

Wash Cockle and Mussel Byelaw 2021 – feedback from informal consultation



This document summarises the feedback received from informal consultation about the byelaw, and sets out how Eastern IFCA has listened to the views of stakeholders.

The Authority is very grateful to everyone who took the time to respond to the consultation. The responses were summarised for the Authority whereby they were carefully considered and used to inform revisions to the proposed byelaw. This document includes the key concerns raised in addition to our response to them and the full summary of responses.

Summary

Based on your feedback, we did the following:

- Changed the wording of the ‘cancellation of permits’ provisions to remove reference to a Financial Administrative Penalty.
- The Authority agrees, in principle, to issue permits annually to those who meet the eligibility criteria subject to further consultation and research.
- The Authority agrees, in principle, to limit the number of permits issued to a finite number, subject to further consultation and research.
- The process for issuing, varying, and revoking eligibility criteria is now separated from other ‘flexible’ measures and includes a minimum consultation period and a requirement that decisions must be made by the full Authority or an appropriately delegated sub-committee.
- The Authority agreed to an overall policy objective in relation to the replacement of the WFO to provide further clarity and transparency.

Cancellation of permits for relevant offences

The proposed byelaw included a provision that would cancel a permit for a limited amount of time (proposed 12 months) when a person accepts a financial administrative penalty (FAP) or is convicted by a court for certain offences. This reflects a similar provision within the Wash Fishery Order 1992 (WFO) which effectively prevented access to the fishery permanently where a person was convicted of two offences within two years.

Feedback was received that the provision in the byelaw was disproportionate and, that reference to the acceptance of a FAP would lead to an increase in these being rejected in favour of being heard at court.

Consequently, the Authority decided to remove the reference to a FAP, in acknowledgement of this feedback, and to ensure the Authority retains a scale of enforcement action to act as a deterrent to non-compliance.

Inclusion of an 'entitlement provision'

The Wash Fishery Order 1992 includes a provision which entitles a person to a licence if they held one within the last 24 months (the 'entitlement provision'). The proposed byelaw does not contain this provision and instead intends to manage access through eligibility criteria and policy. In our analysis of the Wash Fishery Order, and via previous feedback from fishery stakeholders, this provision has led to some practices which were not in keeping with the intention of an entitlement under an Order, including the use of licences as 'pensions' and 'renting out' of licences.

Further feedback was received to the effect that fishery stakeholders would prefer the 'entitlement provision' included in the byelaw because this provides security of continued access to the fisheries.

The Authority decided not to include the 'entitlement provision' so as to avoid the issues associated with the Wash Fishery Order 1992 and to ensure that it retains discretion to issue permits as best suits the fishery, in line with the policies to be established through separate consultation with fisheries stakeholders.

The Authority intends to provide an appropriate level of security through transparent and clear policies and eligibility criteria and has agreed in principle that, subject to further consultation, permits would be issued annually to those who meet the eligibility criteria. In recognition of the importance of the matter, the Authority is undertaking **separate consultation** on access to the fishery to develop these.

Flexible eligibility criteria

Feedback was received that using flexible eligibility criteria does not provide enough security to fishery stakeholders to effectively plan and risks business continuity.

The Authority understands the importance of secure and stable management to support sustainable business practices. Unlike a time limited Order, the byelaw will not expire. Therefore, it is important that the Authority can review management of access to the fishery over time.

Changes to eligibility criteria will involve consultation with fishery stakeholders and consideration of the impacts. As a recognition of the importance of the issue, the byelaw was amended to include a separate process for eligibility criteria which includes:

- A minimum of four weeks consultation; and
- A requirement that decisions on eligibility criteria must be made by the full Authority or an appropriately delegated sub-committee.

These changes are intended to increase transparency and clarity with regards to how access is managed.

Limiting the number of permits issued

It is noted that there is concern regarding the current uncertainty about the potential number of permits issued under the byelaw.

In recognition of this, we have commissioned an independent economic assessment of the fishery to inform a decision about a sustainable number of permits that the fishery can support. The Authority has also agreed in principle that the number of permits issued will be limited to a finite number, subject to consultation with industry and further research.

The limit to the number of licences will be contained in the policies that will determine access to the fishery. This is part of a **separate consultation**.

Our approach to replacing the WFO

Feedback was received that a clear policy about our intentions on the replacement of the WFO would be beneficial. The Authority has agreed to the following overall policy objective:

To replace the Wash Fishery Order 1992 with a contemporary management regime to manage cockle and mussel fisheries in The Wash that:

- *Facilitates the conservation objectives of The Wash and stock sustainability*
- *Enables access to the fishery that is equitable*
- *Supports the viability of varying business models*
- *Provides appropriate safeguards for fishing industry members, including business continuity*
- *Provides flexibility and agility for the Authority in effectively discharging its duties*
- *Provides an appropriate degree of consistency with other fisheries management throughout the District*

The policies, permit conditions and eligibility criteria which are being developed as part of a **separate consultation** will meet this objective.

