OUTER HOUSE, COURT OF SESSION

[2023] CSOH 39

P107/23

OPINION OF LORD BRAID

In petition of

THE OPEN SEAS TRUST

Petitioner

for

Judicial review of a decision by Scottish Ministers, through their directorate the respondent to issue a notice in terms of the Sea Fishing (Licences and Notices) (Scotland) Regulations 2011 varying sea fishing licences dated 30 December 2022 and published on 1 January 2023.

Petitioner: J Findlay KC, Colquhoun; Davidson Chalmers Stewart LLP
Respondent: C O'Neill KC, E Campbell; Scottish Government

23 June 2023

Introduction

[1] Fishing vessels licensed by Marine Scotland (a Scottish Government directorate, which I will refer to in this opinion as the respondent) carry out fishing using a method known as bottom-trawling, which involves dragging weighted nets along the sea-floor in order to catch fish; and scallop dredging, a method of collecting scallops by dragging a dredge across the sea-floor. Both methods potentially cause significant damage to features of the marine habitat, including those known as Priority Marine Features (PMFs).

[2] Section 15(1) of the Marine (Scotland) Act 2010 provides that a public authority must take any authorisation or enforcement decision "in accordance with" the appropriate marine plans unless relevant considerations indicate otherwise. Scotland has a National Marine Plan (NMP), which was prepared and adopted pursuant to section 5(1) of the 2010 Act. It sets out strategic policies for the sustainable development of Scotland's marine resources out to 200 nautical miles. The short issue for determination in this judicial review is whether, in taking decisions to vary conditions attached to sea fishing licences in terms of powers accorded to it by the Fisheries Act 2020 (which the respondent accepts are authorisation decisions within the meaning of section 15(1)), the respondent must have regard to the NMP.

[3] The petitioner, a charity whose purposes include the conservation and the environmental protection of marine species in the waters and seas surrounding the UK, argues that it must. The respondent disputes that: its position is that its approach of achieving the purposes of the plan through statutory instrument (SSI) is sufficient compliance with its statutory duty to act in accordance with the NMP, and that it need not (and avowedly does not) take the plan into account when making individual decisions regarding sea fishing licences, of which there are many. The issue in dispute largely comes down to the meaning of the words "in accordance with", and whether the respondent is entitled to implement the plan solely through the process of SSI – a process which, with the best will in the world, could not be described as quick.

The decision under review

[4] The respondent's interpretation of its duty under section 15 of the 2010 Act has long been a bone of contention between the parties, and has been the subject of correspondence stretching back to 2021. However, the particular decision challenged in this petition was made on 30 December 2022, when the respondent published a notice under regulation 3 of the Sea Fishing (Licences and Notices) (Scotland) Regulations 2011 by which, among other things, the general conditions applicable to all Scottish sea fishing licences were varied: quarterly catch limits for the fishing of *nephrops* in certain sea areas were set at 20 tonnes; and the quarterly effort allocation (the number of days in the quarter-year on which a boat may undertake dredging) for the dredging of scallops by vessels over 15 metres was set at 65 days for the period between 1 January and 31 March 2023 in ICE Area VII.

[5] To put the first variation in context, it followed the conclusion of negotiations between the UK and EU in relation to the setting of total allowable catches for jointly-managed stocks and a determination by the Secretary of the State for Environment, Food and Rural Affairs under section 23 of the Fisheries Act 2020. That variation affected only non-sector vessels (that is, Scottish licensed vessels which are not members of a Producer Organisation or a Scottish Quota Management Group). It had the effect of reducing the allowable catch for *nephrops*, for the quarter to 31 March 2023, from 30 tonnes to 20 tonnes. Had it not been made, the allowable catch would have remained at 30 tonnes. As regards the second variation, it applied only to vessels of a particular length (including sector and non-sector vessels) and restricted the number of days those vessels could fish for scallops but applied only to the area ICE VII, which comprises the Solway Coast and part of the Irish Sea. Had it not been made, the number of days on which vessels could have fished in the quarter would have been unrestricted.

