

Wash Cockle and Mussel Byelaw 2021: Re-consultation Outcome Document

This document presents the outcome of the re-consultation on the proposed Wash Cockle and Mussel Byelaw 2021 ('the byelaw').

The consultation was open from 25 April to 15 May 2023. The consultation was intended to provide stakeholders the opportunity to consider revision made to the byelaw as a consequence of the formal consultation and formal quality assurance process undertaken by the Marine Management Organisation (MMO).

We asked

The development of the byelaw has been informed by a significant amount of dialogue with industry including since the formal consultation from March to May 2021 and as a consequence, the byelaw has changed since the formal consultation. Changes included, for example, inclusion of a stand-alone process for revising Eligibility Policy (what sets out how the Authority will manage access to the fishery), removal of provisions which cancel permits where relevant offences have been committed and the requirement to pay an Eligibility Fee annually. Although none of the changes are considered to have significantly changed the intended effects of the byelaw, it was considered appropriate to seek the views of those likely to be affected by it to ensure that the changes have had the intended effects.

The draft Wash Cockle and Mussel Byelaw 2021 was provided in writing to all those who had previously responded to consultations relating to the byelaw. The short, targeted consultation was undertaken in accordance with advice received from the MMO.

Results of the Consultation

Two written responses consultation were received, both of which from representatives of a wider group of Wash fishermen. In addition, one set of representatives attended a meeting to discuss their response.

Responses primarily commented on elements of the byelaw which were not subject to changes since the formal consultation or in relation to managing access under the Eligibility Policy, which is separate to the byelaw.

The main objection received was in relation permit fees and specifically the annual increase in line with inflation. The recent cost of living crises and economic instability was noted as the main reason for this concern now, rather than at the time of the formal consultation.

Other key concerns related to the interpretation of provisions and the potential for unintended consequences. For example, the prohibition on fishing on more than one permit within a Calander day was interpreted as preventing multiple vessels owners from having more than one of their vessels operate within the fishery on any given day.

The feedback from the consultation is summarised in Appendix 1.

We did (proposals)

Permit fees

The Authority is publicly funded and has powers to recover costs associated with managing the fisheries in its district. However, the Authority has consciously agreed to seek to recover 50% of the costs of managing the Wash cockle and mussel fees. Inflation has a financial impact on the Authority including in relation to operating its sea-going assists to undertake annual cockle and mussel stock surveys to inform management of these fisheries.

However, the provision which increased permit fees was automatic each year and provided the Authority no discretion to decide against increasing the fee. Noting the concerns raised, this section was revised to provide the Authority discretion as to whether or not the increase is implemented so that the economic context of the decision can be considered. Where a fee increase exceeds 3.5% then the Authority is required to consult with stakeholders and undertake an impact assessment with regards to the changes.

Unintended effects of the wording

To better understand the concerns raised, a meeting was held with representatives to provide opportunity fully understand and to carefully consider their interpretation. The wording was then carefully considered and amended as necessary to ensure that the provision had only the intended effects. These are set out in more detail in Appendix 1.

Objections to the Eligibility Policy & permit limitation

Objections were also raised in relation to how the Authority has undertaken the process set out in the byelaw in determining the number of permits to be issued and in relation to how the Authority have undertaken the transition process. Although these do not relate directly to the re-consultation of the byelaw, the comments have been carefully considered. These comments are also included in the appendix.

Changes to the byelaw since the Formal consultation

Comments on the changes made to the byelaw since the formal consultation are generally supportive. For the most part, the changes were made as a consequence of feedback from the formal consultation and therefore reflect changes made to lessen the burden on fishery stakeholders.

Appendix 1 – Detailed consideration of consultation responses

The following table sets out the key points from the consultation and our consideration of these.

