

ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

Wednesday 28 March 2007

Session 2

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ENVIRONMENT AND RURAL DEVELOPMENT COMMITTEE

12th Meeting 2007, Session 2

CONVENER

*Maureen Macmillan (Highlands and Islands) (Lab)

DEPUTY CONVENER

*Eleanor Scott (Highlands and Islands) (Green)

COMMITTEE MEMBERS

*Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

*Rob Gibson (Highlands and Islands) (SNP)

*Richard Lochhead (Moray) (SNP)

*Mr Alasdair Morrison (Western Isles) (Lab)

*Peter Peacock (Highlands and Islands) (Lab)

Nora Radcliffe (Gordon) (LD)

*Elaine Smith (Coatbridge and Chryston) (Lab)

COMMITTEE SUBSTITUTES

*Mr Andrew Arbuckle (Mid Scotland and Fife) (LD)

Alex Fergusson (Galloway and Upper Nithsdale) (Con)

Trish Godman (West Renfrewshire) (Lab)

Jim Mather (Highlands and Islands) (SNP)

Mr Mark Ruskell (Mid Scotland and Fife) (Green)

*attended

THE FOLLOWING ALSO ATTENDED:

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP)

Mr Jamie McGrigor (Highlands and Islands) (Con)

THE FOLLOWING GAVE EVIDENCE:

Ross Finnie (Minister for Environment and Rural Development)

Eamon Murphy (Scottish Executive Environment and Rural Affairs Department)

Alastair Smith (Scottish Executive Legal and Parliamentary Services)

Frank Strang (Scottish Executive Environment and Rural Affairs Department)

CLERK TO THE COMMITTEE

Mark Brough

SENIOR ASSISTANT CLERK

Katherine Wright

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 4

Scottish Parliament

Environment and Rural Development Committee

Wednesday 28 March 2007

[THE CONVENER *opened the meeting at 11:00*]

Subordinate Legislation

Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) (No 2) Order 2007 (SSI 2007/240)

The Convener (Maureen Macmillan): Good morning. I welcome members of the committee, the public and the press to the meeting and remind everyone to switch off their mobile phones so that they do not disturb us.

Apologies have been received from Nora Radcliffe, who is unable to be at the meeting; Andrew Arbuckle is here as her substitute. Two visiting members who have an interest in the agenda—Jamie McGrigor and Fergus Ewing—are also here.

Our first agenda item is consideration of the Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) (No 2) Order 2007 (SSI 2007/240). As members will be aware, the order replaces the Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) Order 2007 (SSI 2007/186), which we considered last week. The new order corrects a mistake in the coming-into-force date.

Jamie McGrigor has lodged a motion to annul the order, which we will consider under agenda item 2. Before that, members have the opportunity to engage in a question-and-answer session with the Minister for Environment and Rural Development, Ross Finnie. Technical matters can be clarified and explanations of details can be requested, and officials will be at the table. When the question-and-answer session is complete, we will debate the motion under agenda item 2. Officials cannot participate in the debate on the motion.

I welcome the minister and invite him to introduce his officials and make a brief opening statement on the background to the order.

The Minister for Environment and Rural Development (Ross Finnie): Thank you very much, convener. Alastair Smith is from Scottish Executive Legal and Parliamentary Services, and Frank Strang and Eamon Murphy are from the sea fisheries conservation division of the Scottish

Executive Environment and Rural Affairs Department. Frank Strang is head of that division and Eamon Murphy deals with inshore fisheries.

The issue has a long history. Members will be aware that the Firth of Lorn has been a special area of conservation for some time. Some time ago, leisure users in the area sent a complaint to the European Commission, which was copied to the Scottish Executive. The substance of the complaint was that the fishing activities that were being undertaken in the area, particularly the scallop dredging activities, were not consonant with requirements under the habitats directive. The Commission requested that the Executive consider the matter, which we carefully did. Indeed, we invited our statutory body with responsibility for nature conservation, Scottish Natural Heritage, to provide us with advice on the nature and impact of the fishing activities, and we considered internally whether the requirements of the habitats directive were being fully complied with.

The special area of conservation covers areas of a coral reef. The issue became quite difficult to deal with: fishing had taken place in the area for some time, but to comply fully with the habitats directive the Executive needed to be able to measure whether the scallop dredging activity was causing damage in a way that was inconsistent with the directive.

After a long internal consultation between us and SNH, and following internal legal advice, we concluded that, to meet the directive's requirements, we would have to carry out some scientific investigation of the status and state of the SAC, particularly the coral structure. How the investigation would be conducted raised difficulties. Furthermore, the appropriateness of continuing with existing permits, particularly for scallop dredging, was called into question.

After further consideration, we decided that permitting scallop dredging to continue would not be consistent with the habitats directive and the course of action that we were advised was more likely to meet its requirements was the promotion of a closure order.

We then engaged in discussion with certain parties. We had not at that point promoted the order, but we knew that some parties would be affected and that a substantial proportion of one party's livelihood was engaged in scallop dredging in the area. Following representations about the nature of that practice, we went back to Scottish Natural Heritage to establish whether there was some prospect of delineating within the SAC an area in which one might properly continue the scallop dredging fishery without prejudice to the clearly established requirement to conduct the scientific investigation and, as an interim measure,

to close the fishery. We asked SNH to examine carefully whether it was possible to design a plan to designate parts of the area as permissible for fishing and to concentrate its efforts on those more proximate to the coral structure. I regret to say that, reasonable though our request was, its advice was that it was simply not possible for it to come to such a conclusion.

I proceeded on the basis of the advice I received, which was that the only course open to me was to consider the proposal and promulgation of an order for closure. However, we then faced the problem of the one party in particular whose livelihood was almost exclusively derived from that fishery, although other parties used it too. Our view was that the other parties who used the fishery had opportunities to fish elsewhere under their licence arrangements. The party who was particularly affected, however, did not have that opportunity.

Although I invited my officials to begin drafting the order and commence the formal consultation process, we had discussions with some of the inshore fishing groups, the Clyde Fishermen's Association and the party involved in particular to see whether we could construct mitigating measures that would assist that party. Over the past nine months we have had some inquiries about whether we are taking action on the matter, but I have not been keen to rush into effecting the closure until I could put on the table a series of measures that would help to mitigate the impact of the closure. Following discussions with other fishing authorities—England and Northern Ireland have an interest in stocks and quotas—we were able to ensure that we had access to prawn quota and to days at sea. We were therefore able to offer the prospect of alternative fishing opportunities to the particular party involved.

We are not claiming that what has been offered is a direct, like-for-like alternative, but we hope that it will have a substantial impact. After achieving that position through careful and patient negotiation, we continued to discuss the matter with the parties involved and we laid the order. I offer my profound apologies to the committee for the inconvenience and trouble that was caused as a result of the errors in the original order.

The substance of the order that is now before the committee remains unchanged from that of the original. I hope that the closure will be temporary, but I cannot anticipate the outcome of the scientific investigation that is necessary to meet the requirements of the habitats directive.

I hope that I have set out the background to the closure and the steps that we have taken in relation to other parties, particularly the party who will be most affected by the order.

The Convener: How long do you expect the closure to last? How long will the investigation take?