[6] As the solicitor advocate for the respondent was keen to emphasise, the decision of 30 December 2022 was a routine weekly quota management decision taken in accordance with the Scottish Quota Management Rules 2022. As their title indicates, those rules are about the management of UK fish quotas apportioned to the respondent by the UK Government and do not themselves have anything to do with protection of the marine environment.

[7] Since the notice no longer has any practical effect in relation to either of the variations complained of (essentially because the quarters to which they related have passed), the petitioner no longer seeks suspension of it. It does, however, seek declarator that the notice is unlawful insofar as it was issued without consideration of the effect on PMFs of the variations made thereby, in contravention of the requirements of section 15 of the 2010 Act. For completeness, a complaint in the petition that the notice is also unlawful because it was issued without intelligible reasons as to why the plan was being departed from is no longer a live issue: the respondent accepts that it did not give reasons at all, because it did not consider it was departing from the plan. If that is correct, no reasons were required. If it is wrong, the decision will have been unlawful.

The NMP

[8] The NMP is a lengthy and complex document. Paragraph 2.16 states that it should be applied proportionately. The plan contains a number of core policies which, paragraph 3.10 states, are intended to represent the characteristics against which the sustainability of development and use is considered and which are intended to apply to all plan making and decision making in the marine environment. It is Policy GEN 9 in

particular to which, the petitioner argues, the respondent should have regard when taking licensing decisions. It provides:

> "GEN 9 Natural heritage: Development and use of the marine environment must:
>
> (a) Comply with legal requirements for protected areas and protected species.
>
> (b) Not result in significant impact on the national status of Priority Marine Features.
>
> (c) Protect and, where appropriate, enhance the health of the marine area."

Other policies include: GEN 5 Climate change; GEN 6 Historic environment; GEN 7 Landscape seascape; GEN 8 Coastal process and flooding; GEN 11 Marine litter; GEN 13 Noise; GEN 17 Fairness (a duty to treat all marine interests with fairness and in a transparent manner when decisions are being made in the marine environment); GEN 18 Engagement (a duty to undertake early and effective engagement with the general public and all interested stakeholders to facilitate planning and consenting processes); and GEN 19 Sound evidence (decision making in the marine environment to be based on sound scientific and socio-economic evidence). There is also a section of the plan dealing specifically with Sea Fisheries, which desiderates an evidence-based approach to fisheries management, underpinned by a responsible use of sound science and is supported by the whole sector. This section also states that marine planners and decision makers should aim to ensure:

- existing fishing opportunities and activities are safeguarded wherever possible;
- an ecosystem approach to the management of fishing which ensures sustainable and resilient fish stocks and avoids damage to fragile habitats; and
- improved protection of the seabed and historical and archaeological remains requiring protection through effective identification of high-risk areas and management measures to mitigate the impacts of fishing, where appropriate.

Priority Marine Features and damage thereto

[9] 81 Priority Marine Features, referred to in sub-paragraph (b) of Policy GEN 9, were identified by Scottish Natural Heritage (now NatureScot) and the Joint Nature Conservation Committee in a report prepared in 2012 and adopted by Scottish Ministers in 2014 following a period of public consultation. The petitioner focuses on 11 of these: blue mussel beds; cold water coral reefs; fan mussel aggregations; flame shell beds; horse mussel beds; maerl beds; maerl or coarse shell gravel with burrowing sea cucumbers; native oysters; northern sea fan and sponge communities; seagrass beds; and serpulid aggregations. Many of the sites where these features are found are already protected, falling within the Marine Protected Areas (MPA) Network, which comprises some 233 sites covering 37 of Scottish seas. However, many other sites lie outwith the MPA network.

