

Divers & Marine Licensing: Marine & Coastal Access Act 2009

NAS Interim Statement: July 2011

Introduction

On 6th April 2011 Part 4 of the Marine and Coastal Access Act 2009 introduced a new regulatory regime for Marine Licensing. Marine Licensing is a devolved function and in Wales is discharged by the Welsh Government's Marine Consents Unit (MCU). This regime will require divers to apply for a marine licence in order to undertake certain activities. Previously divers were free to undertake some of these activities without the requirement of a licence. Consequently, this new regulatory regime introduces new controls on certain diving activities but diving itself is not a licensable activity. .

This Interim Statement outlines the new legislative provisions and associated exemptions and provides some clarification as to the MCU's current thinking.

Introductory Outline

1. s.65 states no one may carry out a "*licensable marine activity*" in the UK marine licensing area¹ except in accordance with a marine licence, which will be administered by the MMO in England and the Welsh Government's Marine Consents Unit (MCU) in Welsh waters (0-12 nautical miles).
2. s.66 lists a number of activities which are a licensable *marine activity* and for which a marine licence would be required. This list is very extensive and the wording is very general.
3. The *Marine Licensing (Exempted Activities) Order 2011* S.I. 409/2011 then goes on to grant a number of exemptions to activities which, but for those exemptions, would require a marine licence.

4. s. 66 - Licensable marine activities potentially affecting Divers

Within s.66(1) there are a number of activities which potentially make activities commonly undertaken by divers a *licensable marine activity*. These include, inter alia:

s.66(1)1 - "*To deposit any substance or object within the UK marine licensing area, either in the sea or on or under the sea bed, from—*

(a)

¹ The UK Marine licensing area comprises all United Kingdom marine waters out to the continental shelf with the exception of Scottish inshore waters. In addition, certain activities are licensable wherever carried out if they are carried out by British vessels, vehicles, aircraft, marine structures or floating containers or if the vessels etc have been loaded in the United Kingdom.

any vehicle, vessel, aircraft or marine structure,

(b)

any container floating in the sea, or

(c)

any structure on land constructed or adapted wholly or mainly for the purpose of depositing solids in the sea.”

s.66(1)8 - *“To use a vehicle, vessel, aircraft, marine structure or floating container to remove any substance or object from the sea bed within the UK marine licensing area.”*

s.66(1)9 - *“To carry out any form of dredging within the UK marine licensing area (whether or not involving the removal of any material from the sea or sea bed)”*.

In this context **s.66(2)(a)** provides: *“ ‘dredging’ includes using any device to move any material (whether or not suspended in water) from one part of the seabed to another part.”*

5. Marine Licensing (Exempted Activities) Order 2011 (S.I. 409/2011)

This Statutory Instrument, made under a power granted by the 2009 Act, grants a number of exemptions to activities which, but for those exemptions, would require a marine licence. In Wales, an Exemptions Order was also made by the Welsh Ministers – Marine Licensing (Exempted Activities) (Wales) Order 2011 which covers the same exemptions to the marine licensing regime (references to Articles in this section differ to the Welsh SI however). Part 2, Article 4 of the S.I. states that a marine licence is not required for an “*exempt activity*”. Part 3 then lists 32 activities to which Article 4 applies, i.e. are exempt.

In the context of recreational diving, the following exempt activities are relevant:

9 Salvage activities

Article 4 applies to an activity carried on, in the course of a salvage operation, for the purpose of ensuring the safety of a vessel or preventing pollution.

Comment:

This would allow a diver to recover objects which posed a threat of pollution.

22 Deposits in the course of normal navigation or maintenance

(1) Article 4 applies to a deposit from a vehicle, vessel, aircraft or marine structure in the course of its normal navigation or maintenance.

(2) But article 4 does not apply--

- (a) to any such deposit made for the purpose of disposal;
- (b) to any such deposit to the extent that it falls within item 10.

Comment:

This would permit anchoring in the course of navigation but probably not placing a mooring, which is only exempt if done by certain authorities².

31 Diver trails within restricted areas

Article 4 applies to a deposit or removal activity carried on for the purpose of placing, securing or removing signage or other identifying markers relating to a wreck within an area designated as a restricted area within the meaning of section 1 of the Protection of Wrecks Act 1973.

Comment:

The wording permits the laying of diver trails on wrecks designated under s.1 PWA 1973.

