

ANNEX A

Draft Defra/MMO Policy Note: IFCA Byelaws and Sub delegation

Summary

We are aware that there are continued concerns around uncertainty in relation to the sub delegation of powers from the face of IFCA byelaws to associated permit conditions, notices and other forms of sub-delegated decision making; in particular relating to spatial restrictions that IFCAs may wish to apply via permit conditions.

Sub-delegation is when a byelaw delegates the right to define the specific details of the restriction from the face of the byelaw to an associated permit condition or notice. There is concern that continued uncertainty on this issue could delay management of 'red risk' issues in EMS sites, and in the longer term inhibit IFCAs' ability to effectively protect MPA features and to manage key fisheries resources in their districts.

This papers sets out the Defra/MMO position with regard to the sub-delegation issue, but IFCAs should consider getting their own legal advice on this.

1. Defra/MMO position

It is our view that:

- 1.1. Initially, IFCAs should always consider using their byelaw making powers. Sub-delegation should not be used as a means to bypass the byelaw making procedure;
- 1.2. IFCAs can use permit conditions and notices to fill out detailed elements of the byelaw and these can be made/reviewed/amended by the IFCAs, provided that:
 - a) It is made clear on the face of the byelaw what conditions/provisions are to be dealt with by permitting or notices;
 - b) Specific limits are applied to the conditions or sub-delegated detail on the face of the byelaw in so far as is possible;
 - c) The reason/trigger for the sub-delegation is clearly justified (particularly with respect to spatial closures to protect European Marine Sites and Marine Conservation Zones);
 - d) Associated with the byelaw there are formal operational procedures which set out the process, and circumstances, by which the IFCA will make/review/amend the conditions or notices that contain the detailed matters sub delegated from a byelaw. It is important that procedures are transparent, fair and always followed by the IFCA.

2. Key points

- 2.1 In the first instance, IFCAs should always consider using their byelaw-making powers, and only look at sub-delegation options such as permitting where they have good operational reasons for doing so and where this is consistent with the Marine and Coastal Access Act.
- 2.2 **The sub-delegation of matters from the face of the byelaw to permits or notices should not be used as a means to bypass the byelaw-making procedure – sub-delegation should be employed only where appropriate to provide IFCAs with a level of flexibility that will benefit the work they do as inshore fisheries managers and is consistent with the Marine and Coastal Access Act.**

- 2.3 IFCAs will be advised to seek and consider their own, independent legal advice when they have particular concerns around introducing permitting or notices in particular areas or cases.
- 2.4 Where IFCAs decide to use sub-delegation, it is important to specify as much information as possible regarding the conditions that will trigger the operational procedures for making/reviewing/amending sub-delegated matters.
- 2.5 IFCAs **must** set out the operational procedures they will follow (e.g. flow chart etc) when making, reviewing and amending management detail sub delegated from the byelaw.
- 2.6 IFCAs may decide to outline their operational procedures on the face of the byelaws, but it would not always be necessary to do this for all of the procedural detail; rather it may be more helpful to set these out in an associated document/ for example, the committee or sub-committee standing orders or a standalone management 'charter' or guidance.. If this approach is taken, there should be a clear cross-reference to the associated document on the face of the byelaw and the associated document should be publicly available so it is clear what processes apply.
- 2.7 Operational procedures, where appropriate, should bring together and formalise the standard procedures that the IFCAs operate to discharge existing legal obligations (e.g Assessments in line with obligations under Article 6(3) of the Habitats Directive).
- 2.8 IFCAs should consider including appropriate review clauses for byelaws and for any permits/notices. In the case of EMS, MCZs and sites where features change frequently, a regular review may be necessary.
- 2.9 We consider that it is important to provide transparency and as much information as possible to ensure the fairness of procedures. Operational procedures should provide clarity to those who will be affected and to those who have an interest in such amendments, enabling them to understand and, if appropriate, question IFCA decisions in relation to sub-delegated matters.
- 2.10 **Permit byelaws and the obligations under the Habitats Regulations.**
Considered that the act of issuing or changing permits associated with a byelaw is consistent with the definition of a plan or project and as such is subject to the obligations set out in Article 6(3) of the Habitats Directive, therefore a screening for likely significant effect is required (and if necessary an Appropriate Assessment), unless the IFCA is able to satisfy itself (with advice from Natural England) that changes are connected with or necessary to the conservation management of the site.
- 2.11 As IFCA byelaws are being used to ensure the UK complies with its obligations under the Habitats Directive, a reference to this fact should be included in the explanatory note to byelaws which affect EMS.