[10] The petitioner avers (at statement 9 of the petition) that licensed scallop dredging and bottom trawling for *nephrops* are each likely to create a significant impact on the national status of PMFs where they interact, and that both activities take place throughout the year in locations within the Scottish marine area in which PMFs are known to be present, and which are not currently subject to fisheries management controls. By way of example, the petitioner refers to: the waters around Flotta in Orkney, the waters adjacent to the Isle of Rum and the waters at the south end of Islay, where maerl beds are exposed to scallop dredging by licensed vessels; the waters off Scarba, where fan mussel aggregations are exposed to the impact of bottom trawling for *nephrops*; and the waters off the Isle of Lismore, where horse mussel beds and flame shell beds are frequently exposed to bottom trawling for *nephrops* and scallop dredging. The waters off Scarba and those of the Isle of Lismore lie within ICE Area VI, which is covered by the catch limits applicable to *nephrops* set out in the

notice. The respondent's answer to these averments is, first, to point out that bottom-trawling and scallop dredging may affect PMFs without having a significant impact on their national status, and it denies that certain of the PMFs are present in the areas alleged by the petitioner; but it goes on to aver, in some detail, the steps which it is taking to develop fisheries management areas to protect PMFs in these areas.

[11] More generally, the respondent has taken steps to inform itself about PMFs and their status, with a view to taking action to protect them, as explained in affidavits and productions lodged for the substantive hearing. In about 2017 or 2018, as John Mouat of the respondent states at paragraph 30 of his affidavit, the respondent commissioned NatureScot to identify broad search locations outwith the MPA network where there was a need to consider additional management for bottom contacting mobile fishing gears, to ensure there was no significant impact on the national status of PMFs. As part of that process, NatureScot developed and published advice documents in 2018 for each of the 11 PMFs listed above. These included a description of the feature, its distribution from known records, its status, sensitivity, connectivity, ecosystem services and assessment against the NMP. By way of example:

> a) [T]he advice document for flame shell beds reported that they have been recorded at 11 locations within Scottish waters; as regards status, that they are of international importance but that the habitat is considered to be severely declined and threatened in Scottish waters with evidence of decline in certain areas; as regards sensitivity, that they are highly sensitive to physical damage, including that caused by bottom-contacting fishing; dredging was believed to be the source of the decline in extent of former beds in the Clyde. As regards assessment against the NMP, the advice stated that flame shell beds were functionally important and that in a fisheries

context, additional measures to protect flame shell beds from pressures associated with towed bottom-contacting gears were recommended in certain areas.

b) The advice document for maerl beds stated that maerls are extremely slow growing and extensive beds may be thousands of years old. They have a globally restricted distribution, with Scotland having approximately 30% of the maerl beds in north-west Europe and most of the beds in the UK. They are highly sensitive to physical disturbance, particularly in the form of abrasion, and heavy bottom-contacting towed gears have the potential for significant negative impacts on maerl beds with up to 70% of maerl crushed and buried by one pass of a scallop dredge. They too are functionally important, slow to recover and, if lost completely, may not recover. In a fisheries context, further protection measures from pressures associated with towed bottom-contacting gear are most easily focussed on certain discrete areas.

Similar advice was given in relation to fan mussel aggregations, horse mussel beds and seagrass beds in particular. There is no doubt, and the respondent does not dispute, that bottom-contact fishing can, and does, cause damage to these PMFs, in some cases, significant damage such as to impact upon their national status.

The respondent's approach

[12] It is not only the petitioner which is concerned by the impact of bottom-contact fishing on PMFs, including the 11 listed: so, too, is the respondent. The steps it has taken to address the issue, in addition to commissioning NatureScot to provide the advice referred to, are outlined in Mr Mouat's affidavit. Its approach involves: commissioning a sustainability appraisal (including a Strategic Environmental Assessment (SEA) and Socio-economic Impact Assessment (SEIA)); engaging with stakeholders, including public

consultation; followed by ministerial decision and Parliamentary scrutiny of proposed SSIs prior to their entry into force. This approach is aimed at ensuring that obligations under relevant legislation are met, such as the Environmental Assessment (Scotland) Act 2005, the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 and the Islands (Scotland) Act 2018. The sustainability appraisal considers the potential social, economic and environmental effects of draft proposals and reasonable alternatives, drawing upon information contained in the SEA and SEIA in a holistic manner.