<i>Table 1. objections / comments summaries are paraphrased from responses to the re-consultation on the Wash Cockle and Mussel Byelaw 2021</i>	
Objection / Comment	Consideration and amendments (if applicable)
Permit Fees	
The Authority should not have the ability to vary permit fees and should not seek to recover costs associated with surveys and meetings with industry.	<p>Schedule 1 of the proposed byelaw sets out the permit fee at the time the byelaw is implemented along with the provisions for changing the fee over time. The effect of this section is unchanged from that at the time of the formal consultation (March 2021).</p> <p>The permit fee reflects the fee associated with a WFO licence at the time of the Orders' expiry in Jan of 2023. The fees sought to achieve 50% cost recovery for managing fisheries based on an assessment carried out in 2018 and based on 62 licences being issued (the current cap on licences is 61). The Authority agreed to seek 50% cost recovery in 2017¹.</p> <p>Given that fees calculated in 2019² have not changed in line with inflation, the amount of time passed since determining the fees, and the increased costs associated with an aging research vessel, it is unlikely that the fees set out in the byelaw will achieve 50% cost recovery.</p> <p>The byelaw includes the ability to vary fees generally having consulted on the matter and considered impacts. The Schedule includes a list of costs that are potentially incurred by the Authority in managing the fishery which could be factored into cost recovery. This is intended to provide clarity and transparency. However, the list does not require that these costs are recovered, and the current fee does not include costs associated with meetings or the implementation of the byelaw.</p>
The removal of the provision which withdrew licences on conviction of a relevant offence are welcomed.	This provision was removed as a consequence of the formal consultation on the byelaw. It was felt that the effect was potentially disproportionate and so was removed.
The annual increase in the permit fee	The byelaw includes two provisions for fee increases. The first is an 'automatic' fee increase in line with inflation.

¹ <http://www.eastern-ifca.gov.uk/wp-content/uploads/2016/02/exempt-full-set-15-02-17-1.pdf>

² 35th Eastern IFCA Meeting, Action Item 13 <http://www.eastern-ifca.gov.uk/wp-content/uploads/2016/02/35th-EIFCA.pdf> (pages 66 to 87)

<p>inline with inflation should take into account the recent spate of very high interest rates.</p>	<p>Noting that the starting point is a fee which is unlikely to represent 50% cost recovery, and that the costs to the Authority will increase annually as a result of inflation, this is considered necessary in seeking to achieve 50% cost recovery. However, given the recent unexpected increases in inflation and wider economic landscape (including the 'cost of living crisis', this automatic increase is likely to cause significant increases which may impact industry viability. It is therefore proposed that the provision is changed in two ways: first that the provision becomes discretionary. Second, that the increase is capped at 3.5% increase to avoid large increases in any one year.</p>
<p>The exemption which allowed aquaculture in The Wash. This will prevent the historic use of The Wash for this purpose and will obstruct 're-laying fisheries' – where fishermen take shellfish which are below the minimum size for the purpose of re-laying and growing on (aquaculture).</p>	<p>The byelaw will not obstruct re-laying fisheries within The Wash.</p> <p>Re-laying fisheries will be accessible via permits issued under the byelaw and specific permit conditions will be issued in relation to a re-laying fishery as required. This is the same model as was used under the WFO.</p> <p>The Authority can exempt persons from the requirements of this byelaw under the Applications and Exemptions Byelaw. This includes for the purposes of aquaculture in The Wash. Therefore, the exemption which existed within the original wording of the byelaw was not needed, and the management of the aquaculture is not affected by the removal of this exemption from the byelaw.</p>
<p>The Authority cannot manage or prevent aquaculture activity in The Wash through its byelaw because once re-laid, the shellfish become the 'absolute property' of the person who holds the right of aquaculture.</p>	<p>Aquaculture activities fall within the Authority's remit and powers to manage through the use of byelaws. The definition of the 'sea fisheries resources' and 'exploitation' (s.153(10) & (12) respectively) includes 'cultivation' and s.158(6) explicitly refers to byelaw having effect over and above various 'rights' within Marine Protected Areas. As such, they fall within Eastern IFCA's remit to manage and despite shellfish becoming a person's 'absolute property', the Authority's duties and byelaws still apply. However, the intention is that aquaculture is managed via a Several order in The Wash and exemptions from the byelaw will be issued to facilitate this.</p>
<p>Relying on the 'Applications and Exemptions Byelaw' does not provide sufficient security to Lay holders.</p>	<p>With respect to providing additional security, the exemption could be referred to in the Fisheries Management Plan (FMP) which supports the application for the Several Order and underpins how the Authority manages Aquaculture in The Wash. Any changes to the FMP would require consultation with lay holders (as well</p>