33 Deposit and use of flares etc--safety purposes and training

Article 4 applies to the deposit or use of any distress flare, smoke float or similar pyrotechnic:

- (a) securing the safety of a vessel, aircraft or marine structure,
- (b) saving life, or
- (c) training for any purpose referred to in paragraph (a) or (b).

Comment:

This would permit the use of distress flare, smoke float or similar pyrotechnic to secure life or safety of a vessel.

² Exemption item 25 Moorings and aids to navigation provides:

(1) *Article 4 applies--*

- (a) to a deposit or works activity carried on by a person referred to in paragraph (2) for the purpose of providing a pile mooring, swinging mooring, trot mooring or aid to navigation;
- (b) to a removal activity carried on by any such person for the purpose of removing any such mooring or aid to navigation.

(2) *The persons are--*

- (a) a harbour authority;
- (b) a lighthouse authority;
- (c) any other person, where the activity is carried on in accordance with a consent required from, and granted by, any such authority.

(3) *But article 4 does not apply to any such activity which consists of the deposit or the construction of a pontoon.*

Discussion with MMO and MCU

At the June meeting of the Joint Nautical Archaeology Policy Committee the Marine Management Organisation (MMO) discussed the current thinking on what activities by divers would and would not require a marine licence under the Marine and Coastal Access Act 2009. The Welsh Government's MCU is also engaged in these discussions. The MMO will formally confirm the legal position shortly and are working towards the following:

1. Use of a vehicle or vessel to remove any substance or object from the seabed

A licence is *not required* if a non tethered diver removes an object or substance from the seabed, irrespective of whether the diver is transported to the site by a vehicle or vessel. Neither will a licence be required if a diver removes an object or substance and carries it across the foreshore to a vehicle.

A licence *will be required* if:

- the diver is tethered and / or using surface supply
- there is a 'direct link' to the vessel e.g. the object is winched or craned to the surface by the vessel
- a vehicle is used to carry or drag the object or substance across the foreshore from below High Water

2. Meaning of seabed

The seabed includes any structure lying on the seabed. Therefore where a wreck is resting on the seabed any part of that wreck will be on the seabed for the purposes of the Act, even if that part of the wreck rises above the seabed

3. Sites designated under s.1 Protection of Wrecks Act 1973

Contrary to previous guidance if a marine licensable activity is conducted on such a designated site then a marine licence *will be required, in addition to any licence granted under the PWA 1973*. However, the *Marine Licensing (Exempted Activities) Order S.I. 409/2011* contains a number of exemptions for activities on such designated sites, though not all activities are exempted.

4. Other Consents

Similarly, where other licences (such as under the Protection of Military Remains Act 1986) or consents (such as from a Harbour Authority or the Crown Estate) have been obtained, if a marine licensable activity is conducted on such a designated site then a marine licence *will be required, in addition*. The Marine Licensing regime is a separate, stand alone regulatory scheme and other licences or consents *do not* remove the need for a marine licence where a marine licensable activity is being conducted.

5. Dredging

Hand fanning by divers does not constitute dredging within the meaning of the 2009 Act. However, use of an airlift or water dredge will constitute dredging and will require a licence, even on a site designated under the 1973 Act.

Applications for licences by recreational divers for archaeological excavation (dredging) will come within the lowest tier of applications i.e. Tier 1A and will cost £158.00 per application. There will be no requirement to advertise the application and the decision making process will take around 6 weeks. In Wales, the application process may be different and you should contact the MCU directly for advice on making applications and on the relevant fees – mcu@wales.gsi.gov.uk

NOTE:

This clarification is **not** comprehensive, and is merely a note of a discussion with the MMO on 22nd June 2011 and email correspondence with the MCU. It should not be used as legal advice, as the MCU, MMO, their legal advisers and parent organisations are continuing to formulate more comprehensive guidance for divers. Any queries relating to marine licensing should be emailed to the MCU directly.

Both the MMO and the MCU is anxious to facilitate a close working relationship with the recreational, archaeological and scientific diving communities. To this end they will be consulting closely and discussing relevant issues with these communities and in due course more comprehensive guidance will emerge. As noted above, the MCU is engaged in the discussions with the MMO about what interpretation is to be placed upon the 2009 Act and it is understood that a common position may be reached. Scotland has its own legislation, which is comparable and enquiries are also be made with Marine Scotland.