Up Frenchman's creek: A case study on managing commercial fishing in an English Special Area of Conservation and its implications

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The Habitats Directive has matured over the years since it has been implemented. One of the last industries to feel its application is the commercial sea fishing industry: the industry which according to the Royal Commission on Environmental Pollution has the most direct effect on the marine ecosystem.[1] This article outlines one of the earliest applications of the directive to commercial fishing in the UK's Fal and Helford Special Area of Conservation (SAC), where a national NGO brought pressure to bear on local and national administrators over failure to implement the directive in a European marine site. It goes on to describe how different regulators took differing approaches to their roles and how the lack of enforcement capacity of one statutory nature conservation agency meant that the NGO had to threaten a complaint to the European Commission and potential infraction proceedings against the UK before the European marine site was closed to damaging fishing operations. It then explains how this test case has percolated into UK fisheries management around the UK, leading to the closure of damaging fisheries in Welsh marine sites, policy changes over the management of English sites and a growing debate over whether the proper application of the directive and other European environmental legislation to marine fisheries is inevitable in the rest of the UK and the European Union. Commercial fishing will undoubtedly continue in UK waters but it is likely that those fishing methods which have a significant impact on the marine environment will face an increasing burden of regulation where they wish to continue to operate in marine protected areas.

Introduction*

It is over 20 years since the introduction of the European Habitats Directive.[2] The UK Habitats Regulations[3] were introduced shortly afterwards to protect the most outstanding examples of UK habitats and species and contribute to European biodiversity conservation targets set under the Convention on Biological Diversity.[4] The directive covers land, freshwater and marine habitats and species and thus affects different levels of data, governance and management structures in different environments.[5] The UK Habitats Regulations work relatively well on land where the likely impact of development is fairly transparent to regulators, developers and wider society. Implementation of the directive in the marine environment is still a relative novelty. This is a shame as many of the UK European marine sites are huge,[6] and provide considerable potential for ecosystem recovery. There is often a coarser information base on the distribution of conservation features within marine sites than for terrestrial sites, which can result in precautionary management advice from statutory nature conservation agencies (SNCAs) whose role it is to guide administrators on correct practice.

Activities which are likely to have an impact on the favourable status of both the wider site, and the individual conservation features within sites, pose significant problems.[7] There have been signal marine cases on the directive (the *Greenpeace*[8] case and the *Waddenzee*[9] ruling), but the application of the directive has not been consistent across different marine industries. Ports and harbours have generally (if grudgingly) accepted that they have to comply with the directive,[10] but fisheries management traditionally remained obstinately outside

1 RCEP 'Turning the Tide' (2004) 2.

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2 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora OJ L 206, 22.7.1992.

3 The Conservation (Natural Habitats etc) Regulations 1994.

4 J H Jans 'Case analysis: the Habitats Directive' (2000) 12 (3) *Journal of Environmental Law* 385–90.

5 P J Jones, W Qui and E M de Santo 'Governing marine protected areas – getting the balance right' (2011) UNEP Technical Report; B J McCay, P J Jones 'Marine protected areas and the governance of marine ecosystems and fisheries' (2011) 25 (6) *Conservation Biology* 1130–33 http://onlinelibrary.wiley.com/journal/10.1111/%28ISSN%291523-1739/issues.

6 Joint Nature Conservation Committee (JNCC) 'Marine Protected Areas in the UK' http://jncc.defra.gov.uk/default.aspx?page=5201&LAYERS=TwelveTS,UKCS,BFL,InSAC,OFFcSAC.

7 D Kriebel et al 'The precautionary principle in environmental science' (2001) 109 (9) *Environ Health Persp* 871–76; C R Sunstein (ed) *Laws of fear: beyond the precautionary principle* (Cambridge University Press Cambridge 2005); J Verschuuren 'Shellfish for fishermen or birds?' (2005) 17 (2) *J Environ Law* 265–83.

8 *R v Secretary of State for Trade and Industry ex parte Greenpeace* [2000] 2 CMLR 94.