Use of a byelaw instead of an Order

The Authority recognise that many fishery stakeholders would prefer the use of an Order (under the Sea Fisheries (Shellfish) Act 1967) to a byelaw to manage the fisheries of The Wash. Having carefully considered the representations made in favour of an Order, including obtaining legal advice after concerns were raised as required, no new or compelling evidence to support an Order has emerged that is counter to the recommendation to use a byelaw.

In summary, a byelaw is the most effective way to manage the cockle and mussel fisheries in The Wash. The key rationale for using a byelaw are:

- It can do everything the Wash Fishery Order currently does.
- It is more capable of adapting to the needs of the fishery and stakeholders over time than an order.
- It does not expire, but it does require review every six years, this will ensure that it is effective and relevant over time.
- The views of industry are better represented under a byelaw than an Order.

- It will improve transparency and clarity of management as it will be more consistent with management throughout the Eastern IFCA district.

An overview of why a byelaw was chosen instead of an Order can be found on our website.

Full summary of responses and our consideration

A full summary of the responses received and our response to them can be found in Table 1 below.

Table 1. Full summary of feedback from the informal consultation on the Wash Cackle and Mussel Byelaw 2021

This table is the full summary of the feedback received and our responses to that feedback and was provided to Members at the 43rd Eastern IFCA meeting (10th March 2021) to inform a decision as to whether or not to make the byelaw.

Feedback from consultation	Consideration
<p>The Byelaw is intended to strip away the protections for the industry contained within the WFO</p>	<p>Modern byelaw making powers provide for IFCAs to manage inshore fisheries through the use of permitting schemes and such are in existence for the Whelk fishery within the Eastern IFCA District, is intended to come into effect with regards to the shrimp fisheries and is represented throughout other IFCAs along the coast.</p> <p>The proposed byelaw is intended to enable flexible management of the fishery in a manner consistent with our current approach which includes dialogue with industry and consideration of the impacts of management decisions. In practical terms, the annual management of the fishery is likely to reflect the current situation with regards to determining open areas, operating times and any additionally required management measures through consultation with industry. The ‘protections’ in this regard with respect of a the WFO are improved given that the byelaw requires such consultation and consideration of impacts where this is not the case under the WFO.</p> <p>The key difference with respect to ‘protections’ under the Order compared to a byelaw, is the absence of an ‘entitlement’ to further permits once one is issued. This change reflects the benefits of the Authority having discretion in this regard and is further reflected in other permit byelaws and other modern Orders for managing shellfish within the UK (e.g. the Dee Estuary Cackle Fishery Byelaws 2000 and the Fal Fishery order 2016).</p>
<p>The rights of licence holders to fish are protected by law from arbitrary cancellation (e.g. by lottery) or reduction by enabling others to enter the fishery. Rights include those accrued ‘within the environmental sphere’, those enjoyed by fishermen generally in UK law and,</p>	<p>Advice has been provided to the effect that rights to fish within the Wash Fishery order 1992 and legitimate expectation in regards to the continued exclusive rights to fish therein, expire with the Order. This is because the Order, which provides access to the fishery under a licence, expires as set out in that Order (on 4 January 2023).</p> <p>Under the proposed Byelaw, the provisions which enable restricting access to the fishery, by setting a limit on the number of permits and via eligibility criteria, also require due</p>

