Neutral Citation Number: [2022] EWHC 683 (Admin)

Case No: CO/3440/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/03/2022

Before :

MR. JUSTICE HOLGATE

- -

Between :

THE QUEEN

on the application of

TARIAN HAFREN SEVERN SHIELD CYF	**Claimant**
- and –	
MARINE MANAGEMENT ORGANISATION	**Defendant**
-and-	
NNB GENERATION COMPANY (HPC) LIMITED	**Interested Party**

- -
- -

David Wolfe QC and Gethin Thomas (instructed by **Leigh Day Solicitors**) for the **Claimant**
Sasha Blackmore and Matthew Dale-Harris (instructed by **Browne Jacobson**) for the **Defendant**
James Strachan QC and Victoria Hutton (instructed by **Eversheds Sutherland**) for the **Interested Party**

Hearing dates: 8 and 9 March 2022

- -

Approved Judgment

This judgment was handed down remotely at 10.30 am on 24 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

Mr. Justice Holgate:

Introduction

1. The main issue in this claim is whether the power to vary a marine licence under the Marine and Coastal Act 2009 ("MCAA 2009") cannot be used to license a "marine licensable activity" which has not already been included in the licence being varied. The claimant says that the power of variation cannot be used to license what it describes as a "new activity". That may only properly be authorised by the grant of a new marine licence. The claimant's challenge is to the variation approved by the defendant, the Marine Management Organisation ("MMO") on 2 August 2021.

2. The claimant is a company incorporated on 7 October 2021 by a group of scientists, organisations and individuals to oppose the disposal of material dredged from the Severn Estuary as part of the Hinkley Point C project back into the Severn. A number of the people involved in the company have opposed works of the same type going back to the grant of a marine licence in 2014. The claimant is concerned that the material dredged contains fine radioactive particles, involving a risk of low levels of radiation.

3. NNB Generation Company (HPC) Limited ("HPC"), the Interested Party, is the promoter of the Hinkley Point C nuclear power station project. In October 2011 it made an application for a development consent order ("DCO") under the Planning Act 2008 ("PA 2008") to authorise the construction of the station as a "nationally significant infrastructure project". The Panel conducted a statutory examination into that application between March and September 2012. They submitted their report to the Secretary of State for Energy and Climate Change on 19 December 2012. The Secretary of State issued his decision letter granting development consent on 18 March 2013. The order was made as SI 2013 No. 648 and came into force on 9 April 2013. There was an opportunity to challenge the order under s.118 of the PA 2008, subject to a 6 week time limit.

4. The project involves a number of activities or works which are required to be licensed by a marine licence granted under the MCAA 2009. The Secretary of State for Environment, Food and Rural Affairs is the "appropriate licensing authority" for the purposes of marine licensing under Part 4 of the MCAA 2009. However, by The Marine Licensing (Delegation of Functions) Order 2011 (SI 2011 No. 627) ("the 2011 Order") the Secretary of State has delegated to the MMO certain functions under Part 4, including the determination of applications for a marine licence and the variation of such licences. The MMO exercises those functions as a delegate acting on behalf of the Secretary of State (see s.98(1)(b) of the MCAA 2009 and articles 3 and 4 of the 2011 Order).

5. In June 2012 HPC applied to the MMO for the grant of a marine licence for marine works related to the project. On 7 June 2013 the MMO granted that licence ("the original licence"). The licence recorded the proposal for the material it authorised to be dredged at Bridgwater Bay (about 5km north of Bridgwater, Somerset) to be disposed of at the Cardiff Grounds licensed disposal site, also lying within the Severn Estuary, but located about 3km off the South Wales coast. That disposal fell outside the territorial jurisdiction of the MMO, but inside that of the Welsh Ministers. On 11 July 2014 a separate marine licence was granted by Natural Resource Wales ("NRW") on

behalf of the Welsh Ministers for disposal of the dredged material at the Cardiff Grounds site ("the NRW licence").

6. The MMO granted a series of four variations to the original licence in 2014, 2016, 2017 and 2019.

7. On 20 December 2019 the MMO granted a fifth variation of the original licence ("version 6"). This licence included three types of activity at Combwich Wharf within the River Parrett which had not been authorised by the original licence or earlier variations (e.g. capital dredging, maintenance dredging and desilting).

8. Neither the original licence, nor any of the first to fifth variations thereof, were the subject of judicial review.

9. In April 2020 HPC entered into discussions with the MMO regarding an application they intended to make for a further variation of the marine licence. In August 2020 HPC raised the possibility of using the already designated disposal site at Portishead, in the Bristol Channel, not far from the Somerset coast. The site has an area of about 200 ha. In August 2020 the MMO identified the nature of the additional information they would require and said that the proposed variation would have to be the subject of environmental impact assessment under the Marine Works (Environmental Impact Assessment) Regulations 2007 (SI 2007 No. 1518) ("the EIA Regulations 2007").

10. On 20 August 2020 HPC submitted a scoping request to the MMO in respect of the further EIA work. On 17 September 2020 the MMO issued its scoping opinion.

11. On 21 December 2020 HPC submitted its application for a sixth variation of the marine licence granted in 2013. The proposal sought to carry forward activities authorised by the original licence or earlier revisions thereof (with or without updates resulting from detailed design work). It also proposed further activities, that is activities not previously authorised in earlier iterations of the licence, but now considered necessary because of the evolution of the detailed design. By way of example, the application proposed updated dredging details for the cooling water intakes and outfalls and, as a new matter, disposal of the dredged material at Portishead. It is that disposal which the claimant seeks to challenge in these proceedings.

12. The application was supported by *inter alia* the following documents issued in February 2021: -

    - a Report to support the variation of the licence;

    - an Environmental Statement on the disposal of dredged material at the Portishead disposal site;

    - a Water Framework Directive Assessment for the disposal of dredged material at the Portishead site.

    HPC also submitted a Habitats Regulations Assessment ("HRA") for the purposes of the Conservation of Habitats and Species Regulations (SI 2017 No. 1012) ("the Habitats Regulations") in relation to effects of the proposal on *inter alia* the Severn Estuary Special Area of Conservation ("SAC").

13. On 12 February 2021 the MMO sent the application and supporting reports to public authority consultees, notably NRW, Natural England ("NE"), the Environment Agency ("EA"), Devon and Severn Inshore Fisheries and Conservation Authority ("D&S IFCA"), North Somerset Council ("NSC") and Portishead Town Council ("PTC"). In addition, because the proposal was an EIA application, it had to be publicised in two local newspapers, allowing a public consultation period of 6 weeks from 19 February 2021 (regulation 16 of the EIA Regulations 2007).

14. The MMO also sent the application documents to their independent consultants ABPmer for review. The consultants responded on 9 March 2021. They stated that they had not found "any significant marine water or sediment quality, marine ecology or navigation issues" with the proposed use of the Portishead site. But they provided a number of detailed criticisms of and comments upon the application documents.

15. In April 2021 HPC issued a Supplemental Environmental Information Report and an Addendum to the Environmental Statement responding to comments which had been made.

16. NE, the EA and NRW raised no objections to the proposal. NE and NRW agreed with the HRA carried out by the MMO.

17. On 31 July 2021 the MMO issued a decision granting EIA consent for the proposal in accordance with regulations 4(c), 21A and 22 of the EIA Regulations 2007.

18. On 2 August 2021 the MMO issued its notice pursuant to s.72(3)(d) of the MCAA 2009, approving the variation of the licence sought by HPC. This is the decision challenged by the claimant in these proceedings.

The Project Works

19. Mr. Guy Buckenham is the Head of Strategic and Emerging Markets Policy and Regulation Limited for HPC's parent company, EDF Energy Limited. He explains that the project forms an essential part of the UK's strategy for low-carbon energy infrastructure. Existing nuclear power stations produce 20% of the country's electricity, but by 2030 all but one of those will be closed. Hinkley Point C will make the UK less reliant on energy imports and more resilient to shortages caused by low wind conditions. Compared to a gas generation alternative, the project would avoid 9 million tonnes of carbon dioxide emissions for each year of full operation over a 60-year life span.

20. Hinkley Point C will have the capacity to produce 1.6 GW per reactor unit, or 3.2 GW in total. The dates for commercial operation are currently scheduled as 26 June 2026 for Unit 1 and 26 June 2027 for Unit 2.

21. Mr. Jonathan Smith is the Balance Plant Area Delivery Director for the scheme. He explains that it is one of the largest and most technologically complex construction projects in the UK, involving more than £20bn of contracts and 6000 people employed across the country. Construction began in 2016.

22. When in operation, the heat produced in the two pressurised water reactors will be used to convert water in separate circuits into pressurised steam to turn the turbines and

generate electricity. Large volumes of water will need to be taken from the Bristol Channel via further separate circuits to cool and condense the steam for reuse. There will be two intake tunnels, one for each reactor unit and a combined outfall tunnel to return water to the Estuary after it has been used to cool the steam. The two intake tunnels will extend 3.3km into the Bristol Channel and be located 33m under the seabed. Each will be 6m wide. They are designed to be capable of bringing in water from the Severn at a rate of 132,000 litres of water a second. The outfall tunnel is 7m in diameter and extends 2km into the Bristol Channel.

23. Areas of the seabed have been dredged to create pits so that gravel beds maybe laid to accommodate substantial head structures, four intake heads and two outfall heads. Six vertical shafts will be drilled down through the seabed to connect each of these head structures with the respective intake and outfall tunnels. The intake heads are each 44m long, 8m high and weigh about 5,000 tonnes. The outfall heads are each 16m long, 8m high and weigh about 2,500 tonnes.

24. Two types of dredging are involved. "Capital" dredging refers to the removal of sediment for the carrying out of project works, in this instance the creation of the six pits for the heads. "Maintenance" dredging refers to the removal of sediment or silt that accumulates over a period of time, for example between the carrying out of two stages of the project.

25. This case is solely concerned with the disposal of sediment dredged in the six pit areas at the locations of the six head structures. It is necessary to relate this work to the relevant activities authorised by the marine licences.

26. The original marine licence granted in 2013 authorised a number of licensable activities. Activity 1.1 authorised dredging at six locations to prepare for the construction works, including placement of the intake and outfall head structures. This comprised capital dredging and any maintenance dredging needed before the installation of the heads. Activity 1.1 specifically stated that the dredged material would be disposed of at Cardiff Grounds, subject to obtaining a marine licence from NRW.

