

NWIFCA Technical, Science and Byelaw Sub-Committee

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**REPORT
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3

IFCA BYELAW MAKING POWERS AND THE POWERS AVAILABLE AS GRANTEES OF A SEVERAL OR REGULATING ORDER

Aim of the paper: To compare the pros and cons of byelaws and Fishery Orders for the management of shellfisheries of Morecambe Bay

Recommendation: Further development of Byelaw 3 should be given higher priority than continuing of an RO for Morecambe Bay.

Summary conclusions:

1. The Byelaw regime created by MCAA 2009 and currently adopted by the NWIFCA is the most flexible and far reaching legislative option available to the NWIFCA. Byelaws are likely to be the most effective means of regulating shellfisheries in the district.
2. A Several Order (SO) is designed to allow a fishery to be taken out of public usage and offered to a limited number of commercial operators with a view to maximising the development of a shellfish fishery as a profit making enterprise by promoting long-term private investment. To this end it makes the grantee, or the leaseholders, the owner of the shellfish in the fishery, and it is the only regime capable of doing this. While a SO covers a defined geographical area it must be remembered that it is the fishery which is leased not the land on which the fishery operates. The SO may be the best regime for encouraging static aquaculture (shellfish farming) but is not suitable for regulating a public fishery operating in variable locations throughout the District.
3. The Regulating Order (RO) seems to have less to recommend it when compared to the Byelaw regime as the range of powers is arguably narrower in than that provided by byelaw. In addition, the time taken to implement an RO is substantially longer than to implement byelaws. The potential advantages are that it may be capable of including greater sub-delegated regulating authority for the NWIFCA without reference to the Secretary of State (SoS), however in practice this may not be in line with modern standards of accountability, consistency and predictability and is unlikely to be permitted. An RO, which may be made by the SoS for 30 or even 60 years, may provide greater long term security for licence holders but it appears that Governments are now reluctant to make such long term commitments to Fishery Orders (FOs) and there will still be continual need for reassessment of the environmental impacts of fisheries conducted under Orders.
4. SO and RO may arguably now be obsolete as they fail to properly account for the environmental management obligations of the NWIFCA. Specifically they fail to incorporate the obligations of the Habitats regulations leaving a lack of clarity over how these should be built into a Fishery Order regime which may be enacted for up to 60 years.
5. The compliance and administrative burden of an Order are higher than for byelaws requiring annual reports and plans to be agreed with Government.
6. Implementing an RO or SO will likely result in higher licence fees for fishermen while also limiting the area each individual can fish. This may create tension where the cockle fishery is distributed in an uneven manner throughout the district as is usually the case. Additionally an RO or SO is expected to generate a smaller and less flexible income for

NWIFCA as licence fees from FOs must be kept in a separate set of accounts to general finances.

Introduction:

7. This information is taken primarily from the report on the Morecambe Bay Hybrid Fishery Order by the Chief Officer and Senior Scientist delivered to the TSB on 15th August 2014 and the Defra comparison table attached to that report at Annex A. It is also drawn from reading the relevant statutory material directly. The purpose is to summarise very briefly the most relevant differences from the point of view of regulating the shellfisheries in the NWIFCA District and make recommendations as to the legal effectiveness of the various possible regimes.

