.

Aggregate Dredging and the Marine Environment then turns to downed aircraft. Although they share some of the characteristics of shipwrecks, it explains, the challenges of locating aircraft with precision are significantly greater (our emphasis):

“Even if the point of loss can be localised, the position of the crash site will be difficult to determine at scales relevant to an individual licence area. Impact with the sea, any time afloat before sinking, the movement of relatively light structures through tidal water columns, seabed processes and impacts from fishing or other activities will all have an effect on the eventual position and form of an aircraft wreck that is unlikely to be determined from documentary records. There are some sources which help, however, such as the records of rescue boats and aircraft dispatched to pick up survivors, though these may also be imprecise about location due to the limitations of contemporary position-fixing....”

Where a suspected air crash site has been localised, then additional high-resolution geophysical survey is an appropriate form of evaluation that has been employed by marine aggregate companies in at least one instance. Sidescan sonar remains the tool of choice for identifying debris and structural remains; if

the relief is sufficient then a multibeam echosounder can be used to map out extents. Magnetometer survey at a sufficiently narrow line-spacing may reveal the presence of ferrous components, including ordnance, but it should be recalled that the majority of aircraft parts are non-ferrous. Unfortunately, as aircraft present such ephemeral sites, even high-resolution survey may produce only ambiguous results - though 'negative evidence' demonstrating the absence of a localised and coherent site may be sufficient to inform the choice of mitigation."

See pages 63 to 66.

In conclusion, it adds at page 67 (our emphasis):

"As above, avoidance is the preferred approach to mitigation - not least because disturbance will be subject to additional statutory licensing requirements by virtue of the Protection of Military Remains Act 1986. Bearing in mind the points about geophysical survey of aircraft sites, the difficulty lies in establishing position and extents with sufficient confidence to achieve an Exclusion Zone that protects the remains without preventing dredging across a wide area.

... It is worth noting that the UK position with respect to air crash sites covered by the Protection of Military Remains Act (PMRA) is that no licence will be allowed if there are human remains present, the intention being that such remains be left in peace where they lie."

This brings us to the Licence Application which, as we will explain is a direct challenge to Parliament's 'intention' and Ministry of Defence policy in respect of downed aircraft and ship wrecks.

The Licence Application

Though made in 2015, the Licence Application has been in contemplation for much longer. The MMO has twice publicly consulted about it and it remains under consideration. Consultees, including our client, have strongly objected to the license being granted, including on environmental grounds.

Amongst our client's objections is the compelling point that there are a great many drowned military aircraft and shipwrecks in the area where dredging will take place, if licenced by the MMO, and that these will be disturbed, 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. Other consultees have made this point too.

Remarkably, 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.

It is fair to acknowledge that 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). However, even in respect of them, little or no thought has been given to the secondary impact of dredging, including on supporting plinths.

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

First, the desk based studies of the kind recommended in Aggregate Dredging and the Marine Environment appear wholly inadequate. There have 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 and any responses have not been published and their outcome is unknown. We raise questions about this below.

Secondly, the sonar surveys carried out 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 100 cm 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 made by the MMO (see the appended letter of 20 December 2016) have yet to be answered or, if they have been, made public.

No further work is in train that is capable of adequately addressing these assessment shortcomings. A magnetometer (magnetic) survey has been requested by Historic England and that request has been adopted by the MMO (see the 20 December letter), 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.

It follows that 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 either.

Even if these difficulties could be overcome, the Licence Application cannot be determined until a properly informed determination is made on whether Goodwin Sands should be a controlled area.

In law, the case for such designation is straightforward, as we shall now explain.

Legal framework

As explained above, Parliament has decided that the law should robustly protect the bodies and remains of servicemen and servicewomen and their final resting places at sea, whether within a downed aircraft or a shipwreck or nearby.

The 1986 Act

The 1986 Act is the primary means by which this end is to be achieved. The Act’s long title states that it is:

“...to secure the protection from unauthorised interference of the remains of military aircraft and vessels that have crashed, sunk or been stranded and of associated human remains; and for connected purposes.”