9 Case C–127/02 OJ C 262/2 (judgment 22 September 2004).

10 A Cliquet 'International legal possibilities and obligations for nature conservation in ports' in J-L Herrier et al (eds) *Proceedings, Dunes and Estuaries – International Conference on Nature Restoration Practices in European Coastal Habitats* Kokosijde Belgium 19–23 September 2005 VLIZ Special Publication 19 393–404.

its ambit. This is difficult to justify given that the commercial fishing industry is the most obvious human activity which directly affects the oceans.[11] Even when the directive began to be applied, the industry lobbied consistently to water it down.[12] Most recently this has led to a challenge to the UK Government by members of the south west of England fishing industry as to the veracity of the science that informs the designation of SACs in reef habitat in the southwest.[13] A review by the UK's Department for the Environment Food and Rural Affairs[14] found that broadly speaking, there was an adequate evidence base for the designation of sites, but was critical of the transparency of the process that leads to the designation of sites; in short the directive applies to commercial fishing and it is here to stay. This article will look at an important stage in the development of the UK's practice, the application of the directive to scallop dredging in the Fal and Helford Special Area of Conservation, the lessons which UK administrators have learnt as a result, and where this may ultimately lead.

Legal background

Article 6(3) of the Habitats Directive applies the precautionary principle to activities within European marine sites. The wording of the directive is so clear it bears repetition:

> Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of [Article 6(4)], the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Before permitting a 'plan or project' an administrative public body must conduct a form of environmental impact assessment known as an 'appropriate assessment' if there is likely to be a 'significant effect'. The administrative body can only agree to the plan or project if the appropriate assessment is shown to have no adverse impact on the integrity of the site or, under terms set out in Article 6(4):

- agreement can be given for imperative reasons of overriding public interest, including those of a social or economic nature;
  and
- the Member State shall takes all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected;
- with priority habitats there is an even higher hurdle, as the only issues which can be contemplated as overriding are human health or public safety.

The Article 6(4) issues have yet to be tested in fisheries in the UK as the administrative bodies have shown little appetite to apply Article 6(3).

Article 6(2) of the directive states simply:

> Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

The obligations in Article 6(3) and 6(2) need some thought. It is easy enough to pinpoint where an application for some sort of activity (a 'plan or project' in the language of the directive) triggers an appropriate assessment under Article 6(3) for new activities, but there is a more subtle obligation on EU Member States under Article 6(2) to manage sites to avoid deterioration from ongoing or previously consented activities. In reality these amount to similar obligations on administrative bodies to avoid activities which potentially harm the site.

Governance structures at 'national' and 'site' levels

Once a site is designated for the presence of one or more conservation features, the SNCAs provide advice on the likely significant effect of licensed activities on conservation features. This advice is given under Regulation 35 of the UK Habitats Regulations.[15] This assessment of risk of likely significant effect is based on practical experience, case studies, peer reviewed literature and expert judgment.[16] Statutory nature conservation advice on inshore waters (0–12 nm) comes from Natural England, an executive, non-departmental public body, which reviews the evidence necessary to designate marine protected areas in inshore waters, and provides competent authorities with the advice necessary to prevent damage to sites. The management of some European marine sites is supported by management committees comprising appropriate public authorities (likely to be competent national authorities for the purposes of the directive) and SNCAs. These committees regularly meet to discuss pending developments that may require appropriate assessments to ensure licences are only

11 RCEP (n 1).
12 National Federation of Fishermen's Organisations (NFFO) 'MPA Fishing Coalition Takes Stock' (2012) http://www.nffo.org.uk/news/mpa_takes_stock2012.html.
13 Defra 'Independent review of the evidence process for selecting marine special areas of conservation' (2011) PB13598 78.
14 ibid.
15 The Conservation of Habitats and Species Regulations 2010.
16 Defra (n 13); T G Martin et al 'Eliciting expert knowledge in conservation science' (2012) 26 (1) *Conservation Biology* 29–38; A Wolman 'Measurement and meaningfulness in conservation science' (2006) 20 (6) *Conservation Biology* 1626–34 http://onlinelibrary.wiley.com/journal/10.1111/%28ISSN%291523-1739/issues; P F Opdam, M E Broekmeyer and F H Kistenkas 'Identifying uncertainties in judging the significance of human impacts on Natura 2000 sites' (2009) 12 (7) *Environmental Science & Policy Journal* 912–21.

granted when the development will categorically not damage site conservation features.[17] In the case of the Fal and Helford SAC, the management committee is also advised by a non-statutory advisory committee which offers observations and opinion on the management of the site.