Ross Finnie: We have had preliminary discussions with SNH and parties who want to engage with us. The investigation could take up to 18 months to two years. We hope that the evaluation that will follow it will not be difficult.

Mr Alasdair Morrison (Western Isles) (Lab): In the final paragraph of his letter to Fergus Ewing, John Elvidge says:

"In this instance, the distinction between consultation prior to the decision to introduce a closure, consultation on the terms of the original Order, and consultation on the No. 2 Order appears to have become confused. I have asked the Department to reflect on this for future reference."

The minister provided an extensive explanation of the process, but I would appreciate it if he or his officials could elaborate on what that reflection will involve and how it might affect other situations that we are dealing with.

Ross Finnie: Consultation is required under the Inshore Fishing (Scotland) Act 1984. I suppose that we should use the word "consultation" only in the context of the legal requirement that is imposed on us by that act. It is regrettable that we were a little loose in our language and that when we were discussing the matter with potentially affected parties prior to laying the order we said that we were consulting them. That was in no way intended to mislead anyone—it was a fact. However, nine or 12 months ago we were not carrying out a consultation in accordance with the requirements of the 1984 act; what was happening was that, after evaluating the situation and discovering that one party would be singularly affected, we were discussing the matter with the people who were immediately affected. The use of the word "consultation" in that context was unfortunate, but it was never intended to deceive or mislead. As I explained, it took some nine months to obtain the mitigating measures that we thought were essential before we could make the order.

Mr Jamie McGrigor (Highlands and Islands) (Con): Do you agree that the consultation should have taken place before the order was laid, or before it was insinuated that there would be a closure?

11:15

Ross Finnie: The consultation was on the order. The technical requirement in the 1984 act is for consultation before an order is laid. The discussions that we had were on the basis that the clear advice that I received, having reconsulted SNH, led us to the conclusion that closure was the only way of meeting our obligations under the

habitats directive. At the time of those discussions—not the consultation—the order had not been formulated or laid.

Alastair Smith (Scottish Executive Legal and Parliamentary Services): The statutory requirement in the 1984 act is that, before making an order, ministers must consult with such bodies as they consider appropriate. On the decision to introduce a prohibition, the minister indicated some time ago that a view had been arrived at that closure was necessary to meet obligations under the habitats directive. As the minister said, there then followed a period of discussion about the nature of the closure. The relevant decision was the final decision to make the order, before which there had to be consultation. That is the relevant consultation.

Mr McGrigor: Section 1 of the 1984 act gives the Scottish ministers power to make such orders, but it states that they may do so only after consultation with such bodies as they consider appropriate.

I presume that you consider the Mallaig and North West Fishermen's Association and the Clyde Fishermen's Association to be appropriate bodies in this case.

Ross Finnie: Indeed.

Mr McGrigor: On 26 June, you said:

"The Scottish Executive proposes to close part of the Firth of Lorn to scallop dredging on a temporary basis while urgent research is carried out to assess the potential impact of dredging on marine habitats."

Why, then, did Patrick Stewart, the secretary of the Clyde Fishermen's Association, say:

"The fact is that the last discussion I had with the Executive about the Firth of Lorn, prior to the press release of 26th announcing that an order would be introduced was on 19th May. That meeting did not canvass the possibility of a closure far less constitute a consultation?"

The Mallaig and North West Fishermen's Association and the Scallop Association have also told me that no consultation was carried out on the order. Further, Stuart Adam, whose company in Oban makes scallop gear and employs six people, has told me that he was not consulted. One would think that gear makers might be consulted on such an order. If those people were not consulted, why were they not consulted?

Ross Finnie: The letter from Sir John Elvidge, the permanent secretary, to Fergus Ewing has been referred to. On the basis of internal advice, we came to a decision about whether to have a closure. We are clear that, on that process—not the laying of the order—we did not consult. Given that, on the best advice available, closure was the option that I had to pursue, it would have been misleading to consult on the basis that some

alternative in the law was available. However, that did not get us out of the obligation under the 1984 act to consult before giving effect to the decision to lay an order. As I made clear in my opening remarks and as the permanent secretary's letter makes clear in some rather succinct passages, we did consult in line with the requirement under the 1984 act.

One should not confuse the timeframe. I am not suggesting that Jamie McGrigor is doing that; I am just saying that, as I admitted in my answer to Alasdair Morrison, at the earlier stage we consulted not on my decision but on the requirement in terms of laying the order.

Fergus Ewing (Inverness East, Nairn and Lochaber) (SNP): As the minister knows, I represent the Mallaig area, and a deputation led by John Hermse is here to listen to the debate, such is the importance of the issue to its members.

Sir John Elvidge has written to me about the matter. He said that the order is to be considered by the Subordinate Legislation Committee today—I think that he is a bit confused by the parliamentary committees. I do not know whether there are other mistakes in the letter; perhaps there are.

In detailed submissions to the minister and everyone involved, Patrick Stewart has argued that although the complainants, believed to be Mark Carter and possibly one other, have alleged that there is evidence of damage, SNH confirmed to Mr Stewart and Mr Hermse that there is no evidence of deterioration of the habitat and that it was either not damaged or that the damaged area has recovered. Was that accurate? Was that SNH's position? If so, why have you concluded that it is necessary to introduce the order?

Ross Finnie: I do not know about the complainant, but the issue for me starts at the point at which I am asked by the European Commission whether I am satisfied that we have met our obligations under the habitats directive. That is the question that we put to SNH and, notwithstanding the fact that the area is a designated SAC, our knowledge of it means that we are not in a position to say with certainty what the extent or nature is of any deterioration of the site.

Our inability to be conclusive means that we do not meet the requirements of the habitats directive. That is why we are instigating and, subject to the order being agreed to, will put in place detailed scientific research to allow us to come to a conclusion. I am acting on the positive basis that we hope that the conclusion of that research will allow the order to be temporary. We hope that we can meet the requirements of the

habitats directive and, perhaps within certain designated areas, allow the recommencement of scallop dredging. I have laid the order because the information that we have on the status of the SAC does not allow us to meet the requirements for a commercial and specified activity being conducted in that area.

Fergus Ewing: Can I carry on, convener? I wish to pursue the point. It is pretty important.

The Convener: You may continue if you are brief. Many other members want to ask questions.

Fergus Ewing: The minister has not disputed that SNH's information shows no evidence of deterioration, as is confirmed in minutes from 4 August. In addition, Mr Bill Turrell of the Fisheries Research Services marine laboratory told Patrick Stewart at a meeting in Luing that no closure would be required. That has subsequently been confirmed in writing. The scientists have said that no closure is required to enable the research, which SNH has recommended, to be done.

If SNH says that closure is not required—that was its specific statement in the minutes of the meeting on 4 August—and the FRS is saying the same thing, why is the minister proceeding with the order? In your answer, could you please say specifically whether I am correct in saying that SNH has said that there is no evidence of deterioration and that the FRS has said that no closure is required? Will you also publish all the relevant advice that you have received from the bodies, given the importance of the issue to the livelihoods of a great many fishermen in the west Highlands?