27. Activity 1.2 authorised the drilling of the six vertical shafts and the installation of liners. Activity 1.3 authorised the deposition, or disposal, of the drill arisings from the six shafts on the seabed. Activity 1.4 authorised disposal below the sea bed of the three machines used to bore the intake and outfall tunnels.

28. Activity 1.5 authorised the preparation of the site for, and the installation of, the four intake heads and two outfall heads above the vertical shafts, together with any maintenance dredging necessary to remove any build-up of silt following the initial dredging under activity 1.1.

29. In 2018 initial capital dredging works were carried out for the four intake and two outfall pits. This involved the removal of 57,000m^3 of material which was disposed of at the Cardiff Grounds pursuant to a further licence granted by NRW in 2018.

30. The fifth licence variation was granted by the MMO in 2019. This sub-divided the dredging originally labelled as activity 1.1. Now activity 1.1 refers to capital dredging and increases the amount of material involved. Activity 1.2 refers to maintenance dredging and states that "the maintenance dredge material" will be disposed of at "the

Cardiff Grounds licensed disposal site, *unless otherwise agreed by the MMO*" (emphasis added). This implies that that disposal may take place within the territorial area covered by the MMO.

31. The sixth variation approved by the MMO on 2 August 2021, the decision the subject of this challenge, contains more details on the capital and maintenance dredging under activities 1.1. and 1.2. The maximum volumes were increased. Mr. Smith explains that the design had evolved from that used for the initial dredging works in 2018. For example, the pits had been reshaped and enlarged. The intake pits had been widened, the outfall pits joined and the profiles altered. Activities 1.1 and 1.2 were also varied so as to refer to disposal entirely at the Portishead site or at the Cardiff Grounds site. Disposal would be to one or other of the two locations, but not to both.

32. Condition 5.2.30 of the sixth variation of the licence prohibits capital dredging and related disposal outside the period July to November 2021 without the agreement of the MMO. Condition 5.2.34 prohibits maintenance dredging and related disposal outside the period July to November 2021 and April to September 2022. These are referred to as "weather windows". They also protect "sensitive mobile receptors" within the Estuary.

33. Activity 4.1 refers for the first time to use of the Portishead disposal site. It authorises disposal of both capital and maintenance dredged material during the weather windows set out in the conditions.

34. HPC had planned that during the 2021 window not only the dredging but also the laying of the gravel beds and the installation of the heads would be completed. However, because of a delay in obtaining approval of the variation, the work could not begin until 7 August 2021. It was only possible to complete the dredging works during that window. A total of 242,000m^3 of material was dredged, comprising 209,000m^3 of capital dredging and 33,000m^3 of maintenance dredging. Of this material only 132,387m^3 needed to be disposed of at Portishead because of overflow losses, propeller wash and re-suspension (para.17 of Mr. Smith's witness statement).

35. Over the last winter some silt has built up in the pits which have been dredged. Mr. Smith estimates that there remains less than 150,000m^3 of such material to be removed as maintenance dredging. It must be removed before the gravel beds can be laid and the heads installed in each of the six pits. He explains that this work needs to start in April 2022 and be completed in the 2022 window. The boring and lining of the intake and outfall tunnels is expected to be completed by the second quarter of 2022. The heads are to be connected to those tunnels by the vertical shafts which will be drilled in 2023. It is anticipated that each generating unit's cooling water pumping station and open forebay receiving the intake tunnels will be completed by July 2024. That is said to be key to the commissioning of the power station.

36. The MMO and HPC describe the Portishead site as an established, "highly dispersive" disposal site. That has not been disputed by the claimant in these proceedings. Mr. Chris Fayers, the Head of Environment in the Safety and Regulation Department of HPC, explains in paragraphs 10 and 14 of his witness statement that: -

    (i) Bristol Ports Company has a marine licence authorising disposal of up to 1.2m wet tonnes of dredged material a year at Portishead. Between 2014

and 2016 their average disposal was 936,000 wet tonnes a year. But this has reduced to between 2,500 and 180,000 wet tonnes a year between 2017 and 2019;

(ii) There is capacity for additional disposal of dredged material at Portishead;

(iii) The capital dredging for the works on the intake and outfall pits and the disposal of that material at Portishead has concluded, "resulting in its dispersal with the Severn Estuary SAC. That is irreversible."

These matters have not been challenged by the claimant.

37. There is no challenge to the authorisation of the maintenance dredging of the silt which has recently built up in the pits already created and which now needs to be removed. In practice the only currently licensed activity which would be affected by this judicial review is the disposal of that silt.

The Grounds of Challenge

38. The claimant has refined its grounds of challenge over time. I summarise the grounds as presented at the hearing: -

> **Ground 1**
>
> The decision on 2 August 2021 to vary the marine licence was ultra vires the MCAA 2009 and, in particular s.72. The power to vary may not be used to add a wholly different activity which was not previously authorised by that licence. Here the licence being varied had not authorised disposal of dredged material. The addition of that disposal was a wholly different or new activity which could not be authorised by a variation of the existing licence. Instead, that activity could only lawfully be authorised by a fresh licence granted under s.71. The MMO's power in s.72(3)(d) to vary a licence "for any other reason that appears to the authority to be relevant" may not be relied upon to authorise a new or wholly different activity.
>
> **Ground 2**
>
> However, if ground 1 should fail, and the power to vary under s.72(3)(d) may be used to authorise an activity not previously authorised by the licence being varied, that power may only be exercised if the MMO considers that they have a relevant reason for doing so. The MMO are under a legal obligation to identify that reason. In this case the MMO did not have, or they failed to identify, a reason for their use of the power under s.72(3)(d). Neither a proposal made by a licensee in an application to the MMO, nor the content of such a proposal, can constitute a legally adequate reason for the exercise of that power.

Ground 4

In deciding to vary the licence, the MMO failed to comply with regulation 22 of the Waste (England and Wales) Regulations 2011 (SI 2011 No.988) ("the 2011 Regulations"). In particular, the MMO failed to apply the waste hierarchy set out in Article 4(1) of the Waste Framework Directive (Directive 2008/98/EC as amended).

Ground 5

In deciding to vary the licence, the MMO failed to comply with the Water Framework Directive (Directive 2000/60/EC as amended), to which effect has been given by The Water Environment (Water Framework Directive) (England and Wales) Regulations (SI 2017 No. 407) ("the 2017 Regulations"). In particular, the MMO failed to consider whether the proposed disposal would jeopardise the attainment of "good surface water status" under Article 4(1) of the Directive. This ground is solely aimed at the chemical status of the Lower Severn water body. It is alleged that because the proposal would maintain the pre-existing "poor quality" of the water body, it would be bound to jeopardise the attainment of the "good" status and so, as a matter of law, the MMO was required to refuse the application to vary the marine licence.

39. The claimant had also obtained permission to pursue ground 3. This was an extensive attack on the lawfulness of the HRA carried out by the MMO for the purposes of the Habitats Regulations. The MMO provided a detailed response to that challenge, which was supported by Natural England. In its skeleton argument dated 18 February 2022 the claimant announced that it no longer pursued ground 3.

40. Ms. Sasha Blackmore, who together with Mr. Matthew Dale-Harris appeared for the defendant, identified points taken by the claimant in, for example, its pleadings, which no longer appeared to be pursued. At the hearing it was understood and accepted by all parties that the court would only address those legal challenges which the claimant advanced in its oral submissions.

41. The claim for judicial review was filed on 8 October 2021, the day after the claimant was incorporated. By that stage the material from the capital and maintenance dredging carried out in the summer of 2021 had been disposed of at Portishead. As HPC says, and the claimant does not dispute, that position is, in practical terms, irreversible.

42. Initially, in paragraph 90 of the Statement of Facts the claimant sought wide-ranging relief, which included the quashing of the whole of the decision issued on 2 August 2021, declaratory relief and "a mandatory order requiring appropriate remedial steps to be taken by the Defendant and the IP".

43. However, in an email sent on 7 March 2022 the claimant's solicitors limited the quashing order sought to just activity 4.1 in the sixth licence variation (i.e. the disposal of dredged material at Portishead) and declaratory relief. The claimant no longer asked

for the whole of the variation decision to be quashed and abandoned the hopeless request for mandatory relief to compel the taking of "remedial" steps.

44. I have already referred to the claimant's opposition to the disposal in the Severn of dredged materials with, it is said, a risk of low levels of radioactivity. During the consultation exercise such concerns were also raised by NSC. Section 5.3 of the MMO's Report on the EIA Consent Decision (dated 31 July 2021) referred to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter ("the London Convention" 1972). Only materials within levels of radioactivity recognised as *de minimis*, which may effectively be regarded as non-radioactive, may be considered for disposal at sea. The MMO's consultants, ABPmer, were satisfied that the test results presented showed that the material to be dredged would be non-radioactive. Section 5.3.3 of the Report summarised in some detail points which had been raised by NSC, the responses of the HPC and the MMO's views. In section 5.3.4 the MMO explained why the methodology laid down by the International Atomic Energy Agency was appropriate, the test results satisfactory and the proposed disposal compliant with the London Convention. Paragraph 25 of the witness statement of Mr. Rowan Smith, the claimant's solicitor, referred to the compliant test results obtained by the Centre for Environment, Fisheries and Aquaculture Science. It should be recorded that none of the grounds of challenge in this judicial review raise any issues about the way in which the MMO has dealt with the subject of radioactivity.

45. The Court's role in judicial review is limited to determining issues of law. The Court is not permitted to go into the forbidden territory of resolving issues of expert or technical opinion which have arisen in the consultation process or in the exchange of pleadings and evidence in these proceedings (see e.g. *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 446 at [180] and *R (Keir) v Natural England* [2022] Env. L.R. 3).

The Marine and Coastal Access Act 2009

46. The background to this legislation was summarised in *Powell v Marine Management Organisation* [2017] EWHC 1491 (Admin) at [42] to [47]. The object was to introduce an integrated, stream-lined marine licensing system, based upon marine plans. The legislation was to be "targeted on things that need to be controlled", flexible, proportionate and risk-based. Only those activities posing a significant risk to *inter alia* the environment would be regulated. The statutory framework was summarised in [48] to [67]. Those passages were not contentious in the present litigation.

