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Dear Mr Stansfield

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

The British Marine Aggregate Producers Association (BMAPA) is the representative trade organisation for the British marine aggregate sector. The association represents 10 member companies who collectively produce around 90% of the 21.5 million tonnes of marine sand and gravel dredged from licensed areas in the waters around England and Wales each year.

Background

Marine dredged sand and gravel is principally used by the construction industry, and the marine contribution provides 20% of overall sand and gravel demand in England, 90% of fine aggregate demand in South Wales, 35% of total construction aggregate demand in South East England and over 50% of construction aggregate demand in London. In this respect, marine aggregate supplies play a key role in supporting the delivery of various Government policies, including Sustainable Communities, the regeneration of Thames Gateway and the 2012 Olympic Games.

Marine dredged sand and gravel also provide a strategic role in supplying large scale coast defence and beach replenishment projects – over 25 million tonnes being used for this purpose since the mid 1990's. With the growing threats posed by sea level rise and increased storminess, the use of marine sand and gravel for coast protection purposes will become increasingly important.

BMAPA is part of the Mineral Products Association, the trade association for the aggregates, asphalt, cement, concrete, lime, mortar and silica sand industries

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In both cases, the marine aggregate sector is dependant upon identifying and licensing economically viable sand and gravel deposits to secure sufficient reserves to maintain long term supply to existing and well established markets. The location of such deposits is extremely localised around the waters of England and Wales, restricted to their geological distribution and their geographical position related to the markets location.

At present 1344km<sup>2</sup> of seabed is licensed for marine aggregate extraction, of which around 135km<sup>2</sup> is dredged in a typical year. This represents around 0.15% and 0.016% of the total UK continental shelf area (867,000km<sup>2</sup>) respectively. A further 1931 km<sup>2</sup> of seabed is currently under application or covered by prospecting licence. In this respect, the marine aggregate sector is responsible for managing a significant area of the UK seabed.

### Overview

We very much welcome the opportunity to comment on the first consultation on the secondary legislation for Marine Licensing. A robust, efficient and proportionate regulatory regime which delivers a 'licence to operate' for activities and operations is essential to support the wider sustainable development and management of UK waters. Given the wide range of activities and operations that take place in the marine environment, it is also important that the information requirements and regulatory processes are as consistent as possible – allowing for the differing scales of activity, the environment in which they occur, their environmental significance and the nature of the associated impacts.

The proposal for a single marine licence under the new regime is supported, also the wider aims and objectives for the processes to deliver these on a consistent basis.

As a sector that has a range of ongoing licensed interests, many of which require renewal by the end of 2013, we would suggest that there is a requirement for clarity over licensing arrangements during the transitional period to deliver effective and efficient 'business as usual' while the Marine Policy Statement and resultant Marine Plans are evolving. Without this, there is a risk that essential licence renewals may be delayed with knock on implications to both operator's business interests and the supply of essential construction aggregate resources.

### Specific comments

In responding to this consultation we have responded directly to the questions posed. Elsewhere we have made direct reference to sections of the consultation document itself.

p.6 (Coverage) – While the new regime provides for licensing authorities of the various national licensing authorities to develop their own procedures and functions, it is essential that these approaches are consistent with one another. This is particularly important for activities which occur across regional seas, for example in the Bristol Channel and Irish Sea.

p.8 (Marine licensing proposals) – The precise scope of the marine licence remains unclear, particularly the way in which the various existing regimes will be pulled together and combined into a single licence. In the cases where an activity is controlled by multiple licences under the existing regime, each of which has differing terms and conditions, is the intention that one will have primacy over the other? In the case of marine aggregate extraction, it would make sense for the Marine Mineral Dredging permission (or its various predecessors) to be the primary control – particularly as matters of navigation safety get wrapped into this anyhow.

p.9 (Aims of new system) – We would agree with the various aims presented in the consultation document, but we would note that in the case of the operational aims adequate resourcing within the licensing authority will be key to achieving these. Not only in terms of head count, but also in terms of skill sets and experience.

p.12, para.1 – We would agree with the concept of a single process and licence. However we would suggest that the term of a licence will need to be flexible to suit the particular activity it applies to. For aggregate extraction, for example, we would want to maintain the potential for a 15 year permission term (with 5 year reviews) rather than any shorter period.