Ross Finnie: I will deal first with whether a closure is needed. I do not wish to be awkward about this, but it seems to me that there are two ways of asking the question. If you ask a scientific body whether a closure is necessary to allow us to conduct a scientific investigation, I have no doubt that the answer to that question will be no. However, that is not why we are promoting this order. The habitats directive says that if you are unable to confirm the status of the site, you are not permitted to allow the continuation of activities that are specified in the directive and scallop dredging comes within the mischief of that directive. It is because we are unable satisfactorily to answer the question about the status of the site that we are looking for additional scientific evidence. It is on that basis that we will either be able or not be able to permit the continuation of dredging and fishing activities in the Firth of Lorn.

Richard Lochhead (Moray) (SNP): How long do you estimate the research will take?

Ross Finnie: As I said in response to the convener, we expect that it might take up to 18 months.

Richard Lochhead: You have been dealing with this issue for nine months and the fishermen have been fishing the area for more than 50 years. The committee is receiving conflicting evidence and, today, we are hearing only from you. Would there be an adverse impact if you waited another couple of months, to enable the members who are returned for the next session of the Parliament to hear evidence from all sides of the argument in the interests of trying to clarify some of the complex issues that are involved?

When you answered Fergus Ewing's question, you appeared to contradict yourself. You said that the habitats directive asks for closure unless you can confirm the status of a site, but you also said that you can confirm the status only as a result of research that requires closure to take place.

Ross Finnie: That is not what I said. Quite explicitly, I said that closure is not related to whether an investigation can be carried out. As Fergus Ewing quite properly said, neither SNH nor the FRS claims that closure is necessary for that reason. My difficulty is that the fact that we are unable to satisfy ourselves with regard to the status of the site in terms of the habitats directive means that we are not permitted to allow the continuation of activities that are specified in the habitats directive, such as scallop dredging.

Richard Lochhead: Why can you not ask Europe to allow you the opportunity to carry out the research to confirm whether closure is required?

Ross Finnie: Because Europe is already asking us whether we are satisfied that we are meeting the requirements of the habitats directive and the answer to that question is that we are not because, in order to be so, we have to be absolutely clear about the status of this SAC.

Richard Lochhead: Are you honestly saying that if you told the European Commission that you are about to conduct research to confirm the status of the Firth of Lorn, it would say that that is unsatisfactory and start infringement proceedings? Is that honestly what you are saying to the committee?

Ross Finnie: I am saying that we run a serious risk of putting the cart before the horse and ending up in a position in which we cannot permit activity anywhere—not only in SACs but in areas that are covered by orders of a slightly lower status—until we are satisfied that we are meeting the requirements of the habitats directive in all areas.

The Firth of Lorn is a designated SAC. It is a sensitive site that comes fully within the mischief of the order.

Alastair Smith: I would like to clarify the fact that, under article 6(2) of the habitats directive, a

member state has an obligation to take appropriate steps to avoid the deterioration of the habitat for which the site is designated.

The conclusion that the Executive has reached is that, given the current state of knowledge, we cannot be satisfied that adequate steps are presently being taken. On that precautionary basis—if one wishes to use the term—the site is being closed, pending the outcome of research, to exclude the risk of damage to the reef features for which the site is designated.

11:30

Richard Lochhead: Why can we not do what other states do and have an on-going debate with Europe about the definition of appropriate steps, while the Executive conducts the research? We have just had a debate in Parliament, in which the minister was involved, about the fact that the Scottish Environment Protection Agency was not basing enforcement on risk. The position has changed because of that debate, but we now find that the same rationale is not being applied to our dealings with European directives in connection with this issue. Why can we not identify risk first and consider the need for enforcement afterwards? Are we not putting the cart before the horse?

Ross Finnie: We know that there is an inherent risk. As I understand it, the matters specified in the directive include scallop dredging, which is acknowledged as a potential risk. It is a slightly circular argument. We start with the proposition that there is risk, and then we ask ourselves whether we can be satisfied that there is no damage to the reef.

Richard Lochhead: I seek a quick answer to my initial question. What harm would it do for us to wait until the new session to allow the Parliament to reconsider the order, after our successor committee has taken evidence from all sides of the argument? Given that we have already waited nine months, why can we not wait another few weeks?

Ross Finnie: We waited nine months because I was determined that the order would not be laid before we had put in place measures that would mitigate as much as possible the impact of the closure. Although I appreciate that other fishermen are affected, I make the point to Fergus Ewing that the livelihood of one fisherman in particular is determined almost exclusively by scallop dredging in the Firth of Lorn. Putting in place those measures involved delicate discussions about gaining access to nephrops quota, days at sea and certain licence and other conditions that took rather longer than we would have wished. The reason for the delay was that I was neither willing

nor prepared to lay an order whose impact on the family concerned would have been devastating. The delay is not the result of other factors or elements that are likely to come into play. At this point in the parliamentary session, it is always possible to argue that it might be better to wait a little longer, but until Parliament is dissolved next Tuesday we must take decisions on the basis of the information that is put before us.

Frank Strang (Scottish Executive Environment and Rural Affairs Department):

During the nine-month period we explored the nature of the closure, as well as mitigation measures. In response to comments that were made to us by people with whom we discussed the matter, especially the Clyde Fishermen's Association, we explored whether a partial closure would allow us to satisfy the requirements of the directive. We discussed that question with SNH. The delay resulted partly from our attempts to test the nature of the closure.

I make clear to the committee that the directive does not refer specifically to scallop dredging.

Richard Lochhead: So the suggestion that the current activity is a risk is your interpretation of the directive. You could have decided that it was not a risk.

Peter Peacock (Highlands and Islands) (Lab):

I would like the minister to clarify three points. First, I go back to the issue that Jamie McGrigor raised. It is clear to me that the minister is not under an obligation to consult prior to concluding that he needs to proceed with an order, but that he is under an obligation to consult before he lays the order. I understand that the minister has sought to do that. However, Mr Patrick Stewart's correspondence indicates clearly that he believes—at the very least—that the minister has erred in law. There is a slight implication that there might be a basis for judicial review of the matter, although I do not suggest that the Clyde Fishermen's Association is considering that. For the sake of absolute clarity, is the minister clear that there is no question that he has erred in law with respect to his obligations under the 1984 act?

Ross Finnie: I am absolutely clear about that. If I had to rerun the process, I would wish only that, when we had discussions with the parties that could be involved, we confined our remarks to referring to discussions, rather than consultation, because that has given rise to confusion.

Peter Peacock: My second point is about the status of SNH. You referred to advice that you sought. If I understood Fergus Ewing correctly, he referred to an opinion that SNH gave to objecting parties. I want us to be clear that, in trying to reach a conclusion as a minister, a range of advice other than SNH's advice was available to you, that SNH

does not have the last word on whether something meets the requirements of the habitats directive and that the obligation to reach such conclusions, based on the range of advice that you receive, ultimately rests with you.

Ross Finnie: Absolutely. At the end of the day, the minister must decide—that is part of the charm of being a minister. SNH is clearly accorded a slightly special status, as it is the statutory body for nature consultation. Officials who work in the policy area, lawyers and other parties give other opinions on the requirements of legislation, but SNH clearly must give advice, rather than a loose opinion, in line with its statutory duties and obligations.

Peter Peacock: But that advice is only part of the picture or the advice that you receive.