47. Section 2 is entitled "general objective". Subsections (1) to (3) provide: _

> "(1) It is the duty of the MMO to secure that the MMO functions are so exercised that the carrying on of activities by persons in the MMO's area is managed, regulated or controlled—
>
> (a) with the objective of making a contribution to the achievement of sustainable development (see subsections (2) and (4) to (11)),
>
> (b) taking account of all relevant facts and matters (see subsection (3)), and

> (c) in a manner which is consistent and co-ordinated (see subsection (12)).
>
> Any reference in this Act to the MMO's "general objective" is a reference to the duty imposed on the MMO by this subsection.
>
> (2) In pursuit of its general objective, the MMO may take any action which it considers necessary or expedient for the purpose of furthering any social, economic or environmental purposes.
>
> (3) For the purposes of subsection (1)(b), the facts and matters that may be taken into account include each of the following—
>
> (a) scientific evidence, whether available to, or reasonably obtainable by, the MMO;
>
> (b) other evidence so available or obtainable relating to the social, economic or environmental elements of sustainable development;
>
> (c) such facts or matters not falling within paragraph (a) or (b) as the MMO may consider appropriate."

48. Section 2(3)(c) indicates the broad and flexible nature of the judgment which the MMO may exercise in pursuit of its statutory objectives.

49. Sections 49 to 57 deal with the adoption of marine plans containing policies for specific parts of the UK marine area. Sections 58 and 59 require public authorities to reach decisions on "authorisations", which include the determination of applications for a marine licence and the variation of any such licence, in accordance with the relevant marine plan, "unless relevant considerations indicate otherwise".

50. Part 4 of the MCAA 2009 deals with various forms of marine licensing, including enforcement action. Chapter 1 specifically deals with marine licences.

51. Section 65(1) prohibits anyone from carrying on or causing or permitting any other person to carry on, a "licensable marine activity" "except in accordance with a marine licence granted by the appropriate licensing authority". Thus, it is insufficient just to obtain a marine licence. The licensed activity must be carried on so as to comply with the terms of the licence. A person who contravenes s.65(1), or who fails to comply with any condition of a marine licence commits an offence (s.85(1)).

52. Section 66 defines what are licensable marine activities. The list includes: -

> "1. To deposit any substance or object within the UK marine licensing area, either in the sea or on or under the seabed, from—
>
> (a) any vehicle, vessel, aircraft or marine structure,
>
> (b) any container floating in the sea, or
>
> ……

> 7. To construct, alter or improve any works within the UK marine licensing area either—
>
> (a) in or over the sea, or
>
> (b) on or under the seabed.
>
> ……..
>
> 9. To carry out any form of dredging within the UK marine licensing area (whether or not involving the removal of any material from the sea or seabed)"

53. Thus, dredging from, and the deposition of dredged materials in, the sea are activities which must be authorised by a marine licence. Item 7 in the list relates to the common example of construction, improvement of alteration of works in or over the sea or the seabed. Those works would include jetties, piers, wharves, pontoons, piles, platforms, pipes and tunnels. They would also include the construction and operation of complex projects such as harbour and marina developments and windfarms.

54. Section 67 provides for the making of an application to, in this case, the MMO.

55. Section 68(1) requires the making of an application for a marine licence to be published. Section 68(3) requires notice to be given to a local authority in whose area an activity is proposed to be carried out. The licensing authority may not proceed with the application until these requirements are satisfied. (s.68(4)).

56. Section 69 deals with the determination of applications. Subsection (1) provides: -

> "(1) In determining an application for a marine licence (including the terms on which it is to be granted and what conditions, if any, are to be attached to it), the appropriate licensing authority must have regard to—
>
> (a) the need to protect the environment,
>
> (b) the need to protect human health,
>
> (c) the need to prevent interference with legitimate uses of the sea, and such other matters as the authority thinks relevant"

Like s.2(3)(c), s.69(1)(c) gives the MMO a broad and flexible discretion to take into account such matters as it considers relevant.

57. By s.69(3) the MMO must take into account any representations it receives from any person having an interest in the outcome of the application.

58. Where an application is made for a licence to authorise "works" (item 7 in s.66(1)), the MMO must have regard to the effects of any intended use of those works.

59. Section 70 gives the MMO a discretion to cause an inquiry to be held in connection with the determination of an application for a marine licence.

60. Section 71 deals with the grant of a marine licence. Section 71(1) and (2) provides: -

> "(1) The appropriate licensing authority, having considered an application for a marine licence, must—
>
> (a) grant the licence unconditionally,
>
> (b) grant the licence subject to such conditions as the authority thinks fit, or
>
> (c) refuse the application.
>
> (2) The conditions that may be attached to a licence under subsection (1)(b) may relate to—
>
> (a) the activities authorised by the licence;
>
> (b) precautions to be taken or works to be carried out (whether before, during or after the carrying out of the authorised activities) in connection with or in consequence of those activities."

61. Without prejudice to the generality of s.71(1) and (2), subsection (3) sets out particular types of condition which may be imposed. Under sub-paragraph (a), a condition may provide that: -

> "that no activity authorised by the licence be carried out until the authority or some other specified person has given such further approval of the activity as may be specified;"

Under sub-paragraph (f) a condition may require that any activity authorised by the licence must take place at a specified site.

62. Section 73 required the Secretary of State to make regulations to enable any person who applies for a marine licence to appeal against a decision under s.71. He has made The Marine Licensing (Licence Application Appeals) Regulations 2011 (SI 2011 No.934). Regulation 4 confers a right of appeal against a decision to refuse to grant a licence or against the imposition of conditions. The appeal is determined by an Inspector (regulation 5). The Secretary of State determines whether the appeal is to be dealt with by way of written representations, a hearing or an inquiry (regulation 8). Where the MMO is the decision-maker, it must give notice of the appeal to any person who had made representations on the application and to any other person it considers likely to have an interest, so that they may send written representations to the Secretary of State (regulation 9). Part 5 lays down the procedure for hearings and inquiries. Notice of the date of the hearing or inquiry must be given to persons who have made representations or are likely to be interested in the appeal (regulation 12). A person who has made representations is entitled to appear at the hearing or inquiry and to give evidence (regulations 15 and 16). If the appeal is allowed the Inspector may direct the MMO to grant a licence on such terms and conditions as he may direct (regulation 22).

63. Section 72, which lies at the heart of grounds 1 and 2, deals with the variation, suspension, revocation and transfer of a licence. Section 72 (1) to (3) and (7) to (8) provide: -

> "(1) A licensing authority may by notice vary, suspend or revoke a licence granted by it if it appears to the authority that there has been a breach of any of its provisions.
>
> (2) A licensing authority may by notice vary, suspend or revoke a licence granted by it if it appears to the authority that—
>
> (a) in the course of the application for the licence, any person either supplied information to the authority that was false or misleading or failed to supply information, and
>
> (b) if the correct information had been supplied the authority would have, or it is likely that the authority would have, refused the application or granted the licence in different terms.
>
> (3) A licensing authority may by notice vary, suspend or revoke a licence granted by it if it appears to the authority that the licence ought to be varied, suspended or revoked—
>
> (a) because of a change in circumstances relating to the environment or human health;
>
> (b) because of increased scientific knowledge relating to either of those matters;
>
> (c) in the interests of safety of navigation;
>
> (d) for any other reason that appears to the authority to be relevant.
>
> ……
>
> (7) On an application made by a licensee, the licensing authority which granted the licence—
>
> (a) may transfer the licence from the licensee to another person, and
>
> (b) if it does so, must vary the licence accordingly.
>
> (8) A licence may not be transferred except in accordance with subsection (7).
>
> ……"

64. Section 108(1) required the Secretary of State to make regulations providing for appeals against notices issued under *inter alia* s. 72. He has made The Marine Licensing

(Notices Appeals) Regulations 2011 (SI 2011 No. 936). By regulation 3(1) a person to whom a notice under s.72 varying, suspending or revoking a licence has been issued, may appeal to the First-Tier Tribunal against the notice. Such appeals are dealt with by the General Regulatory Chamber. Where a licensee appeals against a notice varying a licence, that notice is suspended in relation to the subject-matter of the appeal until the appeal is determined (regulation 3(2)). In any appeal the burden of proof lies on the licensing authority (regulation 5(1)). In making its decision, the Tribunal may withdraw, confirm or vary the notice or remit the matter to the authority (regulation 5(2)).

65. The Environment (Wales) Act 2016 inserted s.72A into the MCAA 2009 for cases where the Welsh Ministers are the appropriate licensing authority "in relation to a marine licence granted under this Part". The authority may require the licensee to pay a fee for "dealing with an application by the licensee for a variation, suspension, revocation or transfer of the licence under s.72" (s.72A(2)(c)). Where a licensee who has applied for a variation, suspension, revocation of a transfer of a licence under s.72 fails to pay the requisite fee, the licensing authority may refuse to proceed with the application (s.72A(9)).

Ground 1

A summary of the Claimant's submissions

66. Mr. David Wolfe QC, who together with Mr. Gethin Thomas, appeared on behalf of the claimant, submitted that the issue of *vires* depends upon the true construction of the legislation. That is to be understood by reference to the language used by Parliament, according to its natural and ordinary meaning, read in its statutory context. The statute should be read as a whole.

67. The claimant contends that a licensable marine activity must be authorised by the grant of a marine licence under s.71, following the procedure prescribed by sections 65 to 71.

68. The effect of s.65 is that no person may carry on a "licensable marine activity" as defined in s.66 without a marine licence. Mr. Wolfe QC submits that a marine activity may only be licensed where an application made under s.67 results in the grant of a marine licence under s.71. The conditions which may be imposed on a licence may relate to the activities it authorises or to precautions to be taken, or works to be carried out, in connection with or in consequence of those activities (s.71(2)). Likewise, certain types of condition specified in s.71(3) relate to the activity or "any activity" authorised by the licence.

69. Mr. Wolfe submits that a marine licence can only authorise the activities it specifies and cannot amount to a generalised permission "which can roam around and bring in new activities by variation". Thus, the requirement in s.68(3) for notifying a local authority of an application depends upon the activity to which it relates being in a specific location. The special procedure in s.78 allows applications for both a marine licence and a harbour order to be considered together if the latter concerns the activity for which the licence is required (or other works to be undertaken in connection therewith). So, it is submitted, a marine licence cannot authorise dredging in general or deposition in general.

70. The claimant submits that the original marine licence, and the variations up to and including the fifth variation, did not authorise deposition of dredged material. They simply authorised dredging. The power under s.72 to vary a licence cannot be used to add a new activity not previously authorised by the licence being varied. That would not fall within the notion of "varying" a licence or represent a "variation" of that licence.