Reiterating our comments under page 8, where multiple consents are to be merged, it is important to be clear which regime would have primacy. In the case of marine aggregate permissions, would it be the dredging consent (with a maximum 15 year term) or the Coast Protection Act consent (with a 3 year term). This has significant implications for planning the renewal of permissions.

Given the challenges of understanding the requirements and processes for each activity to be controlled by the new legislation in detail, we would suggest that retaining flexibility in the approach to be adopted will be essential to guard against any unintended or unforeseen consequences.

Q.1 – Yes – it would seem pointless to do anything but.

Q.2 – Given the desire for a single licence and process, the only sensible approach would appear to be a single regime, which captures all the elements in one place.

Q.3 – From a marine aggregate industry perspective, given the Marine Mineral Dredging regulations were only introduced in 2007 we believe that the process is modern & robust – particularly compared to the non-statutory regimes that preceded it. The pre-application stage is critical though, in that it allows applicants to identify and resolve issues prior to commencing the formal decision making phase of the process. In turn, this makes the formal decision making process (and associated timescales) more robust. The key to making this work though is having sufficient resourcing (expertise/time) available within regulators and statutory advisors to enable them to make a full contribution to the application in advance of the formal decision. As the pre-application process generally falls outside of the statutory process, this can be a problem.

Q.4 – Drawing on our experiences of the previous regimes the marine aggregate industry operated under, regulator/advisor resourcing and binding process timescales to deliver at every stage (including pre-application) are critical. Applying this forwards, MMO expertise, knowledge & experience will be essential as will the resourcing and expertise available in statutory advisors.

The principle weakness of the current licensing arrangements for marine aggregate extraction is that the activity is caught by two regimes (Marine Mineral Dredging regulation and Coast Protection Act), each of which has different terms but similar information requirements. This results in considerable potential for duplication of effort.

p.14 (Impact of marine planning) – With the Marine Policy Statement in place by 2011 and the first Marine Plans by 2013, what happens in the interim for both for process & decision making? It will be important to have in place robust transitional arrangements to ensure that business continuity is maintained, and to manage stakeholder expectations.

p.15 (Pre-application advice) – Under the Marine Mineral Dredging regime, the pre-application stage has already delivered significant improvements in the way in which the process of issue identification and resolution occurs, prior to formal decision making.

p.15/16 (Pre-application under the current marine regimes) – It is important to understand that screening/scoping does not represent the limit of pre-application discussions with interested parties (both advisors and wider interests). These processes represent only the first stage of a complex and time consuming process in which developers will seek to identify all issues (wider than those considered important by statutory advisors) in order to ensure they are covered by the EIA process, and to inform appropriate management, mitigation or monitoring measures. Further dialogue then takes place to ensure that the issues identified have been adequately addressed, and where necessary mitigated. If not further studies or measures may be needed. Only when the applicant believes they have resolved issues as far as they are practically able will the application pass to the formal stage. By doing this, the applicant is charged with reaching consensus (as far as that is possible) prior to the formal stage.

We would strongly disagree with the suggestion that the pre-application stage under the Marine Mineral Dredging regulations results in confusion and uncertainty. We believe the approach delivers better regulation, by ensuring applications are more robust and informed, with most issues resolved, prior to commencing the formal process. The only caveat is that regulators and their advisors have to be sufficiently well resourced to allow their full engagement throughout this process. Under the current regime, Cefas get a fee to provide that service, but other advisors are equally important (Natural England, JNCC, English Heritage etc). Unless they are equally well resourced the process does not work, with the process only being as strong as the weakest link in the chain. In the case of the MMD regulations, The Crown Estate currently provide funding to support resourcing of pre-application advice within Natural England, JNCC and

English Heritage, otherwise the improvements in the process would not be realised.