My third point is about infraction proceedings. I want to pick up on a point that Richard Lochhead was getting at. My understanding is that, given the range of advice that you received, you concluded that you could not sustain the argument that all the necessary steps would be put in place to meet the requirements of the habitats directive. That being the case, and given the internal advice that you received, can you see any grounds on which you could go to the European Commission and somehow argue that you should not proceed in the way that you have proceeded?

Ross Finnie: I am not too concerned about getting into infraction proceedings per se—I am much more concerned that we can directly say whether we are meeting our requirements under the habitats directive, whether we are taking the necessary steps to do so and whether we will take such steps if we are not already doing so. No matter how often I am asked today or in Europe whether we are meeting our requirements under the directive, I will have to give the same answer: no. We cannot satisfy ourselves that we are meeting our requirements. It does not matter who asks the question. If Peter Peacock asks me whether we are fully satisfying the directive's requirements, my answer will be no. A practical and pragmatic way of dealing with the matter is to require research that will enable me to answer the question properly and to suspend activity in the area on a precautionary basis until we have answered it.

Peter Peacock: So you think that there is no basis for arguing with the Commission about the matter.

Ross Finnie: No, I do not.

Mr Ted Brocklebank (Mid Scotland and Fife) (Con): Given the disastrous impact that the European Union's involvement has had on deepwater fisheries, perhaps the minister will not be surprised that I am deeply sceptical about any

further involvement by it in Scottish fisheries matters. The possibility that it will be involved in preventing inshore fishermen from prosecuting their business is extremely concerning.

Whether the minister calls it discussions or consultation, the necessary level of exchange of arguments has not taken place between his department and the fishermen, otherwise the grievances of the local fishermen would not be as manifest as they are today. Against that background, does he agree that there should be a further period of consultation—true consultation, rather than discussions—so that we can get to the bottom of the matter to everybody's satisfaction? The order should not be rushed through in the dog days of this session of Parliament. I do not believe for a minute that it needs to be sorted out today. I ask the minister to respond to that.

Ross Finnie: I have two comments. First, I am glad that your views on Europe are not shared by your leader. That is of comfort to most of us.

Secondly, and more particularly on the discussions that took place with the parties involved and the mitigating measures that we were able to negotiate, nobody who was involved in fisheries was unaware of what was going on or what we were trying to achieve over the nine months. That includes the Clyde Fishermen's Association, which represents the family that has been particularly affected—I am not suggesting that others are not affected, but one family has no alternative fishing opportunities available to it. Over the nine months, there were extensive discussions on both the potential nature of the partial closure, as Frank Strang pointed out, and more particularly the mitigation measures that we were seeking to achieve. There has been full discussion with those most intimately involved in the impact of the order.

Mr Brocklebank: As I understand it, the allegations of damage to the reefs in question were made by amateur divers in the area. Their views have to be taken into account, but given the fact that livelihoods are at stake—in particular, the livelihood of one fisherman who uses that area exclusively—is it not incumbent on you to go the extra mile to satisfy thoroughly all the interests involved? As I have said, they do not appear to be satisfied at the moment.

Ross Finnie: It is for others to adduce where they are at the moment. Although no one accepted the premise that closure was necessary, I understand that, in at least some sense, people have accepted that we have made efforts to construct a range of mitigating measures that would help, such as obtaining alternative fishing opportunities through nephrops and ensuring that under the financial instrument for fisheries guidance grants would be available for 40 per cent

of the cost of gear changes. People would rather not have the closure but, given the direction in which we are moving, those measures were acceptable.

I do not share the view that the order has been rushed. In fact, I hope that taking nine months to come forward with a package of measures to deal with the particular family in question would not in any sense be regarded as our rushing into a decision.

Rob Gibson (Highlands and Islands) (SNP): What degree of knowledge of the sea bed, reefs and sea life was there when the SAC was designated? What suggested that the Firth of Lorn should be specifically designated as an SAC?

Eamon Murphy (Scottish Executive Environment and Rural Affairs Department): Indicative mapping gathered information for SNH to establish that the site was one of the best of those known for this particular habitat type. That is the basis on which designation went ahead some time ago. The extra research will build on that and give us a much clearer picture of the nature of the sea bed. As we have already indicated, it will also help us to establish whether fishing can continue within the site once the research is complete.

11:45

Rob Gibson: Given that the initial knowledge seems so imprecise, how could those who enforce the habitats directive measure any changes that might have taken place?

Ross Finnie: It is not a question of measurement; it is a question of establishing more particularly the status of the structure as it is found. I agree that, as you imply, it would have been preferable not only to establish by mapping and other methods that such a structure was present and therefore fell to be designated as an SAC, but to carry out extensive research on all the sites in advance so that we had a base point. That was not possible, but it is possible to establish the status of the structure and determine whether there has been any damage or deterioration or whether it is in a condition that will allow us to continue to permit fishing in the area.

Rob Gibson: Is there a question about the degree of damage and/or change that will be taken into account when an assessment is made of whether the requirements of the habitats directive have been met?

Ross Finnie: The requirement is really for us to have a clearer knowledge of the site's status. It is difficult to meet that obligation in relation to every site in every part of the country. That is a development in terms of trying to get the measurement, to which you properly allude, but that is what we are required to do.

The Convener: Andrew Arbuckle may ask a final, very short question.

Mr Andrew Arbuckle (Mid Scotland and Fife) (LD): What would happen if we did not proceed with the stop order and we thus breached the habitats directive?

Ross Finnie: We would leave ourselves open to action by the Commission. I hope that it does not come to that, but that would be the consequence. At the moment, we are unable to answer the question that we have been asked. If we did not proceed with the order, we would be open to further proceedings by the Commission. We would rather not get into that.

The Convener: We move to the debate on Jamie McGrigor's motion S2M-5776. I invite Mr McGrigor to speak to and move his motion.

Mr McGrigor: I have four main points. First, the order breached the 21-day rule not once but twice. Secondly, SNH says that there has been no damage to the reef and the FRS says that there is no need to close the reef to allow research to take place. Thirdly, Mr Finnie stated in his press release of 26 June 2006 that the closure was to be temporary, but the order appears to specify a permanent closure. Also, Mr Finnie said that the closure would not be a blanket closure but would affect only part of the reef, but the order appears to close the entire SAC.

My fourth and most important point is that, according to those to whom I have spoken, including the Clyde Fishermen's Association, the Mallaig and North West Fishermen's Association, the Scallop Association and people who make the scallop gear, there was no consultation with any of those bodies either before or after Mr Finnie's press release, in which he said that he was going to close the Firth of Lorn.

On the first point, I made a point of order in the Parliament, in which I said that the original order was incompetent because it breached the 21-day rule, under which an order must not come into force until 21 days after it is laid. The original order would have come into effect on 12 March. Margaret Curran answered my point of order by apologising profusely and saying that if there were good reasons for doing so the Executive would re-lay the order—that is what happened.

I understand that the order that we are considering is subject to the negative resolution procedure and that the 21-day rule is sometimes breached in exceptional circumstances, on the ground of necessity or to fit in with United Kingdom laws. However, in the case that we are considering there is no such necessity or urgency, especially as the research that the order seeks to protect has been going on for months. Why the big hurry? What is the good reason for re-laying the

order? Does the Executive simply want the order to come into force before the Parliament dissolves at the beginning of next month? Members of the committee should consider whether that is a good enough reason—I do not think it is.