71. Next, Mr. Wolfe submitted that s.72(1) to (3) is concerned with action taken by the licensing authority against the licensee, where the authority acts of its own motion. Section 72 does not allow for an application to be made by the licensee to the authority seeking, for example, a variation of a licence.

72. He also pointed to the procedural implications of the parties' competing interpretations of the legislation. If a new activity has to be the subject of a fresh marine licence under s.71, the application procedure provides for publicity and for participation by interested parties making representations. Article 5 of the 2011 Order (as amended) enables a local planning authority (such as NSC) or an Inshore Fisheries and Conservation Authority (such as D&S IFCA) to state that in their opinion an activity in a licence application meets the criteria in article 5(7)(a), so that the Secretary of State must consider whether to determine the application himself, instead of the MMO. If the Secretary of State decides to "call in" the application, a public inquiry would be expected to be held. In the event of an appeal against a refusal of a marine licence, interested parties who had made representations on the licence application would be able to participate in the appeal process, whether by way of written representations, or at a hearing or public inquiry. By contrast, where the MMO is considering whether to vary a licence there is no statutory procedure to enable interested parties and the public to participate (unless, as in the present case, the proposal was subject to EIA under the EIA Regulations 2007). Furthermore, the MMO does not have a power to hold a public inquiry (contrast s.70) and the power in Article 5 of the 2011 Order for the Secretary of State to call in the matter for his own determination do not apply. Any appeal by the licensee against the decision of the MMO is heard by the First Tier Tribunal without public participation.

73. So far as the present case is concerned, Mr. Wolfe accepted that because the EIA Regulations 2007 had applied to the handling of HPC's application to vary under s.72, no complaint is made about any inability (or reduced ability) of interested parties and the public to participate in the process leading to the decision made on 2 August 2021. Instead, the only procedural difference which arose in the circumstances of this case was that the Secretary of State had no power to consider, on the representations made by NSC and D&S IFCA, whether he would call in the application for his own decision.

74. Mr. Wolfe submitted that the construction of s.72 for which the Secretary of State and HPC contend would undermine the statutory scheme. For example, an application could be made, and a licence granted under s.71, for a single marine activity, perhaps something of a modest nature, and then might be altered by a series of variations to add any number of other activities without following the procedures applicable to an application for a licence, so as to "morph" into something "beyond recognition".

Discussion

75. A number of matters became common ground during the hearing.

76. First, a single licence can cover more than one activity. That is clear from the reference to "activities" in the plural in s.71(2)(a). But in addition, s.6(c) of the Interpretation Act 1978 applies so that any reference to an "activity" in the singular (see e.g. s.65(1)(a)) includes the plural.

77. Second, the MMO's power to vary, suspend or revoke a licence can be exercised upon an application made by the licensee. This is clear from the MCAA 2009 itself (see s.72A(2)(c) and (9)). It is also apparent that Parliament has proceeded on that basis when enacting the EIA Regulations 2007. This can be seen in, for example, the definitions in regulation 2(1) of "application", "EIA consent decision", "regulated activity", "regulatory approval" (which includes a variation of a marine licence) and "regulatory decision" and also in regulation 12 (dealing with applications) and regulation 22 (dealing with the making of the EIA consent decision). Indeed, in the present case the carrying out of the EIA process in relation to the decision to vary the marine licence proceeded on the basis that s.72 of the MCAA 2009 does permit the making of an application for such a variation.

78. In my judgment, the express reference in s.72(7) to an "application" by a licensee to transfer a licence cannot be taken to imply that a licensee cannot otherwise make an application under s.72. The effect of s.72(8) is that a licence can only be transferred on an application made by the licensee under s.72(7). Not surprisingly, Parliament has decided that the MMO should not have the power to direct a transfer of a licence without the licensee's consent. Hence transfer of a licence, exclusively upon an application made by the licensee, is dealt with separately in s.72.

79. Section 72(1), (2) and (3) operate differently. They enable the MMO to give a notice varying, suspending or revoking a licence. Thus, under those provisions the MMO may act of its own motion (in the absence of any application), or it may issue such a notice as its determination of an application by a licensee. It is possible to conceive of circumstances in which a licensee might wish to have his licence suspended or revoked, for example in order to bring to an end ongoing responsibilities for and the costs of maintaining a structure and of complying with the terms of the related licence.

80. The key point to emerge from this second point of common ground is that Mr. Wolfe's submission that s.72(3) is only concerned with actions which may be "done to" or steps taken against, a licensee is untenable.

81. Third, it is now common ground that s.72 can be used to vary an activity authorised by a licence under s.71. It is therefore incorrect to say that a marine licensable activity can only be authorised by a marine licence. Where the power of variation under s.72 is properly used, for example, to extend the geographical area of an activity or to extend a work such as a pier, the activity in question is authorised by the original licence and by the notice of variation. Where such an extension is duly authorised by a s.72 variation, there is no need for the licensee to obtain a fresh marine licence.

82. All this goes to show that the real question under ground 1 is what is meant by "vary" in s.72. Ms. Blackmore, together with Mr. James Strachan QC and Ms. Victoria Hutton who appeared on behalf of HPC, submitted that determining or defining the outermost reach of the power to vary might raise some difficult questions in other cases. They suggested that it is unnecessary to address that subject in the present case, because the

disposal of dredged material, authorised by the sixth variation of the licence, fell well within the ambit of s.72.

83. The powers in s.72 to suspend or to revoke a marine licence, by definition, do not involve any extension to the ambit of the activities authorised by a licensee. But it does not follow that the word "vary" must be construed as if it only enables the scope of a licence to be cut down rather than enlarged. As a matter of ordinary English a variation can widen the scope of a marine licence, just as an anti-social behaviour order may be extended in relation to its duration or the geographical area within which restrictions apply (see e.g. *Leeds City Council v G* [2007] 1 WLR 3025; *R (Langley) v Crown Court at Preston* [2009] 1 WLR 1612). There is nothing in the language of the MCAA 2009 to indicate that the power to vary under s.72 cannot be used to enlarge the scope of a marine licence. So, Mr. Wolfe rightly accepted that where an activity is authorised by a licence, for example, the deposition of dredged material, its geographical area may be extended by a variation under s.72. Likewise, a physical extension of licensed works such as a pier may be authorised under the power to vary the original licence for the pier. On the other hand, Mr. Wolfe would draw the line at a proposal to move the location of a proposed pier already authorised under a marine licence by any distance which is more than *de minimis*. For example, moving the whole of the proposed structure by say 25m would, he submits, require a fresh licence and could not be the subject of a s.72 variation.

84. The main issue between the parties is this: whereas the claimant submits that the power to vary a licence cannot authorise a new activity not previously authorised by the licence, the MMO and HPC say that the language of the legislation does not exclude this possibility, so long as the new activity can properly be said to represent a variation of the existing licence in its current form.

85. In her first witness statement, Ms. Lindsey Mullan, a Marine Licensing Senior Case Manager with the MMO, explains that it is common for multiple variations to be made to the marine licence for a major infrastructure project (see paragraph 49 *et seq*). In practice, these have included the addition of new marine activities. She says that the marine environment is dynamic and complex. Self-evidently, the carrying out of development in coastal waters can be challenging and the licensee may have to cope with aggressive conditions. The design requirements, mitigation and safety measures of a project may need to change over time, during both the development and operational phases. Some projects evolve over a long time from an initial design or concept to the construction stage. A scheme may be undertaken in several phases.

86. Ms. Mullan refers to two major projects as examples where new activities were introduced as licence variations: Terminal 2 and the new marina at the Western Docks, Dover and the Dogger Bank, Teeside B Sofia Offshore Windfarm. In the latter case, the deemed marine licence was varied so as to permit an increase in the number of fibre-optic cables laid with the high voltage direct current cables. But it was also varied so as to authorise the laying of cables between the wind turbine generators and the offshore converter platform, something which had not previously been included in the licence at all.

87. The MCAA 2009 explicitly recognises the need for the content and engineering of a project, particularly one of a complex nature, to continue to evolve after the MMO first grants a licence for marine activities. Section 71(3)(a) authorises the imposition of a

licence condition prohibiting the carrying out of an activity authorised by that licence until the MMO (or another authority) has given "such further approval of the activity as may be specified". This provision may be used where relatively little detail is available for a particular "work" at the stage when a marine licence is first granted authorising that activity in principle. Further details may be reserved for subsequent approval. I acknowledge that such a condition may only allow details to be reserved in relation to the same activity. But in practice the difference between what is first authorised by the licence and what is authorised under the condition, without needing to rely upon the power of variation in s.72, may be very considerable. The licence may describe the activity authorised in broad, generic terms, whereas an approval given under a condition may relate to a very detailed design and specification, setting out, for example, the number and size of structures and/or equipment and the extent of the area involved. Where such matters are dealt with under condition there will be no need to obtain a new marine licence.

88. Ms Mullan also identifies a practical advantage of the MMO's approach to s.72. Where the power of variation can properly be used, all the activities authorised and the licensing conditions are contained in a single document, rather than being split between several licences. Both the activities and the licensing conditions may be interrelated. The understanding of those relationships, whether by the licensee, an enforcing authority or the public, is likely to be improved by having them expressed in a single document.

89. Ultimately, Mr. Wolfe accepted that differing procedural consequences, according to whether a proposal is dealt with under s.71 or under s.72, provide no real help to the court in choosing between the competing interpretations of s.72 or to determine the ambit of the power to vary. This includes, for example, the requirement which can arise under s.68(3) that a local authority be notified of an application for a marine licence. Even when a licence is granted the MMO may impose a condition restricting an activity to a particular location, but is not obliged to do so.

90. In any event, I accept the submissions for MMO and HPC that, in the light of *R (Sharp) v North Essex Magistrates' Court* [2017] 1 WLR 3789 at [38(v)], a constraint on the ability of interested parties to challenge a proposal on its merits does not affect the proper construction of the language used by Parliament to confer the powers in issue. In this case that principle applies *a fortiori* because of the absence of any rigid demarcation between s.71 and s.72. On a true reading of those provisions, some matters are capable of being dealt with under either section.

91. Although it is not necessary for my conclusions, I would add that in the event of the MMO refusing to approve an application by a licensee to vary a licence, there is no right of appeal. Regulation 3 of SI 2011 No 936 only allows an appeal to be brought against a *notice* varying, suspending or revoking a licence. So where an application to vary is refused by the MMO, or the MMO refuses to act under s.72(3), there is no appeal process from which interested parties are excluded.

