

NWIFCA Technical, Science and Byelaw Sub-Committee

15th August 2014: 10:00am

**REPORT
NUMBER**

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MORECAMBE BAY HYBRID FISHERY ORDER

Purpose: To provide a summary of Defra's advice on the use of Byelaw versus Fishery Order for the management of cockle and mussel fisheries

Recommendation

1. Advice below be considered and discussed;
2. The Authority withdraws its application for a Hybrid Fishery Order for Morecambe Bay and continues to manage the fisheries under the current regime of Byelaw 3 for the time being;
3. Work is continued on an application for a Several Order for Morecambe Bay which should be submitted to Defra as soon as possible;
4. Under the Review of Byelaw 3, parameters and justifications are made within the amended version to ensure the NWIFCA has the powers for adaptive management.

Background

1. At the last meeting of the TSB, Members were asked to consider regulatory and financial pros and cons of the proposed Fishery Order versus the powers under Byelaw 3.
2. The merits of Byelaw 3 and its progress towards the Authority's regulatory objectives were recognised. Much has been learned from implementing this byelaw and a review would now be timely when resources allow.
3. Officers were asked to seek advice from Defra comparing powers under Sea Fisheries (Shellfish) Act 1967 (67 Act) with Byelaw making powers under Marine and Coastal Access Act 2009 (09 Act).

Advice from Defra

1. The information that follows refers solely to comparative regulation of Byelaw versus Regulatory Order (RO). The NWIFCA has already recognised that a Several Order (SO) would still be required, as there are no equivalent powers to grant proprietorial rights under the 09 Act.
2. With regard to our specific query as to whether NWIFCA would have equivalent powers for adaptive management under a byelaw as under a proposed RO, the answer is yes, but there are both advantages and some qualifications.
3. In respect of byelaw powers, s.156 of the 09 Act sets out six non-exhaustive Heads of provision, with non-exhaustive sub-provisions under each. Taken together with the duties under s.153 there is a strong argument that a broad interpretation of these heads is permitted and that accordingly a broad interpretation of powers which would be permitted in a byelaw is possible. It should be possible to implement the regulations and restrictions which RO allow under the 67 Act in a Byelaw under the 09 Act. This is subject to the following:
 - There is a provision for IFCA's to sub-delegate certain powers in RO under s.15 in the 1968 Sea Fisheries Act (68 Act). These powers are not mirrored in the 09 Act and there is

therefore a question mark over whether a byelaw is the best vehicle for regulation if the IFCA's intend to rely on sub delegated powers extensively.

4. There are other potential advantages of using byelaws as a mean of regulation. There are additional investigatory and monitoring powers under the 09 Act and there is also the fact that byelaws can override other rights if the site is an MPA, as Morecambe Bay is.
5. Defra supplied a comparative table which is attached as Annex A. A summary of the key points is provided below:

i) Power to regulate

There are some key differences between the 67 and 09 Acts in relation to the powers to regulate fisheries:-

- a) Byelaw regulations have to be consistent with the IFCA's duties of sustainability and protecting MCZs under s.153 (09 Act). These are mandatory duties and the byelaw making power is the principal mechanism for their performance.
- b) s.156 of the 09 Act sets out six non-exhaustive Heads of provision, with non-exhaustive sub-provisions under each by way of example. Taken together with the duties under s.153 there is a strong argument that a broad interpretation of what powers are permitted in a byelaw is necessary. That being the case it should be possible to implement those regulations and restrictions which would otherwise be permitted under an RO (67 Act) in a byelaw (09 Act). This is subject to the byelaw being consistent with the IFCA's duties i.e.: - it needs to be clearly justified, in the pursuance of those duties, and the byelaw must specify, as far as possible, what it is controlling.

ii) Power to sub-delegate regulations:

For RO there is a power under s.15(3 & 4) of the 68 Act which provides for the sub-delegation of powers (with the consent of the minister) in relation to: dredging; fishing for and taking of shellfish; varying tolls and royalties.

This power is not replicated in the 09 Act for byelaws, however, advice from Counsel and from Defra legal is that although there is a risk of challenge to byelaws when sub-delegating powers are used (the greater the sub-delegation, the greater the risk) that risk should be limited provided that it is made clear on the face of the byelaw what conditions are to be dealt with by way of permitting/schedules/ or notices; specific limits are included on the face of the byelaw; the reason for sub-delegation is clearly justified and within the duties of IFCA's, and there are associated with the byelaw formal operational procedures which set out the processes by which the IFCA will review/amend the byelaw.

iii) Powers of Investigation/monitoring

The 09 Act includes additional powers of monitoring, including requiring vessels to be fitted with specific equipment, as well as powers of obtaining information from those involved in exploiting fisheries. These powers are not available in the 67 Act in relation to ROs.

iv) Third Party Rights

A byelaw under the 09 Act can override other rights if the site is a SSSI/Ramsar site, MCZ, or European Marine Site and, in those circumstances, can be made without the consent of those it affects. Otherwise consent is required. By contrast an RO requires the consent of third parties whose rights are infringed.

v) Emergency Regulations

Under the 09 Act IFCA's have the power to make an emergency byelaw. This can be made without confirmation from the SoS in circumstances where the IFCA considers there to be an urgent need, and the need to make the byelaw could not have been foreseen – s.157(1). Such a byelaw is time limited to 12 months unless extended by the SoS. No such powers are available under the 1967 Act.

vi) Offences

Offences and penalties are essentially mirrored under both Acts. One key difference is that the MACAA does not contain the presumption of an offence if the accused is caught within the vicinity of the regulated fishery with equipment.

A breach of a byelaw permit condition alone is not an offence under s.163I. A breach of a byelaw would be required for there to be an offence.

vii) Enforcement Powers

Since the implementation of the 09 Act the enforcement powers available to IFC officers in respect of byelaws and SROs are the same.

viii) Limits of Order / Byelaw

There are slight variations in the limits of ROs and byelaws.

The geographical extent of a byelaw is confined to the limits of the IFCA jurisdiction.

An RO is can be made anywhere within 6nm of the seashore.

An RO cannot exist longer than 60 years whereas a byelaw is not specifically time-limited. However, a byelaw does not have the long term certainty of an Order and may not nurture the same level of ownership and stewardship as an Order.

Defra byelaw guidance stipulates that IFCA's should continually monitor the effectiveness of byelaws and where they are no longer effective, they should be repealed/modified (para 6.5).

ix) Process of Implementation

The principal difference between an RO and a byelaw is that the IFCA takes responsibility for consulting on and drafting the byelaw. Once the consultation for a byelaw is complete the IFCA is required to submit the final draft to the MMO for checks and then to the SoS for approval.

There is no provision for the SoS to recoup any expenses for approving the byelaw. For a Regulating Order all expenses shall be paid by the applicant and shall be paid to the minister in such sums he thinks fit.

6. The Authority has discussed previously the desire to work for a District-wide Fishery Order for the hand-gathering of cockle and mussel fisheries. According to Defra advice, an amended Byelaw 3 would provide the means for management of cockle and mussel fisheries across the District with the same measures contained within the Regulating Order Management Plan but without the lengthy process of applying for a FO.
7. The review of Byelaw 3 would need to ensure that clear parameters and justifications for management measures are included so that the Authority could then have the sub delegated powers it needs for adaptive and flexible management.