	<p>as wider stakeholders) and would set the ‘default’ to an exemption applying. This will be considered within the associated workstream and the FMP will be formally consulted on, along with the wording of a draft Wash Several Order, in the coming weeks and months.</p>
<p>Additional provisions</p>	
<p>A new provision is inserted into the byelaw which states that decisions on Eligibility Criteria are to be made by a sub-committee of the Authority. If this is to be included, the provision must set out how many Members it should have, an appropriate quorum, how it will achieve a balanced view (i.e. that there is adequate impartial expertise on the sub-Committee). As it stands, none of the operators in the Wash can support it and it should be removed.</p>	<p>This provision was included as a consequence of the formal consultation and subsequent discussions with industry about Eligibility Policy. It requires that decisions on the Eligibility Policy cannot be delegated to officers and is intended to ensure that members are decision makers with respect to the Policy.</p> <p>The nature of the sub-committee is set out in the constitution and standing orders and it would not be appropriate to describe such on the face of the byelaw as this would fetter the discretion of the Authority.</p>
<p>The additional process inserted into Schedule 5 (process for reviewing Eligibility policy) is welcomed.</p>	<p>Additional process was inserted in Schedule 5 to allay concerns from industry that the Eligibility Policy would be revised without due consideration.</p>
<p>A section was added in relation to transitioning from Wash Fishery order Licences to permits under the byelaw. The provisions refers to licences issued under the Order which are still in effect. However, the Order expired in January of 2023 and so none of the</p>	<p>Advice was received from the Marine Management Organisation to the effect that licences issued under the WFO would still have effect after the expiry of the Order until such time as they would ordinarily expire.</p> <p>Whilst our view differed from that of the MMO, we included this provision to provide for this. Given the likely timings for the byelaw coming into effect, the issue no longer remains as all Licenses are considered expired now. As such the provision has been removed.</p>

<p>licences are extant. These sections are irrelevant and should be deleted</p>	
<p>The byelaw includes a new provision which enables a person to fish from a vessel other than the one named on the permit where authorisation is provided by 'the Authority'. Whilst the principle of this is appreciated, in practice, the Authority will not be able to make a decision expediently. In addition, it refers to such authorisation potentially containing 'conditions' – these should be fettered to the same extent as permit conditions.</p>	<p>The Authority has the ability to delegate authority for decisions to the CEO in accordance with the Constitution and standing orders, as is the case in relation to this provision. Therefore, any such matters can be dealt with expediently without the need for a full Authority meeting.</p> <p>Enabling exemptions in this nature is considered appropriate without fettering the Authority's discretion. Reference to flexible permit conditions would not be sufficient as such conditions may involve restrictions unrelated to the categories set out in the associated paragraph. In reality, attempting to restrict the conditions which may be included in an authorisation would hinder the Authority's ability to take a flexible and proportionate approach to fishing from a separate vessel in these circumstances.</p>
<p>Minor wording changes</p>	
<p>The definition of a 'person' has been removed from the byelaw although the term is used throughout the byelaw.</p>	<p>A definition was originally included to enable a distinction between a 'legal person' (which can include a business) and a 'natural person' (which is a human individual). However, on consideration it was identified that it would have had unintended consequences on the implementation of the byelaw (e.g. a 'company could fish without a permit). It was removed from the byelaw and included in the eligibility criteria as this was considered a more effective place to make the distinction.</p> <p>The term 'person' within the byelaw therefore refers to a person in the general sense, encompassing both 'legal' and 'natural' persons.</p>
<p>Several definitions should make reference to The Wash, rather than 'the District'.</p>	<p>Reference to 'the Wash' is not required for the purpose of the byelaw however, it has been included in several places to ensure the wording is as clear as possible.</p>
<p>Prohibitions include in relation to transporting – Eastern IFCA has no</p>	<p>The byelaw making provisions under the marine and Coastal Access Act 2009 (specifically at Head 1 - s.156(3)) provides for IFCA's to prohibit or restrict the</p>