92. In my judgment, the risk of "morphing" or "licensing creep" to which Mr. Wolfe referred, does not help the court to decide between the two competing constructions of s.72 or otherwise to determine the correct interpretation of that provision. Even on the claimant's construction there would be the possibility of a licensee seeking to enlarge an activity already authorised in the licence very considerably and so "morphing" into

something of a radically different nature from that originally licensed. By contrast, a licensee's proposal may be for a new activity involving only a modest, unobjectionable addition to the authorised activities. The new activity may be entirely incidental. As Mr. Strachan submitted, the claimant's analysis lacks coherence.

93. In my judgment the real control in s.72 to address Mr. Wolfe's concern about "morphing" is that a proposal must not exceed what can properly be regarded as a variation of the licence.

94. Ultimately it is the language used by Parliament in the MCAA 2009 which defines the ambit of s.72(3). Putting to one side revocation or suspension, the MMO is only empowered to vary a licence. It is that concept of variation which limits the exercise of that particular power. The claimant's argument depends upon reading additional words into, or putting a gloss upon, s.72, for which there is no justification. The language used by Parliament does not exclude the authorisation under s.72 of a marine activity which has not previously been authorised under the licence in question, so long as that activity can properly be said to represent a variation of that licence. There is no legal requirement to distinguish between proposals to extend an authorised activity or to add a new activity. The relevant question is whether either would go beyond varying the marine licence.

95. It would not be appropriate in this case for the court to seek to define exhaustively what may or may not constitute a variation of a marine licence, or to define the outermost reach of the power to vary. It is sufficient for me to say that what may qualify as a variation will be affected by the terms of the original licence (including its conditions), the nature and extent of the activities already authorised by that document and any previous variations, and the nature and extent of the proposed addition to the licence. It is also relevant to consider the nature of the project to which the marine licence relates, or any other relevant statutory authorisation, for example an authorisation referred to in the marine licence or which forms part of the context for the licence. The relationship between all these factors is plainly relevant. These considerations may to some extent involve matters of judgment, which Parliament has entrusted to the MMO, and which it is well qualified to assess, as Ms Mullan's witness statement demonstrates.

96. There was a difference between the parties as to how certain conditions of the DCO and of the marine licences should be read. But there was agreement that the general principles which are now well-established for the interpretation of planning permissions should be applied. Many of the leading authorities and some of the key principles were identified in *Swire v Canterbury City Council* [2022] EWHC 390 (Admin) at [30] to [34] and do not need to be rehearsed in detail here. I would, however, also refer to the judgment of Lieven J in *UBB Waste Essex Limited v Essex County Council* [2019] EWHC 1924 (Admin), in particular at [26] to [35].

97. For the purposes of the present case the following points are particularly pertinent: -

    (i) The question is what would a reasonable reader understand the words used in the DCO or the marine licences to mean, in the context of each consent and its conditions, read as a whole;

(ii) In the case of the DCO, it is relevant to have regard to the decision letter of the Secretary of State which decided to grant the application for the DCO. That is a public document;

(iii) The Court should have regard to the natural and ordinary meaning of the words used and the purpose of the consent and relevant conditions;

(iv) The reasons given for the imposition of a condition are relevant to its meaning. The MMO's guidance on making an application for a marine licence states that they will give reasons for the imposition of a condition on a licence;

(v) The context in which the DCO and the marine licences must be interpreted includes the legal framework within which each consent was granted. The reasonable reader must be treated as being equipped with some knowledge of the relevant law and practice relating to DCOs and marine licences;

(vi) The words of the consent are to be interpreted using common sense (*Lambeth London Borough Council v Secretary of State for Housing, Communities and Local Government* [2019] 1 WLR 4317 at [19]; *DB Symmetry Limited v Swindon Borough Council* [2021] PTSR 432 at [60].

98. During the examination of HPC's application for the DCO, NE initially said that they were not satisfied that the project would not be likely to have a significant effect upon the Severn Estuary SAC and Ramsar site (Report of the Panel para. 5.71). One of the main concerns was the possibility of material dredged from the Severn being disposed of outside the estuary. That "would undermine the sediment budget and affect the estuary habitat feature of the Severn Estuary SAC and Ramsar site" (para. 5.73).

99. The MMO also expressed concerns about dredging and disposal. They understood that dredged materially was to be disposed of locally or otherwise at the Cardiff Grounds disposal site. Initially they thought that disposal elsewhere would require the "designation" of a new disposal site and said alternatives to disposal at sea should be considered under the Waste Framework Directive, presumably referring to the waste hierarchy in Article 4(1) (para. 5.90). Subsequently, the MMO withdrew its concerns on the basis that "the issue" would be addressed through the marine licensing process (para. 5.91). Mr. Wolfe sought to persuade the court that that issue related to the application of the waste hierarchy.

100. However, at page 27 of its EIA Consent Decision Report dated 31 July 2021 the MMO explained why it changed its position during the examination of the DCO. The sediment budget of the Severn Estuary SAC is protected under the Habitats Regulations and therefore dredged material must be disposed of within the SAC. The Decision Report refers to the "requirement" that was included in the DCO (see below) with the agreement of all the statutory marine stakeholders, that is EA, NE, the MMO and the Countryside Council for Wales (subsequently merged into NRW). The MMO stated:-

> "The proposed disposal options that retain marine sediment within the water body align with the WaFD requirements under the waste hierarchy"

It is clear, therefore, that by the end of the examination the MMO's position on the handling of dredged material had changed from that set out in para. 5.90 of the Panel's Report so as to align with that of NE. They told the Panel that they were content with the requirements proposed for the DCO. All this is summarised in paragraphs 5.91 and 5.92 of the Report.

101. The Panel's conclusions on the subject are clear. At paragraph 5.125 they expressly acknowledged the concerns that removal of dredged material from the Severn Estuary could undermine the sediment budget and affect the estuary habitat features of the SAC, Ramsar site and also the Bridgwater Bay Site of Special Scientific Interest. Because of the absence of any guarantee that dredged material would not be removed from the Estuary, the Panel recommended the imposition of a "requirement" (or condition) in the DCO pursuant to s.120(2) of the PA 2008, then referred to as "PW35", "to ensure that sediment is retained in the estuary". PW 35 was expressed in these terms: -

> "Dredged material arising from the authorised project shall not be disposed of except within the Severn Estuary SAC".

102. Likewise, at paragraph 57 of Appendix C to their Report, the Panel said: -

> "Natural England are concerned that the supply of sediment in the Severn Estuary Special Area of Conservation (SAC) should be maintained, in order to replenish intertidal habitats following the erosion of material. Accordingly, they consider that a requirement should be imposed to prevent the disposal of dredged material outside the Severn Estuary SAC."

In paragraph 58 the Panel identified three parts of the project for which HPC planned to carry out dredging. Given that marine licences had yet to be issued for two parts, including the installation of the cooling water infrastructure, the Panel said that a "project-wide" requirement in the form of PW35 should be included in the DCO (para. 59).

103. The Secretary of State accepted the Panel's reasoning and recommendation on this matter and decided that the requirement should be included in the DCO. The text remained the same but the reference changed to PW23.

104. Mr. Wolfe submitted that PW23 only bites in relation to dredged material which is disposed of. Accordingly, PW23 does not exclude the possibility of dredged materials being re-used, for example, as part of a landscaping scheme on the main construction site. That reading of PW23 is untenable. Having regard to the clearly stated reasons for the imposition of the requirement, and applying common sense, PW23 is to be read as requiring all material dredged from the Severn to be disposed of within the SAC. That reading is necessary in order to give effect to the very reason for the imposition of the requirement, namely to maintain the sediment budget within the SAC. There is nothing in the language of PW23 which requires it to be read as allowing (or not excluding) the dredged material being dealt with other than by disposal within the Estuary, for example by re-use or recycling. That would conflict with the stated purpose of the requirement.

105. For these reasons, I reject Mr. Wolfe's submission that in its EIA Consent Decision Report (and elsewhere) the MMO misinterpreted PW23 of the DCO. It is plain that the

DCO was granted on the basis that any dredging undertaken for the project must maintain the sediment balance of the SAC by returning the material dredged to the SAC. The fact that a marine licence would subsequently be needed for that dredging and disposal does not detract from this legal requirement imposed by the Secretary of State in the DCO.

106. Section 32 of the original marine licence provided a description of the project and treated the DCO as forming part of the context for that licence. The reasonable reader of the licence would be expected to be aware of relevant provisions of the DCO. The original marine licence did not authorise any disposal of dredged materials. But the methodology for the dredging authorised as activity 1.1 had regard to the HPC's proposal that the dredged material would be disposed of at the Cardiff Grounds site within the SAC.

107. Given NE's concern regarding sediment budgeting in the SAC, and its position as the statutory national conservation body for the purposes of the Habitats Regulations, the MMO would have been expected to address the issue of what would happen to dredged material when considering whether to authorise dredging. Condition 5.2.24 of the original marine licence stated:-

> "Dredged material shall not be disposed of except within the Severn Estuary Special Area of Conservation"

The reason for the condition was said to be "to maintain the sediment budget of the area". This condition replicated requirement PW23 of the DCO. They both have the same meaning. This is reinforced by condition 5.2.25 which required the licensee to notify to the MMO the volume of dredged material and the location in which it was disposed of within a time limit of six weeks so that the MMO would be informed of "activities happening *in the marine area*" (emphasis added).

108. I also note that activity 1.3, the deposition of drill arisings, was programmed to take place over the same period as activity 1.1. There would appear to be no reason why the original marine licence did not also authorise the disposal of the dredged material within the SAC, other than the fact that the disposal site then proposed fell within the jurisdiction of NRW and not the MMO. Indeed, the NRW licence was granted on 11 July 2014.

109. As we have seen, the fifth variation of the original marine licence granted by the MMO, divided the dredging authorised into activity 1.1 (capital dredging) and activity 1.2 (maintenance dredging). Activity 1.1 stated that the dredged material would be disposed of at the Cardiff Grounds site in reliance upon the NRW licence. Activity 1.2 stated that the maintenance dredged material would be disposed at the same location "unless otherwise agreed by the MMO". Thus, so far as maintenance dredging was concerned, the fifth variation envisaged that the material dredged might be disposed of in the MMO's territory.