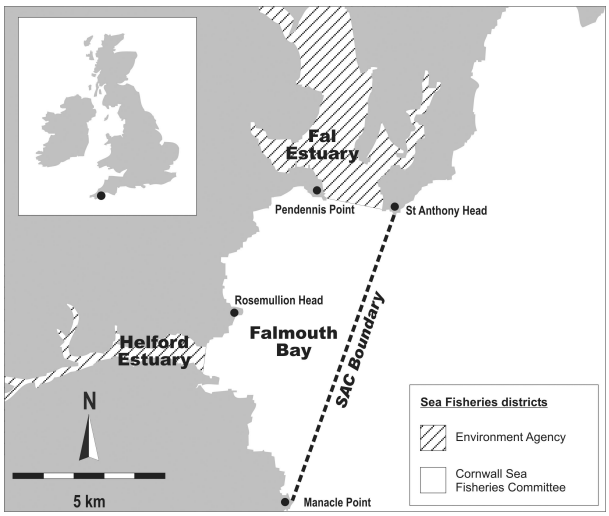
Managing fishing in European marine sites

The case of determining if fisheries are a 'plan or project' and are thus subject to Article 6(3) of the Habitats Directive was made clear by the *Waddenzee* ruling. The European Court of Justice ruled that an annually licensed mechanical cockle fishery must have an appropriate assessment prior to being permitted within a European Marine Site. The implications of this ruling have however been variously interpreted by local and national management bodies of different EU Member States and by those agencies responsible for licensing fishing in the UK. For nearshore waters in England, the Sea Fisheries Committees (SFCs) managed fisheries within 6 nm while up until 2009 the vessel licensing body was the Marine Fisheries Agency (MFA). Following the Marine and Coastal Access Act 2009, inshore fisheries are now managed locally by the Inshore Fisheries and Conservation Authorities (IFCAs) and vessel licences are issued by the Marine Management Organisation (MMO). The importance of vessel licences will be seen later.

Management of scallop dredging in the Fal and Helford Special Area of Conservation

In 2006, after repeated, unsuccessful efforts by one of the authors (Hoskin) to instigate appropriate management of scallop dredging within the Fal and Helford SAC via the local management structure,[18] the Marine Conservation Society (MCS), a UK-based NGO, was made aware of the situation. It was also provided with photographic evidence of recent dredging activity in the outer SAC which showed the vessels working inshore of a line between Rosemullion Head and Pendennis Point.

In December 2006 the MCS wrote to the Cornwall SFC (the inshore fisheries regulator) to outline the implications of scallop dredging affecting the conservation features of the site, detailing both the conservation advice (Table 1) on scallop dredging, and the likely significant effect to maerl, a subfeature of the sandbank habitat for which the site was protected.[19]



The Fal and Helford SAC.

Table 1. Excerpts from Natural England advice on scallop dredging and sandbanks/maerl.[20]

Activity	*Feature*	*Conservation Advice*
Mobile fishing gear	Maerl	An operation which may cause disturbance to the Fal & Helford Marine Site features at current levels of use
		Avoid damage, abrasion
	Sandbanks slightly covered by seawater at all times	Highly or moderately vulnerable

Fisheries management

In the Fal and Helford estuaries

When the SAC was first designated in 2004 the Environment Agency (EA) immediately passed a bylaw[21] to prevent scallop dredging occurring within the estuarine waters of the site. The EA determined that the activity would cause a likely significant effect to the conservation features of the site (sandbanks).

In Falmouth Bay

Cornwall SFC was the regulator responsible for fishing activities outside the estuary. Rather than pursuing an

17 P J Jones, J Burgess 'Building partnership capacity for the collaborative management of marine protected areas in the UK: a preliminary analysis' (2005) *Journal of Environmental Management* 77 (3) 227–43.

18 Activities included:
- gathering photographic and other evidence of where and when scallop dredging was occurring in the SAC, how many vessels, etc.
- corresponding with NE, Defra and CSFC, highlighting among other things that the SAC Management Scheme recognised scallop dredging as a problem and required proactive management to protect the SAC;
- giving a presentation on the issue at a meeting of the SAC Advisory Group on 6 Dec 2006;
- securing unanimous support from the SAC AG for the recommendation that the management forum should look into impact of scallop dredging in the SAC and if necessary take appropriate action; and
- organising a 300+ name petition to Defra against scallop dredging in the SAC from local divers, anglers and conservationists.