<p>rights provided by Article 8 of the European Convention of Human Rights</p>	<p>process to be undertaken which includes consultation and an impact assessment. In addition, regardless of the powers provided under a byelaw, the Authority has duties to make reasonable and justifiable decisions in that regard and would be held accountable, for example, by way of Public Inquiry under the under powers provided to the Secretary of State.</p>
<p>There is no clear policy objective for the byelaw or the management of access to the fishery.</p>	<p>Whilst the engagement with fishery stakeholders did intend to provide clarity as to the policy objectives of the proposed byelaw, it is a recommendation of Action Item 10 that further clarity is provided by agreeing to a recommended 'Policy Objective' which can be referred to during further consultation.</p> <p>The Aim and Objectives for managing access to the fishery have been subject to consultation with fishery stakeholders as it was felt that engagement at the earliest stage would be of benefit to the development of proposals and to provide transparency to those potentially impacted. It is noteworthy that feedback was received to the effect that there is a preference for the details of our proposals rather than the higher level Aim and objectives.</p>
<p>There is no driver or need for additional flexibility to manage the fishery</p>	<p>Fisheries and their prosecution adapt and change over time. Significant changes have been seen within the Wash based fisheries since the WFO came into effect, including the adoption of a TAC. The revised approach to management of fisheries within MPAs and the establishment of a hand-work only cockle fishery.</p> <p>Orders are, compared to byelaws, more cumbersome and less flexible to amend as the process includes such amendments going before parliament. Modern byelaws are more readily amended, albeit through the same process as is required to make a byelaw in the first instance. In this way, the Authority can, if required and in consultation with industry and confirmation by the Secretary of State (for the Environment, food and Rural affairs), amend a byelaw to address any such changes.</p>
<p>No impact assessment was undertaken</p>	<p>An impact assessment is required to inform the Authority's decision to make a byelaw and is generally informed by informal consultation. The impact assessment for the byelaw is presented as an appendix to this item.</p>
<p>Due process with regards to flexible management of the fisheries needs to be set out in the byelaw</p>	<p>The process for introducing, varying or revoking flexible management measures is set out in the provisions of the byelaw. These include permit conditions, eligibility criteria, limits on the number of permits issued, operating times and open / closure of the fisheries.</p>

	<p>The process requires consultation with industry and consideration of the impacts such management measures have on stakeholders.</p>
<p>There is no over-arching policy context to what the byelaw is intended to achieve.</p>	<p>The policy context for the byelaw is developed as part of the byelaw making process, taking into account the views of industry and which are informed through informal engagement, which has been ongoing for several years.</p> <p>For the most part, the policy objective is to manage the Wash cockle and mussel fisheries in a manner consistent with the established fisheries management plans for cockles and mussels in The Wash.</p> <p>The vast majority of measures which are used to manage the fishery are established within the WFO and have recently been reviewed. It is intended that these are carried over into the proposed byelaw.</p> <p>The remaining issue to be reviewed is access to the fishery, and an Aim and set of Objectives has been produced and consulted on with industry which is intended to guide the development of the management measures to access the fishery. Additionally, it is a recommendation of Action Item 10 that further clarity is provided by agreeing to a recommended 'Policy Objective' which can be referred to during further consultation.</p>
<p>It is not appropriate to increase the level of access (in terms of number of entrants) into the fishery.</p>	<p>The level of access into the cockle and mussel fishery is presently the subject of review which has included dialogue with the industry and the commissioning of an independent economic assessment.</p>
<p>A byelaw which enables the Authority to decide who can access the fishery is against the rights of fishermen.</p>	<p>As above, the byelaw is drafted using modern legislation which provides the Authority discretion in issuing of permits to access a fishery.</p>
<p>The byelaw should manage all fished bivalve species which for the time being are present within the fishery.</p>	<p>The cockle and mussel fisheries are the only bivalve mollusc species which have been subject to a fishery within The Wash for at least a decade. It is intended that a separate byelaw will enable management of other molluscan bivalve species in The Wash and throughout the district.</p> <p>The distinction being that there is an established fishery and associated fisheries management plans for the cockle and mussel fisheries which is not the case for other bivalve molluscs in The Wash.</p>

<p>The cancellation of a permit and 12 month suspension is not proportionate and risks the livelihood of individual fishermen.</p>	<p>It is acknowledged that this provision could have impacts on individuals within the fishery if they are excluded for a period of time. The overall effect of the provision is less than that under the WFO, given that exclusion is not intended to be permanent (as is currently the case under the WFO).</p> <p>The intended effect is an increase in deterrent effect, given that acceptance of a FAP or conviction by a court of a single offence would trigger its application. This is a reflection of the sensitivity of the Wash to impacts of fishing activity. However, higher level enforcement actions are not routinely used and compliance is sought via education and engagement in the first instance.</p>
<p>A Category 2 permit would allow access to 'all others' to the detriment of fisheries sustainability and industry viability. There is no need for them.</p>	<p>The inclusion of a Category 2 permit is intended to be used as a tool as may be required as part of the Authority's management of access to the fishery. There are no firm plans on how to use the permit, but it is recognised that a separate permit, which can have separate and distinct rules and restrictions attached, may be of benefit in addressing the issue of 'new entrants' into the fishery, a commonly raised complaint by industry with regard to the WFO.</p> <p>It is intended that its use is informed as part of the ongoing consultation with industry regarding the Aim and Objectives for managing access to the fishery.</p> <p>It is acknowledged that the ebb and flow of the cockle and mussel stocks provide 'good years' which make up for years where less stock is available and that the use of the Category 2 permits to enable additional, temporary access would impact negatively on the ability of established permit holders to make up for the poorer years. It is not intended that it would be used for this purpose.</p>
<p>The provision which entitles people to further permits (as per the 'entitlement' provision in Article 8(8) of the WFO) should be included to provide industry security and enable business continuity.</p>	<p>It is recognised that the exclusion of an entitlement provision is a change compared to the situation under the WFO and this is understandably causing concern amongst industry, who fear that this could result in their access to the fishery being removed from them.</p> <p>It is intended that a level of security can be provided through adoption of policy and eligibility criteria, but it is also acknowledged that the intended reliance on policies and flexible eligibility criteria do not provide the same level of security as a provision on the face of the byelaw would.</p>