[13] In line with this approach, a screening and scoping exercise for the SEA was undertaken. That itself required public consultation. The next stage was to complete the Environmental Report of the SEA, undertake a socio-economic impact assessment and complete the sustainability appraisal of the proposed management measures. This was done during 2018/19. In September 2018, based on the advice of NatureScot and the consultation, the respondent developed three different draft fisheries management options for the protection of the 11 PMFs. At the same time, phase 2 MPA fisheries management measures were being developed in parallel. The third stage, in anticipation of a public consultation on the proposed fisheries management measures, was to hold a pre-consultation stakeholder workshop in October 2019 following which Ministers decided to delay the public consultation to allow time for extended stakeholder engagement. The impact of Covid19 in 2020 delayed this process, which restarted in 2021. In August 2021 the Scottish Government and the Scottish Green Party signed the Bute House Agreement and adopted a shared policy programme which included a commitment to:

> "…deliver fisheries management measures for existing [MPAs] where these are not already in place, as well as key coastal biodiversity locations outside of these sites, by March 2024…These measures will give protection for MPA features, as well as those priority marine features identified as most at risk from bottom-contacting mobile fishing gear outwith MPAs".

The sustainability appraisals are to be undertaken by external contractors, thus a procurement process had to be undertaken. It began in June 2022, but took longer than anticipated, a contract being entered into on 6 January 2023. As at the date of the hearing before me, the estimated completion date for the draft fisheries management measures for PMFs to be finalised was said to be May 2023. The sustainability assessment is estimated to be completed by December 2023, the public consultation by May 2024, analysis of the results of that by July 2024, with a Ministerial decision being taken by November 2024 and the SSIs being drafted and laid in Parliament by December 2024. Thus it is likely to be 2025 at the earliest before any SSIs come into effect, even if there is no further slippage. Given that even the procurement process for the contractors for the sustainability appraisals took longer than anticipated, that may be a fond hope, rather than an expectation.

[14] The petitioner does not take issue with this approach, as such. It applauds it. But, says the petitioner, it is not enough: during the delay in implementing measures to protect PMFs, damage continues to occur, as a report by the respondent itself in 2022 – Marine Scotland Assessment Biogenic Habitats – demonstrates. The petitioner argues that the respondent should have regard to policy GEN 9 when authorising licence variations, and should impose restrictions on bottom-contact fishing now, or at least, give consideration to doing that.

[15] In his affidavit, Malcolm MacLeod of the respondent lists four reasons as to why the respondent does not consider it practical to consider policy GEN 9 when carrying out licence variations: (i) an inability to carry out appropriate stakeholder engagement, including obtaining scientific advice, (perhaps) undertaking public consultation and impact assessments; (ii) consideration of the impact on wider UK vessels and waters: any action

taken through licence conditions would affect only Scottish vessels, not the activity of fishing vessels from other parts of the UK; (iii) the requirement to implement the outcome of international negotiations timeously, rendering it impractical to address the policies in the NMP when considering licence variations; and (iv) the need for flexible and adaptive management measures to be introduced through licences.

[16] For all these reasons, while the respondent takes the NMP seriously and is committed to introducing measures in accordance with it, it does not consider it to be a proportionate application of the plan to address each of the relevant policies every time a licence variation is made. By applying the NMP in a manner which it considers to be appropriate, and proportionate, the respondent considers that it is acting in accordance with the NMP.

Legislative framework

[17] It is now necessary to look in a little more detail at the provisions of the two statutes in play, the Marine (Scotland) Act 2010 and the Fisheries Act 2020. Since the decision in question was made under the latter Act, I will begin with it.