19 D A Birkett, C A Maggs and M J Dring 'Maerl: an overview of the dynamic and sensitivity characteristics for conservation management of marine SACs' Scottish Association for Marine Science (UK marine SACs project) (1998) V 116.

20 English Nature 'Fal and Helford European Marine Site' English Nature's advice given under Regulation 33(2) of the Conservation (Natural Habitats etc) Regulations 1994 (2000) 77.

21 The Fal and Helford (prohibition of scallop dredging) Order 2004.

evidence-based approach to managing the scallop fishing in Falmouth Bay and its damage to the conservation features of the site, Cornwall SFC and local fishers argued that the activity was rare, only undertaken during westerly storms (when other offshore areas are inaccessible) and was being carried out on predominantly dead maerl gravel. There was an assumption amongst Cornish fishers that there was little problem with dredging as maerl was often observed washed up around the Pendennis headland, and that it must be abundant and naturally loose to do so in the area that was being dredged. Furthermore, fisheries representatives expressed the opinion that because the French still allow access to extracting dead maerl for the beauty industry in northern Brittany, it was reasonable to allow periodic scalloping in Falmouth Bay in an area of maerl and maerl gravel.[22] This opinion was supported by the UK fishing industry quango, Seafish.[23]

In March 2007, a meeting was held between Defra, Cornwall SFC and the MCS in order to discuss the management of the site. Cornwall SFC reported that the fishers had agreed to undertake a voluntary agreement that would restrict the scallop dredging fishing activity to November and December, and only 15 days in each month within approximately 30 per cent of the seaward part of Fal Bay area. This agreement was for the waters entirely under the jurisdiction of Cornwall SFC.

Seabed surveys

Cornwall SFC commissioned the University of Bangor to evaluate the current status of the features over which the winter 2006–2007 dredging had taken place. It also used its own vessel to undertake towed video and grab surveys of the seabed, the better to understand the habitat over which the scallop dredging was occurring.[24] Grab surveys showed a percentage of live maerl from between 0.35 to 4.43 per cent by weight that was restricted to the top 1 cm of the seabed. Still images taken every 42 seconds of the video surveys showed a cover of living maerl in the areas that the scallop dredgers were working of between 20 and 30 per cent. The report states that the greatest concentration of live maerl in the outer bay is in the area that the fishers wanted to continue to operate as written in the voluntary scallop fishing agreement.

The management resolution

Given the clear evidence of the primary conservation feature occurring in outer Fal Bay, the MCS wrote a letter to Defra in October 2007 suggesting that only a complete removal of all bottom towed fishing gears in the Falmouth Bay area would adequately protect SAC features from damaging activities. The MCS considered that allowing scallop dredging to continue under the terms of the voluntary agreement would constitute a breach of the directive, and result in a complaint by the MCS to the European Commission's Directorate General for the Environment. This letter followed a meeting held in September in Cornwall where local fishers, the SNCA, Defra and the MCS were present to discuss the Bangor University survey report. As a response to this letter, the UK fisheries minister convened a meeting in December 2007 in London with the major parties to resolve the issue.

Natural England, the SNCA, offered statutory advice to regulators in late 2007 to show that it could not state that scallop dredging in the area of Fal would not lead to a significant effect on the favourable conservation status of the maerl (sandbank) feature of the site; in essence, dredging was potentially harmful to the site. However Natural England did not have the same regulatory powers over the fisheries sector which the EA did over estuarine waters. It could only provide conservation advice to local competent authorities in European marine sites and it was the role of other public authorities to give that advice (either the SFC or Defra).

With both the SNCA and a national NGO essentially concurring on the likelihood of damage to the maerl, there was a real likelihood of a complaint being made to the European Commission and potential for infraction proceedings against the UK Government by the Commission. In such a case the UK could face substantial financial damages in the European Courts. A similar case in Strangford Lough in Northern Ireland resulted in heavy fines being imposed by the European Commission. As a result of this very real threat the fisheries minister issued a ministerial Order to ban all mobile fishing gears in the entirety of the Fal and Helford SAC in March 2008.[25]

Lessons learned – who was in control?