It is also important to stress that from a developers perspective (and a regulatory perspective) consultees/interested parties are wider than statutory advisors. It is essential to make sure the process provides for all interests to have an opportunity to feed into an application at every stage.

p.16/17 (Pre-application for a marine licence) – We do not consider that the steps outlined are representative of pre-application discussions, as outlined in the section above. At present, the steps outlined are essentially optional (screening/scoping/QC) and are unlikely to be required or pursued in most marine aggregate cases.

p.17/18 (Routes through pre-application) – Of the three options proposed, 2 represents the most appropriate for the purposes of marine aggregate developments, but with fee to support input from advisors. We would suggest that MMO sign-off of the scoping report is unnecessary as the ultimate sign off is actually derived through the EIA process and the ongoing discussions with expert consultees.

The weakness of the current MMD regime is that some advisors (Cefas and statutory advisors) will only contribute to this non-statutory part of the process if the pre-application fee has been paid by the applicant.

p.18, para.1 – In terms of ‘...other interested parties...’, consultee lists provided by regulators tend to be incomplete and out of date. Typically applicants will derive their own lists of consultee contacts for pre-application discussions.

The last sentence of this paragraph reflects the principle objective of the pre-application process, but the consultation document does not demonstrate clarity or understanding as to how this is actually achieved in practice, nor the practical constraints involved.

Q.5 – As an applicant, it is essential to have full engagement from all consultees throughout the pre-application discussions, backed up with timely responses. However, as previously explained suitable resourcing is key – particularly outside of the formal decision making process.

Following up the point under p.18/para.1 it is important not to limit ‘...interested parties...’ solely to statutory advisors – there will be a range of local, regional and national stakeholders who will routinely need to be consulted during the course of an application.

Q.6 – No comment

Q.7 – As a potential consultee for other marine activities, it is preferable to be engaged in the process with opportunities to comment at the earliest possible stage of the development process. In this way issues of concern can be identified in advance of the formal assessment. From experience, it is preferable to be dealing directly with the applicant (or their consultant) at

the pre-application stage, rather than via a third party (such as the licensing authority).

Q.8 – Resourcing is key to the delivery of an effective and efficient licensing regime, particularly during the pre-application stage when issues are identified, assessed and measures proposed to manage, mitigate and monitor. Regulators and advisors must have sufficient capacity to support their full engagement in the full range of pre-application discussions (as outlined in our comments under p.15/16). Service Level Agreements would assist in this matter (particularly if fees are being received for engagement), as would governance arrangements for monitoring and reporting performance.

Q.9 – Consistency of approach is important in terms of requirements & expectations. Some elements under S42-49 of the Planning Act are useful, but given the range of activities to be regulated through the Marine Licence it is probably more appropriate to account for this through guidance rather than a statutory requirement.

It is very much in the applicant's interest to identify and resolve issues at pre-application stage before formal decision making. This avoids delays in decision making, and increases the chance of a successful outcome without having to resort to inquiry/hearing.

In actual fact the key element should be how applicants are then required to take account of representations – not the fact that you have to seek them.

Q.10 – We would consider that a standard format for EIA would be too inflexible. Guidance on content & scope is necessary, and indeed in many cases already exists, but we would not be in favour to this extending to a more prescriptive requirement for format or style. Guidance can also be modified to ensure that new significant issues or developing best practice approaches to assessment can be included.

Q.11 – We would very much be in favour of maintaining the pre-application arrangements currently in place under the Marine Mineral Dredging regulations for the reasons set out in earlier comments in this response. However, we would be prepared to consider an alternative arrangement which was applied equally to all other activities being licensed, so long as it delivered an efficient and well resourced service during the pre-application stage.

Q.12 – No comment

Q.13 – As both a potential applicant and as an interested party consulted in relation to other developments, we would suggest that it is in the interest of all parties involved to fully engage in pre-application discussions in order to help identify issues and participate in dialogue to reduce, remove or mitigate concerns.

An issue could arise whereby an interested party chooses not to participate in dialogue at the pre-application stage, when issues have to be identified and resolved. In this instance, we would suggest that this should have some bearing on the weight of the comments they may raise at the formal decision making stage.

Q.14 – The requirement to undertake public consultation makes no reference to the requirement to lodge application documents somewhere, or for how long. We would suggest that there is a strong case for a web based portal to facilitate interested parties access to documents.