	<p>Further, it is acknowledged that the Entitlement provision effectively enables a 2-year grace period whereby fishermen can choose not to fish but still be entitled to access subsequently and that this is in-keeping with the general principle of the need for inshore fishermen to diversify.</p> <p>The byelaw is intended to provide a flexible mechanism for the Authority to use to manage the fisheries in the long-term. Inclusion of an 'entitlement' provision would restrict the Authority's ability to alter the management of access to the fishery and, as has been the case with its inclusion in the WFO, can lead to a 'closed shop' which cannot be addressed without revision of the byelaw itself. Whilst the byelaw is itself more readily amended than an Order, this does not detract from the reasoning that such a provision can have unintended impacts into the future.</p> <p>It is also noteworthy that other byelaws and more modern Orders do not contain an 'entitlement' provision and MacAA allows for the IFCAs to manage access via permit schemes.</p> <p>On balance, it is considered appropriate that the Authority retains its discretion to revise how best to manage access to the fishery by not including an 'entitlement' because this will enable more adaptive management of the fishery. The management of access to the fishery is subject to its own review, which is also subject to engagement with industry and an economic assessment.</p>
<p>The byelaw should / should not enable transfer of permits</p>	<p>Both for and against argument were received in relation to enabling the transfer of permits.</p> <p>The Byelaw includes a provision which will enable the Authority to enable the transfer of a permit via eligibility criteria, which will be subject to consultation with industry and consideration of any associated impacts.</p> <p>It is recognised that normal business practices have at various times under the policies of the WFO been hampered due to the management of access to the fishery. The intention is that eligibility criteria can be used to address this issue which are also flexible and can be amended to address changes over time.</p>
<p>Vessel owners should be the holder of a permit and this should reflect 'real' (or</p>	<p>The byelaw does not specify that the owner of a vessel on which a permit is named must be the owner of the vessel.</p>

<p>beneficial) ownership of a vessel rather than just majority share holding.</p>	<p>Instead, it is intended that the issue of vessel ownership and its relation to a permit can be addressed via eligibility criteria and which can be informed by the ongoing dialogue with industry regards the management of access to the fishery.</p>
<p>The provisions to introduce, vary or revoke management measures with 12 hours' notice and with no consultation is not proportionate and provides opportunity for the Authority to change things without due process.</p>	<p>The byelaw contains provision to introduce, vary or revoke management measures (including permit conditions, opening / closing of fisheries, and operating times) with no less than 12 hours' notice.</p> <p>Any such measures must however be reviewed within two months of coming into effect which must include consultation with industry and consideration of the impacts on them. This is included to mitigate concerns regarding implementing management without having consulted with the industry.</p> <p>This provision is included as it provides the Authority with the ability to react to emerging issues which risk the continuation of the fishery because it could impact on the site integrity of the Wash MPAs. Reference to the Authority having identified a 'risk' further restricts the use of these measures to only justifiable circumstances. In practice, the Authority will continue to engage where management measures are required in a short time frame, as is the case under the Order.</p>
<p>The byelaw has to be reviewed every 6-years, this provides less certainty than an Order which can last for up to 60 years.</p>	<p>Byelaws must be reviewed every 6 years to ensure that they are fit for purpose and are achieving the policy objectives as required. This is also in-keeping with Defra byelaw making guidance.</p> <p>A review does not mean that a byelaw will expire. Unlike an Order, byelaws do not have to set expiry dates and so in that sense, they can provide more security than an Order.</p>
<p>Providing weekly catch returns is too much of a burden on industry.</p>	<p>The byelaw requires that catch returns are submitted on a weekly basis as a minimum and this mirrors the current situation under the licence conditions of WFO cockle licences.</p> <p>Mussel seed fisheries, which have operated under a much smaller TAC have been subject to daily catch return requirements.</p> <p>The frequency of data return reflects the management of the fishery in accordance with a TAC. Returns are required on a weekly basis so as to monitor uptake of the fishery and</p>

	prevent the TAC from being exceeded. Often, this is required for stock management purposes and to prevent impacts on site integrity of the MPAs within The Wash.
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