It is interesting that the potential destruction of a maerl bed led to very different reactions inside and outside of estuarine waters. For the estuarine waters within the direct control of the regulator, the EA had appropriate powers to safeguard the site, while Natural England did not. We believe that the local SFC should have made a decisive move to close the fishery, rather than potentially involve the EU's DG Environment, the UK's fisheries minister and a national NGO. The constituent membership of the Cornwall SFC at the time was considerably weighted towards the commercial sector[26] and it is difficult to envisage their membership voting for environmental limitations where they had a perceived discretion. Lessons learned by Defra from the inability of the voting membership of the local fisheries managers adequately to

22 J Grall, J M Hall-Spencer 'Problems facing maerl conservation in Brittany' (2003) 13 *Aquatic Conservation* 55–64.

23 Seafish *A Guide to the Responsible Fishing Scheme* (2009) Seafish UK http://onlinelibrary.wiley.com/journal/10.1002/%28ISSN%291099-0755/issues?year=2009.

24 A Ruiz Frau et al 'Falmouth Bay maerl community benthic survey' School of Ocean Sciences, University of Wales, Bangor (2007) 23.

25 The Fal and Helford Designated Area (Fishing Restrictions) Order 2008.

26 J Eagle 'Democracy and natural resource: British and American approaches to public participation in fishery management' British Council London (2004).

protect the Fal and Helford SAC has influenced the evolution of the Sea Fisheries Committees to Inshore Fisheries and Conservation Authorities (IFCAs), which include greater representation from civil society and individuals and fewer vested interests from the fishing fraternity. Whether these alterations have been sufficient to effect real change remains to be seen; IFCAs' constitutions are quite similar to SFCs and there is a still a considerable commercial fishing lobby sitting on IFCAs.[27] Recent changes in Defra policy have been clearly communicated to IFCAs, and it appears that most are treating their nature conservation duties as a higher priority of their current actions.

Another complication that affects pro-active decision-making, is that although the SFC was a regulator for the area, it was not necessarily the licensing body for the 'plan or project' under Article 6(3), so would have been acting to prevent deterioration under Article 6(2). With no obvious trigger to act on it is not entirely surprising the SFC was slow to take the matter up, particularly as it would have led to real political issues among its membership.

The absence of an Article 6(3) trigger for Cornwall SFC placed under scrutiny the role of the general fishing vessel licence, which permitted UK vessels to fish throughout the UK and gave shared access to EU waters. Administration of these licences was carried out by the MFA and is now the preserve of the MMO in England and Wales and central administrations in the remainder of the UK. The Fal and Helford case highlighted a real question as to whether these expansive licences did in fact authorise a 'plan or project' and should therefore trigger an appropriate assessment. The UK authorities tried to distinguish their vessel licensing function from the *Waddenzee* ruling. Defra argued that it was the vessel only which was licensed, but the activity of fishing was permitted to all UK citizens under the public right to fish, outside of the vessel licence.[28] Defra held that the general role of the licence was for the management of quotas, fishing fleet capacity and effort,[29] not the environment. Examination of the governing arrangements revealed that under section 5 of the Sea Fish (Conservation) Act 1967 it was the activity of fishing from vessels which was licensed not just the vessel, and that these vessel licences were bespoke for each vessel, containing quota restrictions for individual vessels and a great number of local amendments, moreover they were re-issued regularly for different types of vessel.[30] They were in fact a micro-management tool suitable to control a plan or project at this level and should therefore be appropriately assessed prior to reissue.

If the general fishing vessel licence authorises fishing in the Fal and Helford SAC without assessment (in breach of Article 6(3), then it follows that the issue of all general fishing licenses in the UK is a potential breach of the Habitats Directive. This would therefore be a case of a systemic failure by the MFA and latterly the MMO to operate within the law in order to protect European marine sites; it is a point that has been debated between the MFA and MMO and the MCS and the NGO Client Earth ever since.[31] This discussion was partially resolved in 2012 when Defra issued new clear policy guidance on the obligations of fisheries regulators to the legal delivery of Article 6 of the Habitats Directive.