Purpose of Legislation

8. The foundation of the new byelaw regime in MCAA 2009 and which is now implemented in all IFCA byelaws are the duties of the IFCA to:
 - a. Ensure that the exploitation of fisheries is carried out in a sustainable way;
 - b. Balance the social and economic benefits with the need to protect the environment; and
 - c. Balance the different needs of those engaged with the exploitation of fisheries in the district.
9. These objectives allow for a broad and flexible approach to fisheries regulation in the District by the NWIFCA. They should ensure that all stakeholders can and have their interests represented in the byelaw regime and all issues can be taken into account. This fits well with highly variable, short and long term cockle and mussel industries with potentially significant environmental and social impacts and which include operations ranging from single fishermen to large commercial operators.
10. By contrast the SO is designed to provide for “the establishment and improvement and the maintenance and regulation of a fishery”. This envisions the creation of new commercial fisheries through aquaculture or the development of existing ones into larger businesses. There is no mention in either of the 1967 Act regimes of environmental or social considerations and the concept of the SO predates any of the recent environmental legislation. Environmental obligations have therefore had to be bolted onto the SO regime leaving some uncertainty about how they should operate.
11. Although not the current situation of the cockle or mussel fisheries in the NWIFCA District, there may be the potential for establishing mariculture operations based on the cultivation and development of the good settlement of spat which occurs in certain years. Such development of aquaculture may be desirable, but only in very limited parts of the District such as parts of Morecambe Bay.
12. Similarly the RO provides powers which include the regulation of and restrictions on those who have licences to fish, and the power to collect tolls, deposit propagating shellfish and licence dredging. Once again the focus is on the shellfish fishery as a business to be developed and for revenue to be generated through tolls with no integrated provision for environmental protection.

Geographical Considerations

13. Byelaws, by default, apply throughout the District but with the power to specify different regulations for different areas if necessary under derogations, special permits or emergency measures. By contrast, FO only apply in the specific area over which the Order is granted and are relatively inflexible. SoS consent is required for all changes to Orders

as shown by the recent changes to the Dee Order. Historical experience and the existing examples suggest that FO will generally be granted for specific areas which could be said to be identifiable as a distinct fishery. The cockle and mussel fisheries in the NWIFCA District do not occupy such a specific, distinct fishery area. The NWIFCA District now includes cockle fisheries in the Dee (under an RO), on the Wirral, in the Solway, in the Ribble and Duddon, as well as in Morecambe Bay.

14. The Byelaw regime has the ability to flexibly regulate all shellfisheries, wherever they are located, as and when such fisheries appear, whereas an order is fixed to its limited defined area. An FO will therefore require a separate additional byelaw regime to cover the bulk of the District outside the area of the Order. Having both an Order and a byelaw regime in place within the District seems complicated and unsatisfactory. Moving the area of any Order would be a long, costly and difficult process. Additionally, it seems unlikely an Order would be granted to cover the entire District as the area is so large and so many fishermen and other marine interests would be affected.

Powers

15. The powers provided to the NWIFCA through the byelaw regime are set out in considerable detail in the text of the MCAA 2009. At first glance the list of topics covered by the byelaw making powers may seem rather specific, but on further reading they can be interpreted very broadly, as long as they are in line with the duties identified above. Byelaws can be used to create any restrictions or prohibitions on fishing as regards time, place, date, the need for a permit, the fishing gear used, the need to pay a permit fee, etc. NWIFCA can create a District-wide byelaw regime, or it can create local regimes as needed. Indeed it may be possible to define specific areas in a byelaw which will be put aside for aquaculture where a license to fish will be granted only to a single named individual and his agents. Thus it may be possible to create Several Fisheries under a byelaw although at present the Authority is continuing with the policy of pursuing Several Orders to promote aquaculture.
16. The powers provided by FO are general, simply comprising “regulation and restrictions”. This may seem flexible, but the flexibility must be written into the text of the Order and cannot easily be altered without reference to the SoS and a formal amendment to the Order. The byelaw regime appears to grant the power to make any kind of regulation we can conceivably need or have required in our work so far but again the specifics of the flexibility required must be written into the byelaw. This leads to the key point that a byelaw is easier to amend than an Order.
17. Also relevant to the section on powers is the point that the purpose to which an Order and its attached regulation should be directed was originally more commercially focused while the byelaws must take account of all environmental, social and broader fishing interests.
18. Orders are used for the key purpose of limiting fishing effort, creating financial buy-in and investment in the fishery and to provide longer term security to fishermen. The only notable extra power advantages of FO are that, in the case of an SO, the shellfish which are the subject of the Order become the property of the grantee. This provides extra long-term security to someone engaged in aquaculture as it ensures they can recover any shellfish taken or damaged as if they were stolen or damaged property. It further creates the incentive to invest in development of the fishery increasing the potential to create a long term sustainable mariculture operation yielding harvests year on year.
19. In the case of an RO there could be advantage over byelaw if the SoS were to consent to the IFCA being granted authority to vary regulations and restrictions as and when they wish, without further reference to the SoS. This could provide NWIFCA with greater flexibility to change regulations very quickly but is untested and it is not at all clear that Government lawyers would permit that level of local management.

