

# Wash Fishery Order 1992 Replacement

## Informal Consultation December 2020: Outcome



This document presents the outcome to the informal consultation on the proposed aim and objectives for the future management of access to bivalve fisheries in The Wash. This consultation ran from 5<sup>th</sup> November to 18<sup>th</sup> December 2020.

This work was part of the early stages of the development of the new Byelaw that will replace the current management of the Wash Fishery Order 1992, when it expires in January 2023.

### We asked

We consulted on our proposed aim and objectives for managing access to bivalve fisheries in The Wash. Under a management mechanism (a Byelaw or an Order) access to fisheries is managed by policies, eligibility criteria (who is eligible for a permit to fish) and permit conditions (restrictions on fishing activity). Our purpose was to establish a broad aim and set of objectives for management, together with stakeholders, as a framework to develop the new measures to manage access to the fishery.

We asked for views on our proposed **aim** for management of the fisheries:

*‘To achieve a level of access to the fishery that is equitable, and which supports the viability of varying business models, the conservation objectives of The Wash and stock sustainability.’*

We also asked for views on our proposed **objectives** for management of the fisheries:

1. To limit access to the fishery to a number of persons which will meet the aim
2. To provide clarity and transparency to support effective business planning and continuity
3. To enable a range of legitimate business arrangements that are compatible with known business models operating within the fishery
4. To prioritise the continuity of active participants and business models that can provide evidence for best practice and legitimate business practices
5. To facilitate new entrants into the fishery by enabling appropriate turnover and infrastructure to log suitability to enter the fishery
6. To cater for standard business practices and issues which arise in operating within the fishing industry (such as vessel breakdowns and replacements)
7. To prevent the permit from having its own value or becoming a tradable commodity

## You said and our response

58 responses to the consultation were received from stakeholders, 50 of these were duplicated responses, or signatories to the duplicated response, written in representation of their clients by a solicitor. Some stakeholders represented by the solicitor also additionally provided a more detailed response to the consultation.

The responses included comments and questions that were about the aim and objectives that were the subject of this consultation. We also received comments about the replacement of the Order with a Byelaw more broadly and whilst this was not the purpose of the consultation we have, nonetheless, responded to the points raised. Read what was said and our responses in the table below.

The following summarised key points from responses are highlighted:

You Said	Our Response
<p>Security needs to be given to fishermen about future access, this needs to involve stable tenure of licences that support the vessels and crews throughout the year. Due to their insecurity, permit Byelaws cause more economic disruption for fishermen. Security also includes being able to pass licences on to close family to preserve traditions within communities.</p>	<p>This concern has emerged as a priority for industry throughout the consultation. In simple terms a permit Byelaw is able to provide the same degree of security as an Order if that is what we agree to do. We recognise the critical importance of providing economic and other securities and the impact that uncertainty has on the livelihoods and wellbeing of our stakeholders. We also recognise and celebrate the fisheries importance socially and economically across the generations of fishermen that The Wash has supported. We agree that it is important to maintain this into the future and this is reflected in objective 2 for the new management policies.</p> <p>Any security provided under the WFO 1992, such as being able to pass licences to close relatives, is contained in policies that were developed in consultation with industry by the ESFJC, rather than being written into the Order itself. Therefore, there is no additional protections or securities provided to industry that cannot be replicated under a Byelaw.</p> <p>Following the outcome of this consultation officers will draft a set of proposed policies and permit conditions.</p>