My second point is about evidence of damage. In closing the Firth of Lorn, the minister hopes to achieve two things, both of which arise from obligations on member states under the habitats directive. First, the closure is intended to prevent further damage to the reef. Allegations of damage were made to the European Commission, although when such allegations were made previously—by the same body, I think—it was suggested that the damage was being caused by fish farming, not scallop dredging.

Article 6(2) of the habitats directive states:

“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.

No evidence was produced by the complainants or the Commission that the alleged damage was leading to deterioration of natural habitats. An examination of the site that was supposed to have been damaged showed that either there had been no damage or that the damaged area had recovered. Thus, if there was no deterioration, there was no obligation to close the site under the terms of article 6(2). Indeed, according to the minutes of a meeting on the proposed closure that took place on 4 August on the Isle of Luing, SNH

“Confirmed that they could not, at that time, recommend Executive action on the basis of 6(2) of the Habitats Directive because there was no evidence of deterioration of the habitat. To ascertain the true position it was prepared to commission a substantial survey of the site.”

Secondly, the minister proposes that the prohibition of scallop dredging within the SAC is necessary for the purposes of the research that is needed to inform the assessment. Such an approach is logical if we think that there is a danger to the people who are carrying out research. However, Dr Bill Turrell, of the Fisheries Research Services, said at the meeting on 4 August that closure was not necessary to permit the required research. The minutes of the meeting note that the FRS

“Confirmed that for the purposes of research, it was not necessary to have scallop dredging prohibited within the SAC.”

I move to the third point. In his press release, the minister said that

“Loch Creran would be permanently closed to scallop dredging and the loch zoned to prevent all types of fishing in the most sensitive areas”.

He also said:

“I want to stress ... that in the case of the Firth of Lorn we are not proposing a blanket closure. Scottish Natural Heritage ... Fisheries Research Services and other stakeholders would work together to establish the impact of dredging and whether the Firth of Lorn could be reopened as a matter of urgency and, if so ... when.”

The order closes the whole Firth of Lorn. It also makes reopening it difficult. The habitats directive says:

“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 paragraph 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.”

I do not think that the public have been consulted.

To reopen an area that has been closed, it must be proved all over again that scallop dredging will not affect it. To reopen an area is much more difficult than to close it. We must consider the effect on the fishing industry on the Isle of Luing. I admit that that industry is small, but that does not matter. This is a bit of a David-and-Goliath situation. The full weight of the EU, SNH, the Scottish Executive and everything else is coming down on one fisherman, whose livelihood will be destroyed. It is slightly ironic that it has been suggested to him that he could be given new gear to fish for prawns. That is rather like telling a pike fisherman on Loch Lomond to put down his spinning rod and fly-fish for salmon, just because the two species happen to exist in the same area.

The fisherman—Mr MacLachlan—on the Isle of Luing is an expert at scallop dredging. He does not go near the reef, because he might lose his gear. He has done that work for 40 years. The effort in that area has declined in the past 10 years—there is nothing like the previous number of boats fishing there. Mr MacLachlan must fish there, because he has no quota to fish anywhere else. His efforts there are very much concentrated on the areas where scallops are, which are not on the reef. He has studiously avoided the reef, but he is being told that he cannot fish, although he probably knows the area like the back of his hand and better than anybody else.

The fourth point is on consultation—*[Interruption.]* I am sorry, convener, but all the points are important and I am determined that people should hear them. It is clear from my discussions with Patrick Stewart and John Hermse that no consultation took place on closure before the minister made his press statement on 26 June 2006 and that no proper consultation has occurred

since. Section 1 of the Inshore Fishing (Scotland) Act 1984 gives the Scottish ministers the power to make orders, of which the order before us is an example. However, the section says that they may do so only

“after consultation with such bodies as”

they consider appropriate. If the Mallaig and North West Fishermen’s Association, the Clyde Fishermen’s Association, the Scallop Association and the scallop gear company in Oban that makes dredges are not appropriate bodies, who on earth is? None of those bodies has been consulted.

The research has been going on for some time. Surely to goodness it is not necessary, at this very late stage in the parliamentary session, to breach the 21-day rule and to close the Firth of Lorn to scallop dredging without any consultation. Surely it would be better to wait until the new session of Parliament and to discuss matters again once we have had the benefit of the experience of the people who know what they are doing in the area concerned.

I move,

That the Environment and Rural Development Committee recommends that nothing further be done under the Inshore Fishing (Prohibited Methods of Fishing) (Firth of Lorn) (No. 2) Order 2007, (SSI 2007/240).

12:00

The Convener: Thank you very much. Several other members want to take part in the debate.

Richard Lochhead: It seems to me that an individual made a complaint, and the minister took fright and pressed the panic button, with the result that the order was made. Jamie McGrigor has highlighted the various mistakes that have been made over the past few months.

The importance of any enforcement being seen to be fair and just is a point that has been raised in other contexts, especially in relation to some of SEPA’s regulations. The crux of the matter is that it is not fair or just to give fishermen the message that they will be prohibited from fishing in an area in which they fish because the Government needs to carry out research to find out whether they are causing damage to the reefs.

The minister said that the main requirement was to know the status of the Firth of Lorn under the habitats directive. The research, not the closure of the Firth of Lorn to scallop dredging, is what is essential. I cannot envisage the EU conducting infringement proceedings against the UK in circumstances in which the minister had stated his intention to embark on a major, 18-month research exercise to identify the status of the area in question. I do not think that the minister can put his hand on his heart and say that he envisages that happening, either.

There is a good case for instigating the research and allowing the issue to be considered in more detail in the next session of Parliament. Both sides of the argument should be heard at the top table. Our successor committee should hear from the industry as well as the minister. The order is controversial and is not fair or just. Basically, it is a sledgehammer to crack a nut, because no one really believes that the European Commission will instigate infringement proceedings.

Eleanor Scott (Highlands and Islands) (Green): I will vote against Jamie McGrigor’s motion and support the designation because we have clear obligations under the habitats directive. I take issue with what Richard Lochhead said—I do not have the details to hand, but there are precedents for action being taken at European level. If fishing activity in a special area of conservation is considered to be a plan or a project, to undertake it can be interpreted as a breach of the directive.

A special area of conservation is a high-level designation and the expectation is that the member state will accord it a high level of protection. The designation has been made because of the habitat of the reefs that we have heard about. I am sure that there must be times when people around the world wish that the areas that they live beside, on top of or in the middle of had not been designated as environmentally important areas. I am sure that there are many people in Brazil, for example, who wish that the rainforest was less important so that they could just cut bits of it down to build things. However, the fact is that we have a duty of care to such areas and we must stick closely to international law to observe that duty of care.

I point out that the fishermen are not the only users of the waters of the Firth of Lorn who depend on the area’s environmental integrity. The minister mentioned that the complaint to Europe was brought by leisure interests. They are more than simply “leisure interests”—someone makes a living from taking divers down to look at the reef and its important habitat. Fishing is not the only means by which people make a living from the Firth of Lorn.