To some extent the fishing vessel licence question has been left undecided because MMO/Defra and the IFCAs have adopted a risk-based approach to site management.[32] Instead of conducting an environmental impact assessment for the general licence, this approach seeks to restrict damaging activities at a site level, based on the regulation of the riskiest activity first. While this may not comply with the letter of the law, it is a practical response to the issue. This process is in its infancy but the signs are that considerably more effective regulation is being drawn up by the IFCAs within the 6 nm limit and negotiations are underway with other EU Member States under the Common Fisheries Policy for management of sites beyond 6 nm.

Lessons learned – precautionary principle

As the Fal and Helford case progressed throughout 2007 and Defra started to be involved in the discussions, it became clear that there was a continued argument put forward by fishers that it was up to Natural England and the MCS to reveal evidence of damage from scallop dredging activities.[33] The bald meaning of Article 6(3) of the Habitats Directive is that the competent authority must not licence the activity if there is a chance of there being a significant effect. It can only license the activity once there has been an appropriate assessment and that assessment has shown no adverse impact, or for reasons of overriding public interest. This changes the whole nature of the precautionary principle when applied to Natura 2000 sites from a principle which is essentially unenforceable to a strict requirement for an evidence base before a management decision can be made which may affect the site; the precautionary principle is shifted from theory to practice.

27 T Appleby, P J Jones 'The Marine and Coastal Access Act – A hornets' nest?' (2012) 36 *Marine Policy* 73–77.

28 Defra Letter to Association of Sea Fisheries Committees 'Letter regarding application of Article 6(3)' (24 September 2004) in D Symes, S Boyes *Review of Fisheries Management Regimes and Relevant Legislation in UK Waters* (University of Hull, Institute of Estuarine and Coastal Studies) 58–59.

29 Marine Fisheries Agency (MFA) Letter to the Marine Conservation Society 'Habitats Directive and Fisheries Licences' (15 September 2009) http://www.marinemanagement.org.uk/protecting/conservation/documents/090915_mcs.pdf.

30 Client Earth, Marine Conservation Society (MCS) Letter to Marine Management Organisation 'Fishing Vessel Licences and the Habitats Directive' 1 August 2011 http://www.marinemanagement.org.uk/protecting/conservation/documents/110801_mcs-ce.pdf.

31 ibid.

32 Marine Management Organisation (MMO) (online) http://www.marinemanagement.org.uk/protecting/conservation/documents/ems_fisheries/policy_and_delivery.pdf.

33 Seafish response to Defra Consultation on measures to protect the Fal & Helford Special Area of Conservation (SAC) from the impacts of fishing with dredges and other towed gear (2008).

The application of the precautionary principle in this case has been exceptionally difficult for a number of reasons:

- it is inherently costly to undertake such assessments, particularly relative to the value of the fishery
- fishers weren't used to paying for environmental impact assessments
- it is difficult to see the exact distribution of habitats in the marine environment
- it is often the case that damaging fishing activities are ongoing at the time of designation. This means that not only had the effort and area of impact not been monitored but the removal of the activity was unexpected politically; there was an expectation that the statutory designation of the site permitted ongoing activities to continue because they were somehow intrinsic to the site
- it is likely that there has already been some adverse effect to which conservation features have already been exposed.

As a result there has traditionally been a conflict between the commercial sector and the environmental sector over who collects the data. The commercial sector argues that the environmental sector should prove what is down there before it is protected, and the environmental sector says that it is for the developer to prove its activities are not harmful (or pay compensation) before it carries out its activities.[34] Looking at both Article 6(2) and 6(3) the latter view is clearly the legal one, but it has not always been easy to implement this on the ground.

The political circumstances at the time of this case (2007) involved tensions between Natural England, the conservation NGOs, the towed bottom gear fishing industry that was being managed by Defra and the local SFCs. A concurrent case in nearby Lyme Bay (south Devon) was pitting the scientific survey evidence of Natural England against the local scallop dredging fleet activities between 2006 and 2008 and eventually led to the exclusion of bottom towed fishing from a 60 square mile area of reef and sandy gravel habitat in northern Lyme Bay. During this period, an unfortunate statement was made by Dr Helen Phillips, the CEO of Natural England describing the actions of the scallop dredging fleet as being akin to 'rape and pillage'. This is a phrase which has resounded around the industry ever since,[35] and has exacerbated the tension which existed between fishers and conservationists; a tension which makes political decisions in this sector in favour of the environment exceptionally difficult.