20. Such powers could also bring greater liability and risk of challenge on the NWIFCA were it to make any errors in how the Order was implemented. Such new regulations may in any case be negated by the necessity of ensuring there was full accountability and openness when making new regulations, as well as ensuring stakeholders were fully consulted and had sufficient warning of new rules.
21. The byelaw regime already has a powerful emergency byelaw making process for exceptional circumstances with protections built in. This process has been successfully used by the NWIFCA and other IFCA.

Administrative Burden

22. Byelaws must be accompanied by an impact assessment when they are implemented and a full consultation process. They must be consulted on and signed off by the SoS, and should also be kept under regular review, every 3-5 years. However up to now the review process for byelaws which are working well has not been required.
23. Orders require completing a detailed application, a full and detailed management plan and where they are in an EMS they require preparation of a full Habitats Directive 'Appropriate Assessment' which would have to take a forward look for the period of the Order. The area of the Order must be mapped in detail and all landowners must be consulted as must all stakeholders. If the Order is contentious, and most are, a public inquiry may be required. Once enacted there are regular reporting requirements to Government on the progress and activities of the Order. Orders generally have the function of permitting an activity over an area for a long term period of 5-60 years. It is not clear how the EMS assessment process integrates with such long term permits. On balance, the administrative burden of the implementation and operation of a Fishery Order appears greater than that of byelaws.

Financial provisions

24. Financial arrangements must be set out on the face of both Orders and byelaws and are tightly regulated in both cases. Fishery Order financial provisions are tightly defined in that the Grantee cannot make a profit from the Order but must operate separate accounts for each Order. Fees such as licence fees or lease fees are set at the start of the Order and can only be changed with the agreement of the SoS. A financial statement must be provided to the SoS each year
25. In the case of byelaws, provision for increase in fees can be made in line with a suitable inflation index. There is nothing in the MCAA to limit the fees which can be charged and fee income can be incorporated into IFCA finances.

Work done on the Morecambe Bay Order to date

26. The NWIFCA has undertaken a great deal of work in preparation for an Order. Much of this such as the Management Plan, the Habitats Directive Appropriate Assessment and the research on landowners and mapping will be valuable whether shellfisheries in Morecambe Bay continue to be operated under byelaw or the Authority continues to pursue implementation of an Order.
27. There are significant problems in development of a Morecambe Bay Order which have proved intractable to resolve. Key to this is the number of permits which will be offered under a Regulating Order and how much each will cost. Members have been reluctant to consider more than 50 hand working licences and about 5 dredge licences for seed fisheries. There is no budget within the NWIFCA to fund implementation and operation of an Order and there is no evidence that management costs of the District will be reduced if Morecambe Bay is moved into an Order so there is unlikely to be savings from which an Order could be funded.

28. An Order for the area of Morecambe Bay could require 1-2 officers to operate it and additional survey and monitoring costs not currently covered by the NWIFCA budget would be expected. Morecambe Bay shellfish, particularly cockles are highly variable from year to year and it is difficult to see how the costs of an Order could be covered, particularly in years when stocks of cockles were low.
29. NWIFCA now has what is widely considered to be an effective regulatory framework for inshore shellfish in Byelaw 3 which covers the whole District and achieves many of the Authority's objectives for shellfish management.
30. The creation of an Order for Morecambe Bay which is a relatively small part of the NWIFCA District would require significant restructuring of Byelaw 3. This would create two classes of permit holders within the District, those that have Morecambe Bay licences and those that don't. However this is set up, there could be conflicts created in years when stocks were relatively better or worse in Morecambe Bay than the rest of the District. For this reason, the Authority considers that it should have a single regulatory regime across the whole District based on its byelaw powers.

CEO
24th October 2014