In terms of formal consultation, it is essential that the licensing authority consults with every party the applicant has had dialogue with through scoping and pre-application discussions – not just statutory advisors etc. The formal application should therefore include a requirement for the applicant to provide a definitive list of consultees and interested parties for regulator's reference.

Q.15 – The consultation period needs to be proportionate to the scale of the application and the evidence associated with it. For minor cases 28 days may be appropriate. However for major projects 8-12 weeks may be more reasonable – depending on the weight of evidence to consider. In both cases, an absolute cut-off should be applied as per Government policy/regulation consultations.

Q.16 – It is essential that key consultees are sufficiently well resourced to avoid this, particularly if they are performing a statutory function or duty. MoU/SLA will be important to ensure performance levels are delivered, and to monitor performance. A key issue is that significant delays can result in data/evidence going out of date.

In exceptional circumstances, the consultation period could be extended by a maximum of twice the advertised period (say from 8 weeks to 16 weeks) subject to notification and agreement by licensing authority and applicant. This type of extension though must represent an absolute cut off.

Q.17 – We would suggest that there are two elements. Firstly those parties who perform a statutory function which will need to be well resourced and deliver to timescales. Secondly there are wider interests such as local authorities, local industries, members of the general public etc. A guidance note would allow key contacts to be identified along with more general interests that could be relevant. However, if those parties with a statutory function are formally identified in the secondary legislation it would then mean that they would have to ensure adequate resourcing for all stages of the licensing process – including the essential pre-application discussions.

Q.18 – The process presented to trigger an inquiry are fine in theory, but the test will be how it works in practice. Inquiries should be driven by multiple issues and valid, evidence based concerns.

Q.19 – The power to hold informal hearings are appropriate to determining single or more limited issues. Such hearings should only focus on the issues of concern though, and not open the wider application for debate.

p.22 (Analysis, resolution & decision making) – Professional judgement, experience and technical competence of the licensing authority will be paramount in successfully delivering a risk-based approach.

Q.20 – While in theory such an approach would make sense, it will be important that the rationale behind the risk-based analysis was transparent, consistent and robust. This will require consideration of the wide range of scales & significance of the various activities which may require a marine licence, also expert appraisal and weighting of the nature of individual responses based on the evidence supporting their views.

Q.21 – As a potential consultee for marine licences, we believe that it would be possible to provide a risk assessment of a new licence application to our activities. However, to be meaningful in terms of contributing to the wider licensing process, guidance on how to do this consistently should be provided.

p.23 (Impact of marine planning) – Given the likely timescales for developing Marine Plans, it will be important for a robust and transparent set of transitional arrangements to be introduced to allow licences to continue to be determined in the interim.

Q.22 – In terms of the marine planning process, we would suggest that the content and direction of the Marine Policy Statement will be vital – both in terms of the overview and the detail for each sector/interest. The MPS needs to clearly and unambiguously define Government's priorities and objectives. From this, the marine planning process should seek to deliver these priorities on the ground on a consistent basis. If this is done, it should offer applicants and stakeholders greater certainty and confidence.

p.24 (Transparency and certainty) – we would suggest that these two factors are very different issues, with different requirements and different drivers.

Q.23 – In terms of certainty, target timeframes would assist only if they are adhered to, and there are mechanisms or means to ensure that this happens. Publicising performance could aid transparency, however there also needs to be some form of adaptive or feedback management to improve performance where there are failures.

Q.24 – While the principle of setting timescales for applicants is reasonable (particularly if other parties are being asked to perform to timescales at other stages of the process), there has to be some flexibility to allow for the nature of the further information required e.g. new modelling or scientific studies. We suggest that should difficulties arise in meeting the timescales set, the applicant provides an indication to licensing authority of a reasonable timescale which can then be agreed.

Q.25 – An oral hearing would ensure that any detailed issues of concern are explored accurately and in full, something that can prove difficult to do (for both appellant and the appellant body) if there is a sole reliance upon written representations.

Q.26 – The most appropriate route will depend upon the nature of the appeal – similarly to the decision making process. For a single or limited issue a hearing may be more appropriate, while for more complex appeals an inquiry may be required. There should be sufficient flexibility to allow a 'fit for purpose' approach.