It is always difficult to impose restrictions when the protection of a habitat will affect a lot of people; it is even harder to do so when one person in particular will be strongly affected by them. I have been impressed by the mitigation measures, into which the Executive has put a great deal of effort. I realise that the proposed ban will be devastating for the individual concerned, but I do not think that there is any way round it. The area is a special area of conservation that is internationally recognised as requiring a high level of environmental protection. Therefore, we need to go with the proposed closure.

There are disputes between environmental interests in the broadest sense—including, for example, the divers—and the fishing interests about how much damage is caused by dredging on the reefs. For example, footage has been taken that purports to illustrate the damage that was caused by recent dredging, but the fishermen have not been convinced by that. Therefore, we need more research on the matter.

I do not think that we can get out of this one. We need to impose the order.

Fergus Ewing: Earlier, I put it to the minister that SNH's advice stated that it was not necessary to make the order because there is no evidence of deterioration of the habitat. SNH's findings were that either the area was not damaged or it had recovered from any damage that had taken place. As the minister did not demur, I conclude that he accepts that that is a correct summation of SNH's advice. When the minister is arguing his case, he normally says that it would be irresponsible to ignore SNH's advice and that any responsible minister would not be fulfilling his obligations if he went against SNH's advice. As he said this morning, SNH is the statutory adviser on the environment. The minister's decision to go ahead with the closure seems a departure from his previous stance, in that SNH has plainly not taken the view that the closure is necessary.

Secondly, I put it to the minister earlier that the scientists in the FRS marine lab have said that the research could be carried out without the closure. In response—and with characteristic deftness—the minister indicated that, in practice, it would be irresponsible to allow scallop dredging while the research was being carried out. However, that was not what Bill Turrell said. I understand that Bill Turrell's position, which he confirmed to Patrick Stewart at the meeting in Luing on 4 August, was that the closure is not necessary for the research to be done. Bill Turrell does not advise that the closure is necessary. That means that the two main advisers—SNH and the FRS marine lab—have stated that the order is not necessary. It seems unprecedented for the minister to go against the advice of both his leading advisers by concluding that he should go ahead with the closure despite the fact that it is not necessary.

In response to Mr Peacock, the minister claimed that he has no discretionary room for manoeuvre. Again, the minister did not respond directly to my suggestion that he should publish the advice that he has received. I appreciate that he will argue that legal advice and other advice and correspondence to ministers must be confidential so that ministerial discussions and decisions can be informed by candid advice. However, in this case, the order will affect the livelihood not only of one fisherman—although that is serious enough—

but, I am told, of 30 or 40 fishermen. The minister looks puzzled, but that is the information that I have received from John Hermse about the number of fishermen who fish in the area. Therefore, to give the impression—perhaps the minister did not mean to do this—that only one fisherman will be affected is wrong, according to the information that I have.

The advice from Mr Smith was that the closure is required to comply with article 6(2) of the habitats directive. However, Mr Smith did not read out the whole of article 6(2). He omitted to refer to the fact that the article requires member states to take

“appropriate steps ... in so far as such disturbance could be significant”.

The fact that the directive states that “appropriate steps” must be taken leaves a measure of interpretation as to what is appropriate. What is appropriate is always a matter of subjective opinion.

Fishermen have been fishing in the Firth of Lorn for decades and the findings of the scientists are that either there is no damage or the area has recovered from damage. Given the fact that the area—including the rocky reefs that are subject to protection under the habitats directive—has been fished extensively for decades and given what the minister's statutory adviser says about the absence of damage or recovery following damage and what the scientists in the marine laboratory say about closure not being necessary, the minister must surely have some discretion to take a different decision on this matter today. I say that as the constituency MSP who, as the minister knows, has spoken up for my constituents over the past eight years.

If the decision is established as a precedent and if the precautionary principle is to be applied, that raises the possibility that any area of the sea that is subject to protection, whether it is an SAC or a marine park, could be subject to closure. I am concerned that if it is scallops today, it could be prawns tomorrow. How can one prove a negative? I submit that the precautionary principle does not apply as such in the habitats directive. Rather, the wording in paragraphs 2 to 4 of article 6 needs to be considered. I ask the minister to publish all advice.

The Mallaig and North West Fishermen's Association believes that the decision that the minister took last year was to inform the EU that all of the Firth of Lorn was to be closed. Judging from the information that has been given to me, I think that it was misleading to give the impression that it might be only some parts of the firth that would be closed.

There is a gentleman here in the committee room—Mr Stuart Adam of Oban Scallop Gear—who is possibly the only manufacturer of scallop gear in Scotland. He has never been consulted by the Scottish Executive during its entire existence.

The minister will know that I have made this point every year in which I have participated in fishing debates, which I think has been seven out of eight years. I say this with no enthusiasm at all. I suspect that the minister will know what I am going to say, as Mr Hermse made the same point on Radio Scotland this morning. As we all know and as we have seen in the recent television programme “Trawlermen”, the occupation that fishermen carry out is dangerous. It is arguably the most dangerous occupation of all in Scotland, or indeed Britain. Fishermen accept life on the sea and the risks to which that exposes them. They use their skills and expertise to deliver the fish for Scotland.

However, the effect of the order before us will be to expose small boats to risk, such as the 12m boat that is owned by Mr David Fraser from Oban, who wrote to the minister on this point last autumn—I am told that Mr Fraser has not received a response to his letter. Lives will be put at risk if the order goes ahead. By that I mean that, if the Firth of Lorn is closed, and given that the area tends to have less dangerous weather and sea conditions, those fishermen—I am told by those who are here listening to our discussion—will be forced to fish in the open sea in places such as the Tiree passage, the area west of Islay and the area around the Torran rocks. I remind the minister that I am referring to fishermen in 12m boats.

I hope that when committee members come to exercise the vote that they have in their hands, they will agree with the alternative proposal that has been put today, which is to take evidence in the new session from all those involved, including SNH and FRS, from which we have not heard today. We should also hear from the fishermen, who have not been consulted. We should not—and I say this advisedly, and not in an extravagant or floridly worded way—increase the risks that our fishermen take.

12:15

Mr Brocklebank: By the minister's own admission, there have been procedures in relation to the order that he now regrets, so I am prepared to accept that we are talking about a cock-up rather than a carve-up. It is clear that there has not been full consultation. The minister claims that discussions or consultations have been going on for something like nine months, but key stakeholders have simply not been consulted. Some of them are here today and can verify that.

Here we are, in the week before dissolution, trying to force through legislation that will affect the livelihoods of fishermen off the west coast of Scotland. I do not think that the committee should be party to such rushed legislation, so I will vote in support of Jamie McGrigor's motion.

Peter Peacock: Throughout this episode, there has been—to say the least—an extremely unfortunate confusion of terminology, with one party considering “consultation” to be that which is strictly required under the law. The minister has readily accepted that point. The letter from John Elvidge to Fergus Ewing clearly suggests that the department needs to think about that.

We need to separate that unfortunate confusion from the idea that the minister has erred in law in doing what he has done. That is one of the matters that Mr Stewart's helpful representations have allowed us to look into. From the evidence that I have heard and the questions that we have asked of the minister, plus what is in John Elvidge's letter, it is not at all clear that the minister has erred in law, notwithstanding all the confusion surrounding the terminology.