<p><i>vires</i> to prohibit transport under the Marine and Coastal Access Act 2009.</p>	<p>exploitation of sea fisheries resources. The list of potential provisions (156(3)(a) to (c) is not exclusive.</p> <p>The Marine and Coastal Access Act 2009 (S.153(12)) defines exploitation as including ‘transporting’ sea fisheries resources. Therefore, there is a <i>vires</i> for including transport of such in any prohibitive or restrictive provision.</p>
<p>The revised prohibitions are not as clear as the was the case in the original wording.</p>	<p>The revised wording was included as a consequence of additional legal scrutiny and advice from the MMO during the quality assurance process.</p>
<p>The ‘eligibility fee requirement’ is specific to vessels – does this mean that the eligibility fee does not apply to individuals?</p>	<p>In practice, there are no permits issued which are not associated with a vessel, however, should a fishery open whereby no vessel is needed, the intention is to require the eligibility fee. The provision is therefore amended to that effect.</p>
<p>Additional criteria have been added to the ‘categories’ of eligibility criteria that may be brought into effect by the Authority. This includes a limit on the number of persons who can be named on a permit. This is not relevant to ‘Eligibility Policy’ and is in conflict with the requirement that skippers must be named on a permit. It also duplicates the category set out within potential permit conditions.</p>	<p>The ability to limit on the number of persons who can be named on a permit is not in conflict with the requirement to name a skipper on the permit.</p> <p>The limit was included within the eligibility Policy criteria as this appears to be the most obvious place for the limit to be set out which is more easily understanding to fishing industry.</p> <p>Its inclusion as a potential permit condition is required to ensure that the byelaw is future proofed against potential changes over time. Presently the number of people who may be named on a permit is an eligibility criteria, it is not considered to require revision over short time periods. However, should shore-based fisheries open in the future, this may be included as a permit condition which would benefit from the additional flexibility of such.</p>
<p>The revised wording of the permit fee structure makes is less clear.</p>	<p>The revisions were made as a consequence of further legal scrutiny and the advice of the Marine Management organisation.</p>
<p>Eligibility Criteria and Permit Limitation</p>	

<p>The Authority did not consult on the permit limitation (the maximum number of permits to be issued).</p> <p>The process for consultation on the permit limitation is different from the process for consulting on Eligibility Policy and the consultations should not be combined.</p>	<p>The limitation on the number of permits was consulted on alongside the consultation on the eligibility criteria and reference to such was explicit³.</p> <p>The byelaw sets out the process requirements to review the permit limitation and Eligibility Criteria in Schedule 4 and 5 respectively. The process for consulting on both is the same except that when consulting on Eligibility Criteria, the consultation must be at least 4 weeks long and advertised by written means (either email or letters). The consultation met the criteria for under both schedules.</p>
<p>The Authority should not have agreed (pending the confirmation of the byelaw) to issue permits to anyone until all appeals against application decisions were heard to avoid the number of permits issued exceeding 61 as this would be unsustainable.</p>	<p>The limit on the number of permits agreed by the Authority included additional permits to be issued via the Appeals Sub-Committee⁴. This means that additional permits (i.e. above 61) may be issued where the appeals Sub-Committee issues permits. This was considered to be in keeping with the Aims and Objectives of the Eligibility Policy to prioritise active participants of the fishery and address the issue of 'renting out'⁵. Further, whilst the Wash Economic Assessment concluded that the fishery was viable with 61 vessels operating within it, the Eligibility Policy Impact Assessment identified that a small increase could be tolerated⁶.</p> <p>Cockle stocks are protected from over-exploitation because effort is managed through a Total Allowable Catch and as such cannot be over-exploited from a stock sustainability perspective regardless of the number of vessels operating in the fishery.</p> <p>The Authority has the ability to vary the number of permits it can issue and should the fishery become unviable because of the number of vessels operating in it, this may be considered. Management of access in this way is therefore considered to meet the Fisheries Act objectives.</p>

³ <https://www.eastern-ifca.gov.uk/formal-consultation-eligibility-policy-allocation-of-permits-and-limitation-on-the-number-of-permits-under-the-wash-cockle-and-mussel-byelaw-2021/>

⁴ <https://www.eastern-ifca.gov.uk/wp-content/uploads/2022/09/full-set-public.pdf>

⁵ 'renting out' is the term associated with licence holders obtaining the majority of registered shares in a fishing vessel so as to name that vessel on a licence but another person is financially responsible for and dependant on the vessel. The genuine owner of the vessel gains access to the Wash cockle and mussel fisheries by circumventing the Authority's policy on managing access at the expense of those who would ordinarily have gained access. This was one of the key failing of the Wash Fishery Order and a view commonly expressed by Wash fishery stakeholders.