110. Conditions 5.2.22 and 5.2.23 (in relation to activity 1.1) and conditions 5.2.26 and 5.2.27 (in relation to activity 1.2) were to the same effect, and were imposed for the same reasons, as the conditions in the original licence referred to above. For example, condition 5.2.22 now reads: -

> "All material from activity 1.1 of this licence must only be disposed to a licensed disposal site within the Severn Estuary Special Area of Conservation"

111. I can see the force of Mr. Strachan's submission that by the fifth variation of the original licence, the MMO had included in the licence a statement that they would consider agreeing to a disposal site in the Severn and so, in relation at least to maintenance dredged material (which is the only type of dredging which remained to be carried out by the time of this judicial review), it can be said that disposal at the Portishead site is not an entirely new activity which was not previously comprehended in the licence. The difference is one of location and therefore a permissible variation of the licence, even on the approach for which the claimant contends.

112. But I have explained why I consider the claimant's approach to involve an impermissible gloss on the legislation. In my judgment, the resolution of ground 1 should be based on the approach in [94] to [95] above.

113. The marine licence and the variations of that licence have been granted in the context of the DCO for the power station. That project includes the following essential features: -

(i) The intake and outfall tunnels for the cooling water system;

(ii) The vertical shafts at the ends of the tunnels;

(iii) The head structures;

(iv) The dredging needed to create pits for the gravel beds and head structures;

(v) The disposal of that dredged material in a location within the Severn Estuary SAC.

114. Features (ii) to (iv) have previously been authorised by the marine licence (with its variations). Feature (v) is an inevitable consequence of features (ii) to (iv). The disposal of the dredged material in the Severn Estuary SAC is necessary in order to comply with the Habitats Regulations and conditions imposed on the original marine licence (with its previous variations). It is an ancillary or incidental aspect of the activities previously licensed by the MMO. The disposal is limited to the material which the licensee is already authorised to dredge. The licence envisaged that disposal would be to a designated disposal site. The MMO had been unable to authorise the use of the Cardiff Grounds site merely because it fell outside its territorial jurisdiction. The application for the sixth variation sought approval for disposal at one designated site in the SAC instead of another which had been proposed. It was a change of location.

115. In the light of these factors, the nature of the change to the marine licence made by the introduction of activity 4.1 fell well within the legal concept of a variation of that licence. Accordingly, there was nothing unlawful in the MMO's decision that it was appropriate for HPC's proposal to be dealt with as a variation of the licence under s.73(2). In so far as this may be a matter to be decided by the court itself, I unhesitatingly reach the same conclusion.

116. For these reasons ground 1 must be rejected. The alteration proposed did not go beyond the ambit of that which could lawfully be considered and approved under s.72(3)(d) of the MCAA 2009.

Ground 2

The Claimant's submissions

117. Mr. Wolfe submitted that the MMO's power under s.72(3)(d) cannot lawfully be exercised unless: -

(i) There is a reason for the exercise of that power;

(ii) Which appears to the MMO to be relevant;

By "relevant" the claimant suggests that the reason must fall within the scope of s.72(3).

118. It is incorrect to treat s.72(3)(d) as an open-ended discretion to vary a marine licence, because that would render s.72(3)(a) to (c) unnecessary. Section 72(3)(d) should be read *ejusdem generis* with s.72(3)(a) to (c). The "genus" here was said to comprise triggers and characteristics external to the licensed activity or activities. Accordingly, mere desire on the part of the licensee to change the scope of a licence would not suffice as a "relevant reason" under s.72(3)(d).

119. In oral submissions, Mr. Wolfe altered his definition of the "genus" in s.72(3) so as to refer to matters which are done by the MMO to the licensee. On this basis he submitted that the mere content of a proposal by a licensee to vary a licence could not constitute a reason for the exercise of the power under s.72(3)(d).

120. The claimant also submits that the MMO failed to identify or state any reason for the exercise of the power under s.72(3)(d) here. This complaint is said to be based on an implied obligation on the part of the MMO, not only to have what appears to them to be a relevant reason, but to express that reason. The claimant also relies upon a common law obligation to give reasons arising from the duty to act fairly (*R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108).

121. At the outset, Mr. Wolfe submitted that jurisdiction is not conferred on the MMO by s.72(3)(d) unless firstly, there is a reason for the power to be exercised and secondly, the MMO consider that reason to be relevant. He suggested that this requires two stages which should not be "collapsed" into one. In reply Mr. Wolfe defined the two questions differently: (1) is there a relevant reason and (2) on the merits should the power to vary, suspend or revoke be exercised? He went on to add that although these are two separate questions, in some (undefined) circumstances they may be answered compendiously.

Discussion

122. According to their ordinary and natural meaning, the words in s.72(3)(d) "for any other reason that appears to the authority to be relevant" give the MMO a broad discretion to vary, suspend or revoke a licence. The flexibility conferred by that language is in line with s.2(1) to (3) of the MCAA 2009. The MMO is under a general duty to exercise its functions so that the carrying out of activities in the MMO's area is managed and regulated *inter alia* taking into account "all relevant facts and matters".

Those matters include such facts and matters not falling within the specific categories set out in s.2(3)(a) and (b) "as the MMO may consider appropriate" (s.2(3)(c)). By s.2(2) the MMO is empowered to take "any action which it considers necessary or expedient for the purpose of furthering any social, economic or environmental purpose". Parliament has conferred a very broad discretion as to the steps the MMO may take, or the matters which it may take into account, alongside the more specific functions set out in the body of the legislation.

123. Mr. Wolfe is seeking to read down the ordinary meaning of the broad language in s.72(3)(d), by recourse to two canons of construction. First, meaning should be given to all the language used by Parliament, so that provisions are not treated as otiose or redundant (*Bennion, Bailey and Northbury on Statutory Interpretation (8th ed)* at section 21.2). Second, as I have said, he relies on the *ejusdem generis* ("of the same kind") principle to limit the wide language of s.72(3)(d) to matters falling within the same class as that to which s.72(3)(a) to (c) belong.

124. *Bennion* points out that canons of constructions are not to be rigidly applied. Instead, they provide useful tools for analysing the language used (section 20.1). In *Cusack v Harrow London Borough Council* [2013] 1 WLR 2022 Lord Neuberger PSC said that canons of constructions have a valuable part to play but "as guidelines rather than railway lines". Although they embody logic or common sense, they exist to illuminate and help, but not to constrain or inhibit ([57] to [60]).

125. There may be a reason why Parliament has enacted specific provisions followed by a broad provision, so that giving effect to that broad language does not render the specific language otiose. This may depend upon the nature of that broad text and its context. Here the broad language used in s.72(3)(d) refers to a reason that the MMO *considers to be relevant*. But in s.72(3)(a) to (c) we see Parliament laying down matters which it considered to provide a relevant basis for the exercise of the power in s.72(3) *in any event*. As *Bennion* indicates in section 17.4, sometimes Parliament provides a list of examples, or specific instances, in which a power may be used, together with a general provision. Here Parliament was able to identify the matters set out in s.72(3)(a) to (c) as being sufficient to found the exercise of the power to vary, suspend or revoke a licence, but did not consider it appropriate to set down an exhaustive list of such matters. Given the nature of the regulatory regime and the widely ranging circumstances in which it has to be applied, it is wholly unsurprising that Parliament did not seek to envisage all the situations or factors which might arise. Instead, it allowed the regulatory body responsible for operating the licensing regime to have regard to additional matters it considers to be relevant. That legislative approach does not in any way involve treating s.72(3)(a) to (c) as redundant or superfluous.

126. For the *ejusdem generis* principle to apply there must be a sufficient indication in the legislation of a category that can properly be described as a *genus*, or what McCardie J described in *Magnhild (Owners) v McIntyre Bros and Co* [1920] 3 KB 321 at 330 as a common and dominant feature. Neither of the approaches put forward by Mr. Wolfe properly identify a *genus*.

127. First, s.72(3) (a) to (c) cannot be explained as being limited to matters external to an activity authorised by a licence. For example, s.72(3)(b) could apply to a change in scientific understanding about the impacts of a licensed activity on the environment or human health. It would be absurd to read s.72(3) as not allowing the MMO to vary,

suspend or revoke a licence in such circumstances. Likewise, s.72(3)(c) allows reconsideration of the impact of a licensed activity on the safety of navigation. There is no reason why safety of navigation must be external to a licensed activity.

128. Second, Mr. Wolfe's alternative formulation of a *genus* is also untenable. For reasons already given, s.72(3) is not limited to matters done to, or steps taken against, the licensee or the licensed activities. Section 72(3) enables the MMO to vary, suspend or revoke a licence both of its own motion and in response to an application by the licensee. The *ejusdem generis* principle therefore cannot be used to exclude the content of a proposal by the licensee to vary a licence from the ambit of s.72(3)(d).

129. Third, and in any event, the attempt to apply the *ejusdem generis* principle here must give way to the explicit language which Parliament has chosen to use: "*any other* reason that *appears to the authority* to be relevant" (emphasis added). Read in the context of the statutory scheme as a whole, the words mean exactly what they say.

130. The MMO is entitled to treat the contents of a licensee's proposal and the MMO's views on the merits of that proposal as a relevant reason for varying a licence.

131. Reduced to its bare essentials, s.73(3) gives a power to revoke a licence if the MMO considers that it ought to be varied for at least one of the four types of reason listed. The reason may come from the MMO acting of its own motion or on an application made by the licensee. There is no legal requirement for a two stage approach to s.72(3)(d) to be applied by the MMO, any more than, for example, in the application of s.38(6) of the Planning and Compulsory Purchase Act 2004 (see *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1459H to 1460C). The MMO may apply each of the alternative bases for making a variation in sub-paragraphs (a) to (d) as a composite expression. For example, they may decide that the licence should be varied to deal with a change in environmental circumstances or to address the safety of navigation. Likewise, they may consider that it is appropriate to allow an unobjectionable variation to a licence proposed by a licensee. A proposed variation and its merits may straightforwardly provide the reason why the MMO accept that a licence should be varied under s.72(3)(d).

132. I accept that if the MMO did not have what it considers to be a relevant reason, then the power in s.72(3)(d) would not be engaged. The language of that provision guards against any attempt to exercise the power in an arbitrary manner for no reason at all. But that should not be treated as giving rise to a duty to provide reasons for the decision. The two concepts should not be elided or confused. Section 72(3) does not impose an obligation to give reasons where the ground for exercising the power to vary falls within sub-paragraphs (a), (b) or (c) and the position is no different where (d) applies. The decision in *Dover* is not in point. In that case fairness required the giving of reasons in the interests of transparency to explain why a decision had been taken against the recommendation of the authority's officer, and where the reasons for taking that course could not otherwise be inferred. Here the legal issue is simply whether the MMO had a reason they considered to be relevant for exercising the power in s.73(2)(d).