A fundamental ministerial dilemma lies at the root of the problem. On the one hand, every minister in the Executive, and the Minister for Environment and Rural Development in particular, has an obligation in law to uphold the habitats directive. Ministers cannot equivocate about that; it is their obligation under the law. From what the minister has said, it is also pretty clear that he has received advice from a wide range of sources that has led him to conclude that we are not meeting our obligations under the habitats directive.

On the other hand, the minister has to consider the direct impact that the order would have on at least one stakeholder, and potentially on a wider group, albeit that that group might have alternative means of pursuing their livelihoods. That is a fundamental dilemma for any minister to be in, but the minister has to come to the legally required conclusion and do what he believes will fulfil his obligations under the law.

It is fair to say that all the major political parties in the Parliament want Scotland to be a member of the European Union and want us to be good Europeans. Ted Brocklebank might not take that view; no doubt it is because he disagreed with his party's position that he resigned as spokesman on fishing. Last week, the Scottish National Party was making a huge virtue of the importance that it attached to being part of the EU. If we are to be part of the EU, we have to obey the rules.

If the minister has been advised that we are not meeting our obligations under the habitats directive, as he evidently has, he cannot ignore that advice and he cannot reasonably argue that

we are protecting the environment under the habitats directive.

Fergus Ewing asked for the publication of the advice, but I am less concerned about that because it is pretty clear what it is. How could any minister reasonably go to the EU in the full knowledge that we are not meeting our obligations under the habitats directive and argue that we are? The minister simply cannot do that. He has to take a position that is based on the best advice from a range of sources, including legal advice. There is no great difficulty in seeing the dilemma that the minister is facing.

I concur with Eleanor Scott. The minister has taken steps beyond the norm in his recognition that livelihoods are at stake. He has set out to ensure that some effort is made to mitigate that and to open up new opportunities for the individual concerned. Ultimately, the minister still has an obligation in law. We could delay the order until after the election and take further evidence, but I am not clear that there will be any change to what the habitats directive requires of us. That being the case, I cannot see any option but to support the order. I recognise the dilemma, but this is a negative instrument, and we would have to have some pretty serious ground—the minister would have to have failed to meet his legal obligations in some way—if we were to recommend to the Parliament that the order should not proceed. That is why I will not support Jamie McGrigor's motion.

Mr Morrison: I am grateful to my colleague for his forensic and logical analysis of the events. I am also grateful to Ross Finnie for his response to my question about the final paragraph of John Elvidge's letter to Fergus Ewing. To be fair, the minister was quite candid and acknowledged that the Executive had been loose in its language in relation to the distinction between consultations and discussions. He properly articulated the way in which officials and all the relevant agencies will conduct themselves. There is no reason for me to repeat the points that have been ably outlined by Peter Peacock.

All that Richard Lochhead managed to do, in an attempt in his own mind to expose the minister's confusion and contradictions, was to amplify his own shortcomings and inability to follow a logical sequence of statements of fact. As the constituency MSP, Fergus Ewing has rightly been deeply involved in the issue. He said that he had contributed to seven of the eight debates in the past few years, and he mentioned the excellent programme about the livelihoods of trawler fishermen, "Trawlermen". Such a livelihood is a dangerous one, which involves risk and expertise to bring produce to the tables of the United Kingdom and beyond. He made an emotional plea to the minister about not exposing fishermen to the

dangers of small boats. If the order is passed, they may have to go to dangerous waters. Mr Ewing knows his constituency better than I do, so I cannot debate that, but I would ask him to reflect on the language he used the previous time he—quite rightly—appeared at the committee as a visiting member.

Mr Ewing was joined then by another nationalist, Mr Rob Gibson, who has been uncharacteristically silent at today's meeting—perhaps it has something to do with a discussion at the breakfast table. Mr Gibson has not got a leg to stand on when it comes to west coast fishermen. Mr Gibson and Mr Ewing were the two MSPs who led a campaign to deny Western Isles fishermen their livelihood. They took east coast of Scotland arguments and translated them to the west coast. They took their instructions from Mr Alex Salmond, who clearly said, "Whatever you do, do not limit the number of dredges that boats can use to prosecute a fishery on the west coast of Scotland because we will not be able to go to the west coast of Scotland." It was a betrayal of Western Isles fishermen. They ignored the pleas of the Western Isles Fishermen's Association, the Western Isles MSP and the Western Isles Council. Given the way in which Mr Ewing has been behaving and what he has been saying in the past eight years, we should put Mr Ewing's pleadings on behalf of his constituents into their proper historical context.

With regard to Mr Brocklebank's statements, we all know that he has a clear, consistent and principled position. It is one that I fundamentally disagree with.

Any member who has a vote in committee should put into context what the nationalists have been saying and doing in the Parliament and its committees.

The Convener: Minister, do you want to respond?

Ross Finnie: This is obviously a serious matter. It is certainly not my style ever to treat matters that involve the livelihoods of individuals in anything other than a serious way.

I merely reiterate that the issue for me was not who made the complaint or what the basis of their evidence was. I began with the proper question that my department and I were asked, which was whether we could be satisfied that we were meeting our obligations under the habitats directive in relation to the SAC. That seemed to be a proper question and, as Peter Peacock says, ministers who are responsible for the law do not play ducks and drakes with it. They have to be able to answer such questions.

With all due respect to what anyone said about the question that they were asked, I am clear that

the question that we put to advisers, and SNH in particular, was whether we could satisfy the habitats directive. I am equally clear that the advice from SNH was that at no part of the site did we have sufficient knowledge to satisfy ourselves that we were meeting our obligations. That was the question that we put, and that is how we approached the responses.

That led on to the question of what we do about the situation. The first part of the advice was that we should conduct research. As Fergus Ewing and others have pointed out, it is possible to conduct research without closure. However, clearly, given that we were unable to answer the first question—whether we had sufficient knowledge of the area—we would not be meeting our requirements under the habitats directive if we allowed fishing to continue. There is no question of panicking, taking fright or running. The matter was consulted on, and I considered it very carefully, having taken advice from my department.

Given that SNH's advice was that there was no part of the site on which we had sufficient knowledge, I am placing the same emphasis on its advice as I have always done. There has been no departure, despite what was implied in Fergus Ewing's remarks.

I have admitted that the use of language more than nine months ago may have used the word "consultation"; although that was not in any way misleading considering the ordinary use of the English language, the term was not used as a technical phrase under the 1984 act. Other than the technical breaches of the 21-day rule, nothing of substance has been overlooked in the order.

If we separate out discussions that may have taken place prior to the consultation and if we then take discussions that took place in compliance with the 1984 act, we see that the introduction of an order to close the Firth of Lorn had been discussed extensively with a wide range of stakeholders over nine months. Those discussions included meetings with individual stakeholders and the Scottish inshore fisheries advisory group and the detailed briefing of individual industry representatives. They explored the potential extent and nature of the closure. Indeed, part of those discussions caused me to ask whether there was any way in which we could limit the extent and nature of the closure.