Q.27 – The proposals appear to cover most eventualities. However, one addition would be where the determined outcome of an individual case appears to be inconsistent with previous casework decisions.

Q.28 – The suggestion to build some flexibility into the timings concerned would appear sensible – particularly if there is a chance the issue can be resolved informally. Equally, it is important that deadlines are in place (on both sides) to ensure the process does not simply stall through inaction on any party involved.

Q.29 – It is important that the appeal is focussed on the issues under dispute, and not widened to include other issues which have essentially been determined. To this end, the notification should focus on those who have participated in the process to date, and make the boundaries of the scope of the appeal clear.

Q.30 – Emails to existing consultees and advertisement on licensing authorities website should be sufficient.

Q.31 – Information should be limited to that related to the issues under appeal – not the entirety of the information contained within the body of the application.

Q.32 – It would be sensible for the appellant to be able to express a preference for the route to take, even if the appellate body takes the final view.

Q.33 – So long as sufficient time is given for the appellant to build their case – taking into account the time necessary to acquire/process/present new data for example – the statement of case should essentially draw a line under both the terms of the case and the evidence supporting it which are to be considered.

Q.34 – The powers outlined appear reasonable, including the power to award costs in the event of unreasonable behaviour. In terms of the power to appoint an independent specialist, we suggest that this would represent a sensible course of action to allow consideration of complex issues, so long as the expert in question was suitably qualified and experienced to provide the advice required, and also considered to be truly independent. Given the specialist advice required will vary depending upon the nature of the case, consideration should be given to a vetting or approval process whereby both appellant and appellate body could agree on the suitability of such a person prior to their formal appointment.

Q.35 – Yes

Q.36 – Yes

Q.37 – Yes

Q.38 – No comment

Q.39 – Yes – consideration of validity of exemptions relating to specific industry operations must be discussed with the sectors concerned. A decision to change the status of an exempted activity could have significant repercussions for the viability of the wider operation. An example would be exemption's 18 & 19 (table 1) concerning screening and overspill, without which marine aggregate extraction could not take place. Changes to exemption status should be accompanied by a suitable 'grace period' (as proposed for maintenance dredging, page 44, para.3) to allow the necessary consents to be obtained while operations continue.

Q.40 – Consistency of approach is important – whether for exemption on environmental grounds or exemption on the grounds of navigational safety. It is also important to take account of wider controls/regulations which may now be in place concerning safety of navigation, such as ISM Code requirements, Collision Regulations, MCA safe manning requirements and vessel certification to avoid duplication of controls. If existing controls for navigation safety already go above and beyond the requirements of the Coast Protection Act, extending CPA controls under the new marine licence should not be necessary, and those activities should become exempt.

The objective should be to avoid a multi-tiered system of control, particularly where the primary control for an activity may fall outside of the new marine licensing regime. However, to ensure consistency of regulatory approach it is important not to simply exempt an activity from the proposed marine licensing regime because the primary control for that activity falls outside, particularly if that control operates to a lower standard of performance than the new regime.

Q.41 – Yes, subject to the comments made under Q.40.

Q.42 – Subject to the comments made under Q.40.

Q.43 – No comment.

Q.44/Q45a-f – See comments above under Q.40 concerning safety of navigation requirements. We can expand and elaborate in more detail if required.

Q.46 – No comment

Q.47 – No comment

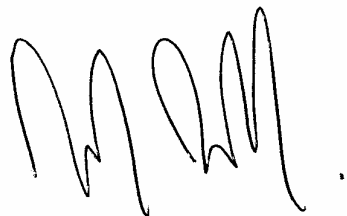
Q.48 – No comment

Q.49 – See comments relating to navigational safety under Q.40.

Q.50 – If they are adequately covered by other regulatory regimes, probably not.

We trust that you find these comments of use. If you require us to clarify any of the issues that we raise or to elaborate upon any of the practical points that we refer, please do not hesitate to contact the undersigned.

Yours sincerely

A handwritten signature in black ink, consisting of several large, stylized, overlapping loops, followed by a period.

Mark Russell  
Director, Marine Aggregates