133. The MMO's internal consideration of an application goes through a series of "gateways". Gateway 2 involves a review of the application prior to the carrying out of formal consultation. It includes consideration of whether a matter should be treated as a variation and impacts for a range of statutory controls. Gateway 3 involves an

assessment of the overall application documentation together with consultation responses to see whether the proposal is acceptable for the purposes of making a determination.

134. The MMO's rubric for the Gateway 2 stage stated that consideration should be given to the nature and scale of the change proposed compared to the initial licence, whether the proposed variation would represent a separate and discrete "project", and the need to advertise and consult. That language broadly accords with the approach I have set out above. How far it would need to be applied in any particular case would depend upon an officer's judgment in the circumstances of that case. Here, the officer stated that the proposed variation concerned updates of the construction methodology and the inclusion of the disposal of dredged material. After having reviewed the application and supporting information she considered that the matter could be dealt with by a variation. In my judgment that demonstrates that the officer approached the matter lawfully. Of course, at that stage she was not considering the merits of the matter.

135. The substance of the proposal and the merits of the different aspects of the application to vary were considered at the determination stage. The EIA Consent Decision Report contains a detailed assessment of the impacts of the different components of the proposal. For example, the document assessed the merits of the proposed disposal at the Portishead site. That site had been selected because of its depth and the strength of the water flows there. The site is highly dispersive and had already been designated for disposal of dredged material. There was sufficient capacity to accommodate the disposal requirements of both Bristol Ports Company and HPC, the latter's deposit being relatively small (pp.22-23). Portishead would be acceptable for disposal by HPC, subject to a robust assessment of environmental impacts (p.25). That assessment was summarised in the decision document. At paragraphs 5.4.5 and 5.24 the MMO concluded that the Portishead site is an acceptable location for the disposal of the dredged material.

136. On 2 August 2021 the MMO gave notice of its decision to vary the marine licence, following "careful consideration of all the evidence submitted to the MMO". The issuing of this decision as a "regulatory approval" was linked to the consideration of the EIA Consent Decision Report (see regulations 22 to 24 of the EIA Regulations 2007). That assessment of the impact and merits of the proposal forms part of the reasons for the decision to vary under s.73(2)(d).

137. Ms. Mullan has fairly summarised what happened in this case (see paras. 75, 78 and 79 of first witness statement). It was not a difficult decision for the MMO to treat HPC's application as a variation of the licence. Essentially the works were in line with the works consented under the original marine licence and its variations to date. The activities proposed were "intrinsically linked" to that licence, the dredged material needed to be disposed of, and it had always been envisaged that that would take place within the estuary. The principle of a disposal to an external disposal site was well understood and was considered routine. The matter was the subject of full consultation by virtue of the EIA Regulations 2007.

138. It is plain from the material before the court that the MMO did lawfully consider that the licence ought to be varied for reasons that appeared to the authority to be relevant. For all these reasons, ground 2 must be rejected.

Ground 4

139. Regulation 22 of the 2011 Regulations requires the MMO, acting on behalf of the Secretary of State, to discharge his functions under Part 4 of the MCAA 2009 *inter alia* for the purpose of ensuring that the waste hierarchy in article 4 of the Waste Framework Directive is applied to the generation of waste. Those functions include the exercise of the power to vary a marine licence in s.72 of the MCAA 2009.

140. The waste hierarchy in article 4(1) of the Directive sets out the following order of priority for *inter alia* waste management legislation: -

> "(a) prevention;
>
> (b) preparing for re-use;
>
> (c) recycling;
>
> (d) other recovery e.g. energy recovery; and
>
> (e) disposal"

141. I note that Article 4(2) requires Member States to take into account "environmental impacts" in accordance with Article 13. That article requires Member States to ensure that waste management is carried out without harming the environment. Regulation 22 of the 2011 Regulations also requires the MMO to exercise its functions under Part 4 of the MCAA 2009 for the purposes of implementing Article 13.

A summary of the claimant's submissions

142. Mr. Wolfe submits that the claimant failed to apply the waste hierarchy in its determination of the application to vary HPC's marine licence. He says that the MMO misdirected itself by (a) interpreting PW23 of the DCO as requiring disposal of dredged material into the Severn Estuary SAC, and (b) regarding the DCO as having determined the issue of disposal to the sea. Mr. Wolfe also criticises the MMO for failing to have regard to the South West Marine Plan which requires proposals for the disposal of dredged material to be assessed against the waste hierarchy and treats "direct disposal" as a last resort. D&S IFCA said in their consultation response that HPC had failed to consider the terrestrial use of the dredged material, for example in landscaping schemes. Despite the exhortation in the rubric for the MMO's Gateways to assess the handling of dredge material against each tier in the waste hierarchy, the defendant simply accepted HPC's assessment which relied upon PW23 in the DCO.

Discussion

143. I have already rejected the claimant's argument on the interpretation of PW23 of the DCO (and the conditions of the marine licence to the same effect) under ground 1.

144. It is convenient to look next at the South West Marine Plan. Policy SW-DD-3 does indeed state that it must be demonstrated that proposals for disposal of dredged material have been assessed against the waste hierarchy. However, the claimant's argument completely overlooks paragraph 282 of the Plan which deals with the second tier in the hierarchy, "preparing for re-use". Paragraph 282 states: -

> "Preparing for re-use relates to the re-use of dredged material as sediments, which are commonly referred to as beneficial use projects. Alternative use therefore encompasses beneficial use projects. Examples include:
>
> - engineering uses, such as for construction materials, flood defence, land reclamation, and beach nourishment
>
> - environmental enhancement, including habitat creation and enhancement, and recreation
>
> - sustainable relocation involves relocating the dredged material back into the system that it was removed from to maintain the sediment budget of a system, which can be done if the material is in an appropriate condition and it is the best option for the system"

145. The return of the dredged material to the SAC falls within the last bullet point of paragraph 282. The MMO has determined that the material is in an "appropriate condition" and that is not the subject of legal challenge. Thus, what is required by PW23 of the DCO, and also by the conditions in the marine licence to the same effect, falls within the second tier of the waste hierarchy, "preparing for re-use", because the disposal within the SAC is necessary to maintain its sediment budget. This is not a method of "last resort" at the bottom of the hierarchy.

146. Unsurprisingly, the claimant does not suggest that tier (a), "prevention", should have been assessed. That tier is concerned with avoiding the dredging in the first place. But here the dredging is already authorised by the marine licence and that has not been challenged. Given that the disposal (or rather relocation back into the system) is for a purpose falling within the second tier, there was no need for the MMO to make any further assessment against lower tiers in the hierarchy.

147. It also follows that the allegation that the MMO wrongly fettered its consideration of the application by its reliance upon PW23 of the DCO is misconceived. Both PW 23 and conditions of the marine licence tot eh same effect were directly relevant to the correct application of the waste hierarchy in accordance with the South West Marine Plan (see also p. 27 of the EIA Consent Decision Report).

148. It is also incorrect for the claimant to assert that the MMO failed to have regard to the South West Marine Plan. The defendant expressly stated that its decision had been taken in accordance with the Plan in its notice of Variation dated 2 August 2021. The MMO also addressed the Plan in the EIA Consent Decision Report.

149. HPC's Environmental Statement is consistent with the above analysis. Paragraph 2.1.2 correctly relied upon PW23 of the DCO. Although it was unnecessary to do so, the Statement recorded the assessment that had been made of other alternatives involving re-use or recycling, before returning at paragraph 2.2.6 to the key point that the views of the nature conservation bodies had resulted in the requirement to return the dredged material to the Severn Estuary SAC. Mr. Barry Phillips, a Lead Advisor with NE, confirms that his body's stance remains that the dredged material must be returned to the SAC to maintain the natural balance of sediment in the Estuary and

ensure that there will be no likely significant effects upon qualifying features of the SAC and Ramsar site (paragraph 12.4 of his witness statement).

150. There is no merit in Mr. Wolfe's criticism of the MMO's responses in the Gateway documents that they had simply expressed agreement with paragraph 2.1.2 of the Environmental Statement and its reliance upon PW23 of the DCO. For the reasons given above, when that paragraph is read properly in context, which includes the South West Marine Plan, the conditions imposed on previous versions of the marine licence and the views of the statutory nature conservation bodies, there was no failure by HPC or by the MMO to apply article 4 of the Waste Framework Directive. But in any event in its Gateway 2 record the MMO did take into account HPC's assessments of alternatives involving re-use.

151. The claimant rightly decided not to pursue ground 3, its challenge to the HRA carried out under the Habitats Regulations. Given the detailed responses from the MMO and from HPC to ground 4, it is most surprising that the claimant persisted with ground 4. The legal complaints were hopeless. Ground 4 is rejected.

Ground 5

152. Regulation 3(1) of the 2017 Regulations requires *inter alia* the Secretary of State to exercise his "relevant functions" so as to secure compliance with the requirements of the Water Framework Directive. By regulation 2(1) "relevant functions" includes Part 4 of the MCAA 2009 (see schedule 2). The suggestion by HPC that regulation 3(1) of the 2017 Regulations does not apply to the MMO is wholly untenable. The MMO exercises functions under Part 4 of the MCAA 2009 acting as a delegate on behalf of the Secretary of State. Plainly therefore, and as the MMO rightly accepted, the MMO is subject to regulation 3(1) and article 4 of the Water Framework Directive.

153. Certain provisions of the Directive are complex, but I need only summarise parts of the Directive relevant to this ground of challenge.

154. The definition in Article 2 of "surface water" includes certain inland waters, transitional waters and coastal waters. "Transitional waters" are bodies of surface water in the vicinity of river mouths which are partly saline in character as a result of proximity to coastal waters, but which are substantially influenced by freshwater flows. It is common ground that the relevant water body, the Lower Severn, qualifies as a transitional water.

155. Article 4 is entitled "Environmental objectives". Article 4(1)(a)(i) requires Member States to implement the measures necessary "to prevent deterioration of the status of all bodies of surface water", subject to certain provisions which are agreed not to be relevant here (the "first objective"). So far as is relevant, article 4(1)(a)(ii) requires Member States to protect, enhance and restore all bodies of surface water with the aim of achieving "good surface water status" in accordance with Annex V, within a specified timescale ("the second objective"). That timescale is not relevant for the resolution of ground 5.