The Fisheries Act 2020

[18] Section 14(1) of the 2020 Act provides that fishing anywhere by a British fishing boat is prohibited unless authorised by a licence. By section 15(1), the power to grant a licence in respect of a Scottish fishing boat is to be exercised by the Scottish Ministers; and by section 15(2), a licence may confer limited authority by reference, in particular, to the area in which fishing is authorised, the periods, times or particular voyages during which fishing is authorised, the descriptions and quantities of fish which may be caught or the method of sea

fishing. Section 16 prohibits fishing within British fishery limits by a foreign fishing boat unless authorised by a licence. Section 17(1) and (2) provide that Scottish Ministers may grant a licence in respect of a foreign fishing boat in respect of Scotland and the Scottish zone (as those terms are defined in the Scotland Act 1998), and section 17(3) mirrors section 15(2) in setting out the ways in which the authority conferred by a licence may be limited. Schedule 3, brought into play by section 18, contains further provisions about sea fishing licences. Paragraph (1) of that schedule provides that a sea fish licensing authority (of which the respondent is one) may, on granting a licence, attach to it such conditions as appear to it to be necessary or expedient for the regulation of sea fishing (including conditions which do not relate directly to fishing). Paragraph 1 provides that the conditions that may be attached to a sea fishing licence include, in particular, conditions …
(c) restricting the time the fishing boat may spend at sea, and (d) which are imposed for the purposes of conserving or enhancing the marine and aquatic environment. Paragraph 2 provides that a sea fish licensing authority may from time to time vary a sea fishing licence so as to alter the authority the licence confers, or add, remove or vary a condition attached to a sea licence it has granted. Finally, paragraph 4 applies where one sea authority attaches a condition, or limits the authority conferred by licences, covering the area for which that authority is responsible. That authority may request that other authorities attach a similar condition to licences granted by them, in respect of the area in question. Paragraph 4(3) imposes a duty on those other authorities to comply with the request unless, in their opinion, it is unreasonable to do so.

[19] In practice, I was told that the number of licences is constant, no new licences having been issued since the 1990s. The power to attach and, by extension, to vary conditions is extremely wide, as is the type of condition which may be attached, of particular note being

the reference to conditions which have the purpose of conserving or enhancing the marine and aquatic environment.

[20] The other salient point to note is that the effect of paragraph 4 of Schedule 3 is that while the respondent cannot regulate the activities of non-Scottish vessels within Scottish waters, and any licence conditions it imposes apply only to Scottish vessels, it does have the power to request the other licensing authorities (viz, the Welsh Ministers, the Northern Ireland department and the Marine Management Organisation) to impose similar conditions in respect of fishing boats licensed by them, when fishing in Scottish waters, and that request, if reasonable, must be complied with. This, at a stroke, removes Mr MacLeod's second objection to the use of licence conditions to protect PMFs: if imposing a condition the purpose of which was to protect PMFs, the respondent could ask the other licensing authorities to do likewise, which they would have to do, subject to a reasonableness requirement.

Marine (Scotland) Act 2010

[21] Insofar as material, section 15 of the 2010 Act provides:

> "**15 Decisions of public authorities affected by marine plans**
>
> (1) A public authority must take any authorisation or enforcement decision in accordance with the appropriate marine plans, unless relevant considerations indicate otherwise.
>
> (2) If a public authority makes an authorisation or enforcement decision otherwise than in accordance with the appropriate marine plans, it must state its reasons.
>
> (3) A public authority must have regard to the appropriate marine plans in making any decision–
>
> > (a) which relates to the exercise by them of any function capable of affecting the whole or any part of the Scottish marine area, but

(b) which is not an authorisation or enforcement decision.