⁶ <https://www.eastern-ifca.gov.uk/wp-content/uploads/2022/11/Impact-Assessment.pdf>

	Ensuring that fisheries are viable and operate within acceptable environmental parameters are fundamental elements of our statutory duties. This has been and will be considered in determining the appropriate limit on the number of permits and Schedule 4 is considered adequate to ensure this is the case.
The Authority did not have the power to issue permits under the Eligibility Policy because the byelaw has not come into effect.	The Process required by the Policy to determine who would be eligible has been undertaken to ensure that there is no delay in issuing permits once the byelaw comes into effect and to provide surety to industry who had been concerned about uncertainty as a result of the transition. The decisions made under the policy have not yet come into effect and access is still determined in accordance with the interim management ⁷ which maintain the <i>status quo</i> until the byelaw is confirmed.
Miscellaneous / general	
The letter informing fishing industry about the consultation was misleading as it 'played down' changes made to the byelaw since the formal consultation.	<p>The letter was not misleading and set out the key changes to the byelaw – i.e. those which had changed the effect of the byelaw.</p> <p>The full wording of the byelaw was also provided to enable respondents to consider any changes which were of concern.</p> <p>The byelaw does not include elements of control which were not present within the original version consulted on in March of 2021.</p>
The term 'Authority' is used inconsistently throughout the byelaw and is not clear. As a consequence, the 'Authority' is relied on to make decisions which will slow management decisions down and impact the fishery.	<p>The definition of Authority as defined in 1(a) is intended to apply throughout the byelaw, with the exception of paragraph 18.</p> <p>The Constitution and Standing Orders⁸ of the Authority provide delegated Authority to the CEO and specific delegated Authority is often sought for particular matters at Authority meetings to enable officers to discharge the functions of the Authority which is commonplace amongst IFCAs. Therefore, where appropriate, decisions can be made by the CEO and the byelaw will enable reactive, flexible management of the Fishery.</p> <p>The intention of the separate meaning applicable to paragraph 18 is to prevent the Authority from delegating responsibility for implementing, varying or revoking Eligibility policy in particular. This was included within the byelaw as a consequence of the formal consultation on the basis that industry had a preference for Authority members</p>

⁷ <https://www.eastern-ifca.gov.uk/wash-fishery-order-replacement/the-transition-overview/>

⁸ <https://www.eastern-ifca.gov.uk/about/constitution-standing-orders/>

	to be responsible for decisions relating to the Eligibility Policy.
The prohibition on fishing more than once per calendar day will prevent multiple vessel owners from sending more than one vessel into the fishery per day and impact their business models . Vessel owners fish vicariously under the permit.	<p>The provisions prohibits a person from ‘fishing, taking or removing’. Being named on a permit does not constitute fishing, taking or removing and therefore the impact described on multiple permit holders will not occur.</p> <p>It is not considered to be the case that a vessel owner fishes vicariously under a permit which they are named.</p>
The byelaw should enable the Authority to set a Wash-wide Total Allowable Catch as well as such for specific areas.	<p>A Total Allowable Catch may be set either globally or for individuals areas depending on the needs of the fishery.</p> <p>By way of example, the cockle fishery typically has a ‘global TAC’ only. The Mussel re-laying fisheries typically have a ‘global TAC’ and TACs for individual beds to ensure enough remains to enable additional settlement of mussel.</p>
The Authority needs to retain flexibility with regards to issuing permit conditions for implementing I-VMS.	The importance of this to The Wash shellfish fisheries is recognised by the Authority. The references to Vessel Monitoring Devices is not considered to curtail the ability to implement restrictions via flexible permit conditions.
The Byelaw does not include a permit for prosecuting a ‘re-laying’ fishery.	A mussel ‘re-laying fishery’ is a fishery which targets ‘undersize’ mussel for the purpose of shellfish cultivation etc. It will be prosecuted as either a ‘hand-worked’ or ‘dredged’ fishery.
The byelaw includes two separate mechanisms for implementing ‘urgent’ reviews of permit conditions, but the criteria for when this is appropriate is not set out in the byelaw.	<p>The decision on what process is to be used will be determined by the Authority, including potentially under any delegated Authority provided to its officers.</p> <p>The criteria for using the ‘urgent’ measures are set out within the byelaw, in all other cases, the ‘routine process’ will be followed.</p>
Conservation objectives are referred to in the byelaw but there is no definition.	The term ‘conservation objective’ has a legislative definition with regards to Marine Conservation Zones, Special Areas of Conservation & Special Protection Areas but is also used to refer to any obligation placed on the Authority to carry out its statutory functions in a manner consistent with other nature conservation legislation including the Wildlife and Countryside Act (SSSI’s,