156. Article 2 defines "good surface water status" as "the status achieved by a surface water body when both its ecological status and its chemical status are at least 'good'". "Good ecological status" is defined by the complex provisions in Annex V. However,

this challenge is not concerned with that aspect but solely with the limb concerned with "good surface water chemical status". That expression is defined to mean "the chemical status required to meet the environmental objectives for surface waters established in Article 4(1)(a), that is the chemical status achieved by a body of surface water in which concentration of pollutants do not exceed the environmental quality standards established in Annex IX and under Article 16(7), and under other relevant Community legislation setting environmental quality standards at Community level". The superficial nature of the claimant's challenge under ground 5 meant that the claimant made no submissions on the implications of this definition or the complexities of the other provisions referred to there.

157. The Court should have in mind that the application of these provisions involves the use of expert judgment by a regulatory authority on technical, scientific subjects. Accordingly, in so far as is appropriate, the court affords an enhanced margin of appreciation to a decision based on matters of technical, evaluative judgment (see e.g. *R (Mott) v Environment Agency* [2016] 1 WLR 4338; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [170] to [179] and *R (Plan B Earth) v Secretary of State for Transport* [2020] PTSR 1446 at [177]).

158. In addition, the principles summarised in *Keir* at [46] and [78] are relevant. The decision makers in the MMO should be treated as familiar with the statutory framework, the relevant legal and policy principles applicable and to have taken them into account and applied the relevant tests, unless there is a sufficient, positive contra-indication in the evidence before the court (see also *Jones v Mordue* [2016] 1 WLR 2682). Furthermore, the internal records of the decision-making process and the formal decision documents should be read fairly and with an appropriate degree of benevolence when seeking to understand how a decision was reached. They must be read as a whole and in the context of the material and issues with which they, and the parties involved, are taken to be familiar. They must not be read in an overly forensic or legalistic way.

A summary of the claimant's submissions

159. Mr. Wolfe relied upon the decision of the Grand Chamber of the CJEU in *Bund fur Umwelt und Naturschultz Deutschland eV v Bundesrepublik Deutschland* [2015] EUECJ C-461/13. At [29] to [51] the Court held firstly, that article 4(1)(a) applies to the authorisation of individual projects as well as to water management planning. Secondly, a Member State is required to refuse authorisation for an individual project (unless a derogation under Article 4(7) is granted) where either (i) it may cause a deterioration in the status of a surface water body or (ii) "it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status" by the relevant date. In other words, a regulatory authority must be satisfied that neither the first nor the second objective of article 4(1)(a) would be harmed before granting a project approval.

160. The claimant does not challenge the MMO's handling of the first objective. The MMO was satisfied that there would not be a deterioration in surface water status through the disposal of dredged material at the designated Portishead site. The claimant sole submission is that the MMO did not address the requirement that that deposition should not jeopardise the attainment of "good surface water *chemical* status".

161. Essentially, the claimant makes two specific criticisms. First, HPC's material showed that the current status of the Lower Severn water body is only "moderate" (the category below "good") because it fails the relevant standards for two chemicals, mercury and brominated diphenyl ethers. The MMO's conclusion that the disposal at Portishead would not have an adverse effect on water quality would result in the maintenance of that existing "poor quality" (as the claimant puts it) in relation to chemical status. Thus, the MMO failed to determine whether the disposal would jeopardise the attainment of "good" water quality status.

162. Second, this criticism is reinforced by the fact that ultimately in its Gateway 3 decision the MMO merely concluded that the "risks would be within acceptable limits".

Discussion

163. There is nothing in the language of Article 4(1)(a) or in the decision in *Bund fur Umwelt* to suggest that a regulatory approval must be refused unless the project would itself contribute (e.g. positively) towards the attainment of a good surface water status, or good chemical status. Those legal sources do not indicate that, for example, a proposal must contribute to that objective by reducing existing chemical levels which cause the current status of the water body to be less than "good", *a fortiori* where there is no evidence to indicate that either the proposal, or the project of which it forms a part, would contribute to those chemical levels.

164. The legal issues in the *Bund fur Umwelt* case were concerned with very different matters, in particular whether article 4(1)(a) applies to decision-making on regulatory project approvals as well as water management planning, and whether Article 4(1)(a) is infringed where a proposal would cause the quality of a water body to deteriorate without reducing its "status class". The requirement laid down by the CJEU in relation to the second objective of Article 4(1)(a) is that a project should not *jeopardise* the attainment of good surface water status. "Jeopardise" means endanger or put at risk.

165. Mr. Wolfe did not explain how this proposal, which would not cause any harm to the chemical quality of the water body (including the two chemicals for which it is currently failing), could itself jeopardise, let alone "would be bound to jeopardise", its enhancement from a moderate to a good status. For that reason alone ground 5 should fail.

166. But I am also grateful to Ms. Blackmore for taking the court carefully through the relevant documents in some detail to show that there is no foundation in the evidence for the claimant's criticisms. Those criticisms looked selectively at only a few passages in the material and out of context.

167. Paragraph 5.1 of HPC's report to accompany its application to vary the licence introduced the WFD assessment they had carried out referring to relevant requirements of the Directive and 2017 Regulations.

168. Paragraph 5.2.1 of the Environmental Statement referred to "the fundamental requirement" of the WFD to attain "good overall water body status". Paragraph 5.2.12 correctly stated that a licensed project must demonstrate that "it will not cause or contribute to deterioration in the water body or jeopardise the water body achieving good status". Table 9.5 on p.155 acknowledged that the Lower Severn currently fails

in relation to chemical status as regards mercury and brominated diphenyl ethers and therefore has a "moderate" status. Paragraph 9.5.4 stated that because of the short-term nature of the works, taking place over a period of only 6 months, it was not expected that there would be any changes to the baseline environmental conditions. Analysis had shown that the dredged material would be of an acceptable quality for disposal at sea (paras. 9.6.2 and 9.9.4 to 9.9.6). The proposal would not affect the water body's capacity to reach "good environmental potential".

169. Paragraph 2.1.5 of HPC's WFD Assessment stated that the aim of the impact assessment was to determine whether the proposal would have a "non-temporary" effect on the status of one or more of the WFD water quality elements at the scale of the water body. "The process requires the assessment to consider whether the activity is likely to cause the parameter to fail to achieve good chemical status". Paragraph 2.1.16 expressly stated that if during the impact assessment stage it were to be shown that the proposal would be likely to affect water status at water body level, for example, by preventing achievement of a WFD objective, potential measures would have to be investigated. Paragraphs 2.1.7 to 2.1.8 summarised the provisions in Article 4(7) of the Directive for derogating from the requirements of Article 4(1)(a). HPC's documents showed that they had the relevant legislative provisions well in mind.

170. Table 3.7 of the WFD Assessment showed that the proposed disposal would not release any chemicals on the Environmental Quality Standards Directive ("EQSD") list (see Directive 2008/105/EC reflected also in the 2017 Regulations). Further details were contained in chapter 9 of the Environmental Statement. Table 3.10 of the WFD assessment report summarised the impact assessment in relation to the risk of "WFD deterioration". It was concluded that there would be no deterioration and no mitigation was required. Sections 3.4 and 3.5 of the assessment said that there was no need for any measures to be taken to manage any WFD compliance risk or to seek a derogation under Article 4(7) of the Directive. The conclusion in Section 4.1.1 was that the disposal would not compromise the objectives of the Directive.

171. The MMO's Gateway 2 record gave a short summary of the assessment by HPC.

172. The MMO then commissioned a review of HPC's work by its independent, specialist consultants ABPmer. They provided a detailed report dated 9 March 2021. They made one criticism of the WFD assessment which they described as a "minor omission" which could be "readily addressed". In relation to table 3.10, it was said that there was a lack of further consideration of contaminants that would be released, noting that the Lower Severn was currently failing standards for two chemicals. The consultant did not criticise, for example, paragraphs 3.4.1, 3.5.1 or 4.1.1 of the WFD assessment. I also note that at page 4 of their review, the independent consultants said: -

> "We have not identified any significant marine water or sediment quality, marine ecology or navigation issues with the use of the Portishead disposal site"

173. Mr. Wolfe referred to the chemical contamination issues raised by D&S IFCA and by NSC.

174. HPC provided a Supplementary Environmental Information Report dated 14 April 2021 which added to the information previously supplied in order to address the comments which had been made. This included an addition to table 3.10.

175. The MMO's Gateway 3 document recorded that EA and NE raised no concerns on these matters. The MMO referred to issues raised by ABPmer and others and the further information supplied by HPC in response. Following a further review of that material, ABPmer had confirmed to the MMO that they were satisfied with the information provided by HPC. It was against that overall background that the MMO stated that it considered the "risks to be within acceptable limits". An expert body such as the MMO was entitled to summarise its views in an internal document in this way. Gateway 3 does not amount to a decision letter. Given also that jeopardising the attainment of good quality status is a risk-based concept, there is no basis for the court to infer from the language used that the MMO did not take into account the second objective of article 4(1) of the Directive (see also *Keir*).

176. Section 5.2 of the EIA Consent Decision Report also considered chemical contamination. There is no need for me to refer to the details of the assessment. However, I note that in relation to polycyclic aromatic hydrocarbons (PAHs), which had been raised by D&S IFCA, the MMO stated that the levels of PAH contamination are typical for industrialised estuaries such as the Severn. They occur widely within the estuary because of the dynamic nature of the movement of sediment. The amount of sediment remobilised by the disposal of the material dredged by HPC would be a fraction of the sediment remobilised on each tide in the estuary. The disposal would not exacerbate the existing failure of the Severn in relation to two chemical contaminants.

177. Page 32 of the EIA Consent Decision Report noted that, according to HPC's assessment, the disposal would not compromise the objectives of the Water Framework Directive. Page 34 of the Report noted that following the submission of supplemental information by HPC on 14 April 2021 the EA responded with no objections. Ms. Blackmore is right to emphasise the EA's particular status as the "appropriate agency" responsible for many of the key functions under the 2017 Regulations.

178. There is no merit in ground 5. The "good status" objective was properly taken into account in the assessment by HPC, ABPmer and by the MMO. As in the case of ground 4, it is most surprising that the claimant chose to pursue this matter as a legal ground of challenge, given the detailed responses provided by the MMO and HPC and, in this instance, the lack of support from the *Bund fur Umwelt* decision for the claimant's legal argument.

Conclusion

179. Each of the grounds of challenge has been rejected. The claim for judicial review is dismissed.