(4) In this section –

(a) an 'authorisation or enforcement decision' is any of the following:

(i) the determination of any application (whenever made) for authorisation of the doing of any act which affects or might affect the whole or any part of the Scottish marine area,

(ii) any decision relating to any conditions of any such authorisation,

(iii) any decision about extension, replacement, variation, revocation or withdrawal of any such authorisation or any such conditions (whenever granted or imposed)…"

Submissions

Petitioner

[22] Senior counsel for the petitioner submitted that the requirement to take authorisation decisions in accordance with the plan meant that the respondent had to "grapple with" the policies of the plan in reaching such decisions. An analogy could be drawn with town and country planning, with which there were strong parallels: *R (on the application of Powell)* v *The Marine Management Organisation* [2017] EWHC 1491 (Admin), Holgate J at [51]. The approach to a development plan when considering a planning decision was described by Patterson J in *Tiviot Way Investments Ltd* v *Secretary of State for Communities and Local Government and Another* [2015] EWHC 2489 (Admin) at paragraphs [27] to [30]. Similarly, the respondent must consider the NMP as a whole and decide whether a decision it proposed to take was in accordance with it or not, recognising that different policies could pull in different directions. The approach of achieving the purpose of the plan by SSI was all well and good but was insufficient on its own. The respondent's argument was in effect that it

was applying the plan proportionately by not applying it, which flew in the face of the section 15 duty.

Respondent

[23] The solicitor advocate for the respondent submitted that the respondent was not required to have regard, or apply its mind, to the plan, in making decisions such as the one under challenge. A better analogy than *Powell*, where the court had discussed a duty to "have regard", was the obligation to comply with convention rights, where the issue was not whether an authority had applied its mind to such rights, but whether there had been substantial compliance with the Convention: *R (SB* v *Governors of Denbigh High School* [2007] 1AC 100. This was important, because the petitioner did not offer to prove that the fishing permitted by the licence variation would cause significant impact on the national status of PMFs. The respondent's approach to the plan – of implementing it by SSI – was proportionate. It would be disproportionate to require the respondent to consider each and all of the policies in the NMP and to assess whether variation of licence conditions would have a significant impact on the national status of PMFs. The NMP envisaged decisions being taken in the long-term public interest after appropriate engagement with the public and other stakeholders and required decisions to be reached on a sound evidential basis, underpinned by sound science. None of that was possible in the context of setting catch and effort limits for existing licences for a three month period. To adopt the approach advocated by the petitioner would paralyse that process. Further, the imposition of conditions on an entitlement to fish could engage the rights of a licence holder under Article 1 of Protocol 1 of the ECHR. The respondent's overall approach to the NMP was proportionate and therefore in accordance with it.

Decision

[24] The issue is essentially one of statutory construction, as identified at the outset of this opinion: what does "in accordance with" the appropriate marine plan, in this case the NMP, mean? Is the respondent complying with the duty imposed on it by section 15 of the 2010 Act, to take authorisation decisions in accordance with the NMP, unless relevant considerations indicate otherwise, by having a long-term strategy to implement its policy objectives, such that it need not have regard to the NMP when taking authorisation decisions? One only has to frame the question in that way to recognise that the answer must be no. As the petitioner submitted, the respondent's position at heart is that it is proportionate for it *not* to consider the plan when taking individual licensing decisions such as the one in question; but what is required by section 15 is a proportionate consideration of the plan, which is not the same thing.

[25] The respondent's position might well have been correct if the duty had simply been a general one to act in accordance with the plan. In a wide sense, the respondent *is* acting in accordance with the plan, by embarking on a process of appraisal, engagement and consultation with a view, eventually, to promulgating an SSI or SSIs. But that is not what section 15 of the 2010 Act requires. It expressly requires the respondent to take any authorisation decision in accordance with the NMP unless relevant considerations indicate otherwise, in other words, the plan is to be an integral part of the process of taking a decision. That is echoed in the plan itself, which has several references to policy makers *and* decision takers. It is hard to see how a decision can be taken in accordance with a plan, unless regard is had to that plan (or as senior counsel for the petitioner put it, unless the plan is grappled with, which comes to the same thing). That regard is to be had to the plan