Since the Fal and Helford Order was signed, management within English European marine sites has continued to be based on 'current perceived risk'. The risk assessment survey of all English European marine sites was undertaken by the SNCAs between 2008 and 2010 by site, and by activity. The purpose of the assessment was to highlight marine SACs at current high, medium or low risk according to current threats.[36] However, it is contentious to undertake this approach, as it relies on good information on the level of potentially damaging activities taking place that in turn relies on good enforcement and monitoring effort. It is clear that neither Natural England, nor any other SNCA has the necessary resources to monitor the extent of damaging fishing operations taking place on a daily basis in all English European marine sites. However, the potential still exists for damaging fishing operations because of the wide nature of the authority contained within the general fishing vessel licence. For these sites, the necessary appropriate assessments of the potential impact of fishing activities have not been undertaken, even though the SNCAs have identified the likely significant effect of these activities in Regulation 33 and 35 advices.

By way of contrast, in 2010, the Welsh Government, in the face of local fishing and conservation protests passed the Wales Scallop Order 2010, banning scallop dredging from all Welsh European marine sites as a result of increased activity (not necessarily proven damage) in 2008.[37] Thus, Welsh Government policy in this instance was effectively to manage European marine sites by using the precautionary approach of Article 6(2) and 6(3) of the directive. Politically, this was an easier decision for the Welsh Government, as the vast majority of Welsh resident fishers operate static fishing gears that are relatively benign to the conservation of European marine sites in comparison to 'foreign' scallop dredgers.[38] It was clear that many of the vessels fishing in the Welsh marine sites in 2008 were from Scotland and England, making the decision to pass the Order a politically expedient one within the fishing (voting) communities of Wales. In contrast, the UK Government and Defra are more heavily lobbied by the towed fishing sector (the National Federation of Fishermen's Organisations (NFFO)), and local scallop and trawl fishery represented associations (such as Southwest Inshore Fishermen's Association) which want to continue to fish using mobile bottom fishing gears without being subject to onerous assessment bureaucracy. As such, it may be politically more difficult for Defra in England, the Scottish Government and the Northern Irish Assembly to undertake systemic protection measures for the remaining UK marine sites than the Welsh Government, regardless of the advice of their SNCAs.

The argument for effective management of these sorts of damaging fishing activities is ongoing, but the active creation of regulation on the risk-based approach in England has addressed many of the major concerns there.

34 Fish2Fork online 'Scallop Dredgers and Trawlers Face Expulsion from a quarter of inshore waters' http://www.fish2fork.com/en-GB/news-index/Scallop-dredgers-and-trawlers-face-expulson-from-aquarter-of-inshore-waters.aspx.

35 NFFO online 'Dogger Bank Marine Protected Area' http://www.nffo.org.uk/news/dogger_bank_marine.html.

36 M Coyle, S Wiggins 'European marine site risk review' Natural England Research Report no 038 (2010) ISSN 1754–1956.

37 The Scallop Fishing (Wales) (no 3) Order (2010).

38 Nautilus Consultants Ltd 'Study into Inland and Sea Fisheries in Wales' (2000) http://www.nautilus-consultants.co.uk/sites/default/files/wales.pdf.

Questions still remain around the regulation of damaging fishing operations in the Scottish and Northern Irish Natura 2000 sites and those outside the 6 nm limit.

Conclusion

The Fal and Helford case has provided a fascinating study into the application of environmental legislation to fisheries management. The UK not only now has to implement the Habitats Directive offshore, but there are requirements for good ecological status under the Water Framework Directive for 2015 a mile out to sea (3 miles in Scotland), requirements for good environmental status under the Marine Strategy Framework Directive for all UK waters by 2020 and the implementation of marine protected areas under the Marine and Coastal Access Act 2009 and the Marine (Scotland) Act 2010. If the Habitats Directive is being applied to UK inshore vessels, it must soon be applied to all EU Member States' vessels outside the 6 nm limit.

The case was a pivotal moment in the evolution of the marine conservation management in the UK. The realisation that commercial fishing is subject to environmental legislation after almost complete exemption has gradually dawned on fisheries regulators. The Fal and Helford is not the only case in this area, but it is symptomatic of a rapidly changing regulatory climate for marine fisheries.