	Ramsar Sites and Nature reserves). Therefore, it is considered appropriate to include the definition of 'conservation objective' within the definition.
What are "other urgent or compelling reasons" as referred to in the byelaw for justifying revision of permit conditions at short notice? These are not defined in the byelaw. Who determines what these reasons are and what constitutes "urgent" in terms of timescales?	This decision will be the responsibility of the Authority or other appropriately delegated sub-committee or officer. The obvious example is that where die-off is detected on a cockle bed, which can result in the loss of a bed within a matter of weeks and which requires rapid consideration and variation of management measures (e.g. increasing the Total Allowable Catch or opening an area which was initially closed to the fishery).
Why has the period for review of emergency action been extended by a month? There is no benefit to stocks or wildlife from a delay, and potentially a considerable risk to the fishing industry. In the interests of industry viability it would be appropriate to revert to the original 2-month timescale (or ideally even quicker than that).	A three-month period aligns with quarterly Authority meetings to enable Authority consideration where necessary. In addition, it is considered more likely to provide sufficient time for stakeholder dialogue and consideration of feedback. This is considered appropriate given the high threshold for implementing such measures.
There is no process for reviewing closures made under 'emergency' provisions within the byelaw.	The intention was to distinguish between 'routine' closures (i.e. because the TAC had been exhausted or to enable a cockle survey) and for 'non-routine' reasons which are not foreseeable e.g. excess damage to a sand, Natural England advice etc.). The wording of the relevant provision seeks to do this but has been revised to provide more clarity. It is not intended that there would be a review of a pre-planned reason for closure (e.g. the TAC is exhausted), but that there would be in relation to 'urgent' closures. The wording has been amended to provide additional clarity.
The fishery is managed in part by	The TAC is ordinarily included as part of the consultation on the fisheries management measures. For example, the

<p>setting a Total Allowable Catch (TAC). However, there is no clear process for how the TAC will be determined.</p>	<p>TAC for the 2023 mussel re-laying fishery is lower than would be dictated under the associated Fisheries Management Plan as a reflection of feedback received from industry during the consultation. Therefore, we will include the TAC as a 'flexible management measure' which requires consultation and consideration of impacts in accordance with Schedule 4.</p>
<p>The process for reviewing and agreeing permit conditions should be the same as set out in Schedule 5 (for Eligibility Policy)</p>	<p>The process set out at Schedule 4 is the 'standard' process for issuing, varying or revoking flexible management measures. This process is sufficient to ensure proportionality and due diligence whilst also ensuring timely decisions can be made in the opening and closing of a fishery. The process at Schedule 5 applies to managing access and includes additional criteria as a reflection of the importance placed on the matter by industry. This includes, for example, a minimum of a 4 week consultation which would not be appropriate for consulting on management measures within a fishery, for example, in the 2023 cockle fishery, representation was made to open the Thief cockle bed as a result of die-off in the bed, a 2 week consultation was held to determine the view of industry which enabled the bed to be opened in time for the industry to operate on the bed without suffering significant loss. A four week consultation would have resulted in significant die-off and lost fishing opportunities.</p>