Scope

The 1986 Act automatically applies to any aircraft which has crashed whilst in military service: see s.1(1) of the 1986 Act.

In addition, ships which sank or were stranded whilst in military service can be designated as vessels to which the 1986 Act also applies, by the Secretary of State, in order for them to be afforded protection under the 1986 Act: see s.1(2).

The conditions for designating a shipwreck as a vessel to which the 1986 Act applies are set out in s.1(3) of the Act. The vessel must have sunk or

been stranded on or after 4 August 1914 and, in the case of a vessel which sank or was stranded whilst in foreign military service, the remains of the vessel must be in UK waters.

Forms of protection

The 1986 Act provides for two types of protection: 'protected places' and 'controlled sites'.

An area becomes a 'protected place' if it comprises of the remains of, or a substantial part of:

1. any aircraft which has crashed (whether before or after the passing of this Act) while in military service; or
2. a vessel, i.e. a shipwreck, that has been designated under the 1986 Act by the Secretary of State; or
3. is an area in the 'immediate vicinity' of the place of the drowned military aircraft or designated shipwreck.

See s.1(6) of the 1986 Act. International waters are exempted.

It follows that, the downed military aircraft are present in the Goodwin Sands area are already protected places. Ships can be designated as such. To date none have been in this particular area.

The 1986 Act also allows for 'controlled site' designation. Designation as a 'controlled site' does not depend on identifying the precise location of aircraft and ships.

Sections 1(4) and 1(5) of the 1986 Act set out the statutory designation conditions. In summary, it must appear to you that:

1. less than two hundred years have elapsed since the crash, sinking or stranding;
2. the owners and occupiers of such land in the United Kingdom as is to be designated as, or as part of, that site do not object to the terms of the designating order which affect them; and
3. where the aircraft or vessel crashed, sank or was stranded while in service with, or while being used for the purposes of, any of the armed forces of a country or territory outside the United Kingdom, that the remains are in the United Kingdom or in United Kingdom waters.

S.1(5) is particularly important in the present context. It reads:

"An area designated as a controlled site shall not extend further around any place appearing to the Secretary of State to comprise remains of an aircraft or vessel which has crashed,

sunk or been stranded while in military service than appears to him appropriate for the purpose of protecting or preserving those remains or on account of the difficulty of identifying that place; and no controlled site shall have a boundary in international waters any two points on which are more than two nautical miles apart.”

This means that the Secretary of State can designate an area as a controlled site even though it may be difficult to identify the precise locations of aircraft or vessel which has crashed provided he does not designate an area larger than that which is appropriate to achieve the overarching purpose of the Act. So, for example, to protect HMS Exmouth, the 2017 Order will, once in force, create a controlled site radiating out 750 metres from 58°18.467' N and 02°28.938' W.

Protected places and controlled sites must not be tampered with, unless the activity is licenced by the relevant Secretary of State, i.e. yourself. Absent a licence, tampering is criminalised as followed:

1. s.2(2) potentially criminalizes certain activities including tampering with, damaging, moving, removing or unearthing the remains present at a protected site or a controlled area (whether an aircraft or a ship);
2. s.2(1)(a) states that that criminal offence is committed if any of the activities listed in s.2(2) are carried out in a controlled site, for example if a person tampers with or damages remains in a controlled site, a criminal offence is immediately committed;
3. under section 2(1)(b), a criminal offence is only committed in these circumstances in relation to a protected place if the person believed or had reasonable grounds for suspecting that the place comprised of an aircraft or vessel which has crashed or sunk whilst in military service before contravening s.2(2); and
4. but, by s.2(3)(b), excavations are expressly prohibited if they involve tampering with, damaging, moving, removing or unearthing the remains present at a protected site containing an aircraft, vessel or he remains of one (so there is greater protection against excavations); and
5. most of the offences can be committed directly (e.g. by the person doing the tampering), or indirectly (by causing or permitting another person to act in that way).