is surely confirmed by subsection (3), which provides in terms that a public authority must "have regard" to the appropriate marine plan in making a decision which relates to the exercise by it of any function capable of affecting the whole or part of the Scottish marine area, but which is not an authorisation or enforcement decision. The legislative intention is plain. The public authority must have regard to the plan in taking either type of decision: in relation to a decision of the type described in subsection (3), the decision need not be in accordance with the plan; but in relation to an authorisation (or enforcement) decision it must, unless relevant considerations indicate otherwise – in which case, reasons must be stated in accordance with subsection (2). The legislature cannot have intended that while an authority must have regard to the plan in a non-authorisation decision, it need not do so in an authorisation one. Further, if the test was simply whether an actual decision was in fact contrary to the plan or not, no regard having been had to the plan in taking that decision, the requirement to state reasons for departing from the plan would make no sense. Reasons could only be given for departing from a plan if the plan has been considered in the first place. I do not consider that the respondent's suggested analogy of convention rights is a good one. There the focus is indeed on substantive rights and whether they have been infringed; whereas section 15 is focussed on the decision-making process.

[26] Since the respondent admittedly did not consider the plan or its policies in taking the decision complained of, that is sufficient to dispose of the petition, and it is strictly unnecessary to consider the extent to which a decision must accord with a plan to be in accordance with it. For what it is worth, I endorse what was said by Holgate J in *R (on the application of Swire)* v *Canterbury City Council* [2022] JPL 1026, albeit in the context of town and country planning, paragraphs [42] to [44], namely, that "in accordance with" means in agreement or harmony with, and does not connote an exact or strict degree of conformity;

deciding whether a development is in conformity or harmony with a plan may well involve matters of planning judgment and degree. Applying that to the present context, deciding whether conditions attached to fishing licences are in accordance with the NMP may likewise involve questions of judgment. To a similar effect is what was said by Patterson J in *Tiviot Way Investments* Ltd, above, again in the context of planning and conformity of a development with a development plan, at paragraphs [27] and [30]. There must be a decision as to whether the development under consideration is in compliance or conflict with the development plan, so that the decision maker can undertake the planning balance in an informed way. That exercise does not involve a mechanistic approach of judging the proposals against each and every policy that may be prayed in aid of a development or against it, but an evaluation of main policy areas within the development plan that are relevant to the proposal to be determined and an assessment of how the proposal fares against them, so that a judgment can be made against the development plan as a whole. This is sufficient to dispose of another of the respondent's arguments that it would have to evaluate every variation to licence conditions against every policy in the plan. That is not what is required, which is an assessment against the NMP as a whole, recognising that different policies may point in different directions.

[27] The respondent further argues that the NMP need not be considered in taking routine decisions. As the petitioner points out, the section 15 duty does not distinguish between routine and other types of decision. As soon as a decision is accepted to be an authorisation decision – as this one is – the duty that it be made in accordance with the plan arises.

[28] Another *cri de coeur* of the respondent is that it is too difficult, if not impossible, to undertake the engagement required by the plan, when taking decisions of the sort under

consideration. Two answers may be given to that. First, that does not prevent the decision maker from evaluating a proposed variation to a licence against the plan, nor from undertaking even limited engagement with relevant stakeholders. Second, as examples given by the petitioner show, the petitioner has in fact, on occasion, used licence conditions for reasons other than the strict management of fish quotas. I need refer to only two such examples: a licence variation dated 6 November 2020 which prohibited creel fishing in an area stretching around 165 km down the Wester Isles to all boats other than those registered in the Outer Hebrides Inshore Fisheries Pilot; and a ban on dredging for queen scallops in the west of Scotland and the Irish Sea from April to June 2023. The respondent complains that these changes were the product of industry involvement in the development of these proposals, and that the decisions were a different kind of decision from that taken on 30 December 2022; but the section 15 duty does not draw a distinction between different types of authorisation decision.

Disposal

[29] For all these reasons, I have concluded that since the respondent did not consider the NMP in making the licensing variations complained of, the decision of 30 December 2022 is unlawful at least to that extent. Since the Notice also dealt with other matters, which I was told are the subject of a separate challenge for different reasons, I shall put the case out By Order to discuss the precise terms of the order to be made.