12:30

On the potential financial impact on individuals, I do not demur from the possibility that, in addition to the one family that will be particularly affected by the closure, a further 30 or 40 other fishermen will also be affected. However, without in any way seeking to diminish that impact, I am advised that

the individual who is singularly affected accounts for some 80 per cent of the total use of the site, with the remainder accounting for the balance. That does not mean that the closure will not have an impact on those other fishermen and that they will not be affected, but only one individual will be severely impacted.

As I said in my opening remarks, that is why there was quite a delay in making the order. I was determined that the order should not be made until we had put mitigating efforts in place. I accept Jamie McGrigor's general point that such efforts will not necessarily be comparable, but it is entirely reasonable to try to provide an alternative fishing opportunity and to take the steps to secure access both to alternative quota in the nephrops fishery and to days at sea that would allow that quota to be prosecuted. We have also tried to ensure that an application for FIFG funding for gear change would attract 40 per cent grant. I do not claim that those mitigating efforts will mean that the individuals will be left unaffected. I am merely saying that, as a minister, I have made reasonable attempts to deal fairly with the persons who will be most affected by the closure and that I have tried very hard indeed to seek that conclusion.

As members would expect, my position is that I believe that I am unable to answer the question whether I am complying with the habitats directive. Being unable to answer that question, on the basis of the advice that I have received, I have laid the order seeking the closure of the Firth of Lorn so that we can not only carry on research but, on a precautionary basis, ensure that we do not continue to allow activity to take place that may or may not be damaging. I am unable to answer that question until I have the outcome of the research.

The timing of the order may well be regarded as unfortunate, but I ask the committee to accept that, until Parliament is dissolved on Tuesday, we still have an obligation to act properly as elected members.

On the final point about what a responsible official in Europe would do, I think that such an official would very much take the view that if I, as minister, was unable to answer the first question directly, the Commission would certainly not be happy that I was allowing an activity to continue that might be prejudicial to the proper discharge of our obligations under the habitats directive. That same official might want to take further action against such inaction by me.

I invite the committee to approve the order and not to support the motion in the name of Jamie McGrigor.

The Convener: I invite Jamie McGrigor to wind up the debate.

Mr McGrigor: The Scottish Parliament's committees are meant to take the place of a second chamber by further scrutinising measures, including negative instruments, that might be damaging or, as the case may be, not damaging.

I have great respect for Eleanor Scott, but I must point out that the reef habitat that she wants to protect has existed for a very long time and that that method of scallop fishing has been used there for at least 40 years. In the past, such fishing was carried out by many more boats than are involved today. Given that decline in effort, I ask her to consider why the reef habitat that she wishes to protect is still there despite all the scallop fishing that has gone on for such a long time. I hope that she will think about that point and change her mind.

Fergus Ewing made two good points, one of which was about marine parks. As members will have noticed, the press has been full of people complaining about the marine park proposal because they do not know what effect it might have on their livelihoods. The present case is a good example of that. Does the designation of an area mean that people will have to stop doing activities that they have done for 40 or 50 years? I am not surprised that people are scared.

As far as I know, Alasdair Morrison has battled not to have the marine national park anywhere near the Western Isles. I suspect that that is because the Western Isles Fishermen's Association has told him that it is rather scared of the implications of having a park there. Would he have been against my proposal if it had related to a reef off the Western Isles? He should think about that.

Fergus Ewing's other point was that, because of bad weather, a great many other boats—at least 20—sometimes use the area when they cannot fish anywhere else because it is too dangerous to go beyond the Firth of Lorn. That has always been the case and, as I have said, it has not affected the continued existence of the reef or of the things on it. There is much less fishing effort in the area than there was.

The research that Mr Finnie wishes to protect has been going on for months without the firth being closed to scallop dredging. We have already had an order that breached the 21-day rule. Why is it necessary to have, at the last minute, another order that deliberately breaches—without good reason, because there is no urgent need for the ban that it proposes—the 21-day rule? Further discussion of the matter could perfectly well wait until the next session of Parliament, when the evidence from all the bodies that have not been consulted could be considered.

I entreat members of the committee to acknowledge that extra scrutiny has shown not only that the order has breached consultation rules and the 21-day rule but that the Commission, the complainer, SNH and the fisheries scientists have provided no evidence to support the case for it. The fact that we are talking about a closure for all time rather than a temporary closure goes against what the minister said that he was going to do in his original press statement of 26 June.

The Convener: The question is, that motion S2M-5776, in the name of Jamie McGrigor, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Lochhead, Richard (Moray) (SNP)

AGAINST

Arbuckle, Andrew (Mid Scotland and Fife) (LD)
Macmillan, Maureen (Highlands and Islands) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Scott, Eleanor (Highlands and Islands) (Green)
Smith, Elaine (Coatbridge and Chryston) (Lab)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Motion disagreed to.

The Convener: The committee is therefore content with the order and will make no recommendation on it to the Parliament.

I suspend the meeting briefly to allow the minister and his officials to leave.

12:39

Meeting suspended.

12:40

On resuming—

The Convener: We move to consideration of a further seven Scottish statutory instruments. If members wanted further clarification or information on any of the instruments, we would need to have an extra meeting this week. I just say that for members' information.

**Tuberculosis (Scotland) Order 2007
(SSI 2007/147)**

**Waste Management Licensing Amendment
(Waste Electrical and Electronic
Equipment) (Scotland) Regulations 2007
(SSI 2007/172)**

**Radioactive Contaminated Land (Scotland)
Regulations 2007 (SSI 2007/179)**

The Convener: We initially considered the instruments last week and we now have the Subordinate Legislation Committee's report on them, which allows us to conclude our consideration. The Subordinate Legislation Committee has comments on all three instruments and members have the relevant extract from its report in their papers. Are members content with the instruments and happy to make no recommendation to the Parliament?

Members *indicated agreement.*

**Inshore Fishing (Prohibited Methods of
Fishing) (Loch Creran) Order 2007
(SSI 2007/185)**

The Convener: We considered the order last week, when members asked the minister for clarification on the map accompanying the order. A response was received, acknowledging anomalies and replacing the map with a new version, which was circulated in the committee papers. If members are content with the Executive's response, are they content also with the order and happy to make no recommendation to the Parliament?

Members *indicated agreement.*

**Animals and Animal Products (Import and
Export) (Scotland) Regulations 2007
(SSI 2007/194)**

**Seed (Scotland) (Amendments for Tests
and Trials etc) Regulations 2007
(SSI 2007/224)**

**Inshore Fishing (Prohibited Methods of
Fishing) (Firth of Lorn) Revocation Order
2007 (SSI 2007/239)**

The Convener: The two sets of regulations were initially considered last week. The Subordinate Legislation Committee has now advised that it has no comments on any of the instruments. If members have no comments, are they therefore content with the instruments and happy to make no recommendation to the Parliament?

Members *indicated agreement.*

The Convener: If no further information is required on today's business, I am happy to close the meeting.

Richard Lochhead: Given that this is our last meeting before dissolution, on behalf of the committee, I put on record our thanks to you, convener, for chairing the meetings over the past few months so well and effectively. I wish you all the best for the future.

Members: Hear, hear.

The Convener: That is very kind indeed. I thank all the committee members. I think that we have worked well as a committee. I also thank the clerks, the official report and members of the Scottish Parliament information centre, who keep us informed and up to date on all that we need to know for our committee work.

Meeting closed at 12:43.

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