S.2(5) also allows for a defence for any s.2 offence where a person can show that he/she believed on reasonable grounds that the circumstances were such that (if those had been the circumstances) the place would not have been a protected place. However, that defence is not available in relation to a controlled site.

S.4(1) allows you to grant a licence to do that which would be prohibited under the provisions above.

Analysis

There are five compelling reasons for designation of Goodwin Sands as a controlled site.

First, all of the ss.1(4) and 1(5) 1986 Act conditions are fulfilled in respect of the aircraft and ships within Goodwin Sands save for those ships that sank before 1914: less than two hundred years have elapsed since the crash, sinking or stranding; the Crown Estate has raised no objection to designation (nor could it sensibly do so); aircraft and ships were being used for military purposes; and the remains are in the United Kingdom or in United Kingdom waters.

As regards the 2001 policy considerations: the wrecks represent the last resting place of servicemen; they will, if not designated, suffer sustained disturbance; designation is likely to stop such disturbance; and some wrecks are of historical significance.

Secondly, designation will make the protection downed aircraft in the Goodwin Sands area currently enjoy practical and effective. We note that the Licensing Application is addressed exclusively to the MMO. To our knowledge, no application to dredge has been made to you under the 1986 Act. Presumably that is because the Board intends to proceed with the dredging operation despite knowing that there are downed aircraft in the sands on the somewhat cavalier basis that, if and when its agents' trailer suction hoppers disturb them, it can rely on the s.2(2) defence on the basis its own inadequate assessment left it in ignorance of their location.

This would completely undermine the 1986 Act. As the 2001 policy announcement made clear, controlled site designation is available and should be used where protected places would end up being disturbed were they not designated as, or within, controlled sites. The reason for that is obvious: designation as a controlled site disapplies the s.2(2) defence. Ignorance, whether as a result of a defective assessment or otherwise, no longer exonerates the person or organisation interfering with the site.

Thirdly, at present the ship wrecks on the site enjoy no protection (save for those designated under the 1973 Act). Unless their locations can be pinpointed, and the Board's assessment so far does not assist with that exercise, they will be wholly unprotected from interference.

That cannot have been Parliament's intention when passing the 1986 Act. Its very purpose is to create a robust safeguard against interference of the kind proposed.

Parliament also predicted and catered for the pinpointing problem that arises at Goodwin Sands: as well as allowing designation of ships that could be located as protected places, it also empowered you to protect those that are known to be in an area but which cannot easily be pinpointed, hence s.1(5).

Fourthly, the proximity of the proposed dredging operation to some of the 1973 Act designated ships and the risks that arise from this indicates that protected place designation would be inadequate to protect those ship wrecks that could be pinpointed.

Fifthly, it cannot be an answer to the pinpointing problem that arises at Goodwin Sands to commission further surveys and studies including that recommended by Historic England that is also sought by the MMO. That is because, as Aggregate Dredging and the Marine Environment make clear, these are not capable of identifying all aircraft and ship wrecks in the area in such a way to make a series of exclusions zones (i.e. protected place designations) sufficiently reliable and comprehensive.

Information and documents sought

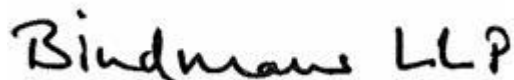
We ask that you address the following requests using the enumeration below so that we can supplement these representations as appropriate on a fully informed basis. If you are unable or unwilling to do so, please state why, giving full reasons.

Please:

1. provide all correspondence with the MMO, and any with the Board, about the presence of aircraft and ships in Goodwin Sands and the application of the 1986 Act to them;
2. confirm that the Board has made no application to dredge within Goodwin Sands to you under s.4(1) of the 1986 Act or, if an application has been made, please give details;
3. indicate what assessment, if any, there has been of the Goodwin Sands area for the purposes of the 1986 Act;
4. confirm the current state of the reported “double checking” of Professor Brocklehurst’s list; and
5. provide the latest iteration of the 1986 Act designation criteria policy announced in 2001, or if that remains the policy, please confirm that is so.

We look forward to hearing from you shortly.

Yours faithfully,



Bindmans LLP
Encs.