	These will be able to be scrutinised by industry in consultation later this year (2021).
Eastern IFCA should reconsider Objective 3 – it is unacceptable for Eastern IFCA to specify what types of business practices are legitimate, and it makes unnecessary speculations of industry.	<p>We will revisit the wording of this objective.</p> <p>The intention of this objective was to emphasise the current prohibitive effect of the WFO policies on enabling what would, in non-fisheries circumstances, be legitimate business models, such as shared ownership or partners. The difficulty facing the Authority in designating 'legitimacy' and thereby illegitimacy is acknowledged and will be reflected upon.</p>
Eastern IFCA should reconsider objective 3 and 7, which are in contradiction of each other. If individuals can partner with another on a licence, and retire from the partnership, Eastern IFCA would be enabling the sale of licences that it seeks to prevent.	<p>The aim and objectives are intended as a set of principles that will guide the development of policies for management of the fisheries. It is acknowledged that some may be contradictory, and it was intended that feedback would help establish what elements to prioritise, for example, if there a preference to enable passing on of access over and above preventing access from being a 'tradable commodity'?</p> <p>These issues will be reflected upon.</p>
Eastern IFCA should reconsider objective 6. This objective is not necessary and creates the potential for abuse and dishonesty. The maintenance of the vessel should be the responsibility of the skipper and vessel owner. Flexibility needs to be afforded by Eastern IFCA when issues arise, but this needs to be on a case-by-case basis.	<p>This objective relates to a flexible response to issues that arise as a matter of course within the fishing industry. The WFO and associated policies have been prohibitive at times and this objective seeks to establish, so far as may be possible, a desire to enable such practices where appropriate. The associated policy or eligibility criteria would seek to enable flexibility but remove opportunity for abuse and dishonesty.</p>
<p>Allowing new entrants to the fishery will shorten the fishing season with the risk of losing skilled crew members.</p> <p>New entrants to the fishery, if they are allowed under the Byelaw, will have</p>	<p>It is an essential part of fisheries sustainability that it is possible for new entrants to enter the fishery in some capacity. It is recognised however that, within the Wash bivalve fisheries, this would benefit from being balanced with</p>

<p>high overheads that require increased fishing effort. This could have an impact on the stocks and environment.</p>	<p>restrictions on the number of permits to also ensure the sustainability and viability of the fisheries as a whole.</p> <p>It is therefore not considered accurate that new entrants will inevitably lead to shorter seasons, or increased effort and we will seek to ensure that this does not happen. The appropriate level of access, from an industry viability perspective, will be informed by the economic assessment of the fishery that has been commissioned by the Authority.</p>
<p>New entrants have access to the fishery by buying shares in a vessel.</p> <p>New entrants to the fisheries should be supported, those who demonstrate experience should be given access</p>	<p>It is understood that while buying shares in a vessel can provide a way for some to access the fishery, there is little certainty or realistic timescale or availability to have their own permit. The degree to which this provides equitable access is a subject of consideration as part of this review and consultation. This is largely due to the failure of current policy in reallocating licences.</p> <p>As is evident in the second of these points, members of industry have also represented that financial barriers to access, such as buying shares in a vessel, can itself lead to economic insecurity due to lack of access to legitimate lenders to be able to establish their own business. The intention is to enable equitable access to the fishery for active fishermen, within the required parameters that will ensure that the fishery remains viable.</p>
<p>New entrants should be prioritised to local fishermen with experience in The Wash and with the relevant safety training.</p>	<p>It is not considered appropriate to allocate fishing opportunities on the basis of a vessels home port and it is, perhaps, relevant to note that this is specifically mentioned in s.23(4) of the Fisheries Act 2020.</p> <p>We do, though, acknowledge the importance of supporting local economies and communities.</p> <p>The Wash is a complex and environmentally sensitive site to</p>

	<p>navigate and fish in and we recognise this by requiring a degree of experience before being able to be a named representative on a cockle WFO licence.</p> <p>We are seeking to develop a more formalised and robust approach to this in all Wash fisheries to ensure that experience as a Wash fisherman is a pre-requisite to having a permit allocated.</p> <p>It is important to ensure that these requirements do not disadvantage fishermen working at a smaller scale and, as the policies and permit conditions are developed industry will have opportunities to share their views.</p>
<p>Eastern IFCA should not be solely responsible for determining who is eligible to enter the fishery – local fishing associations should be involved.</p>	<p>Whilst we recognise the role of fishing associations in assisting with knowledge of track record, it is important that decisions on the allocation of permits are both independent and objective. Such decisions will be informed by policies that will be developed in consultation with industry, but any decisions on the allocation of permits must ultimately rest with the Authority.</p>
<p>Eastern IFCA has licences available that it could issue.</p>	<p>There is a moratorium on the issuing of new licences which was put in place some time ago. The original objective was to manage the number of licences down to what was thought to be a sustainable level and of late, it was not considered desirable to increase the number of licences prior to the review of management of the fishery that expiry of the WFO1992 would bring about. Importantly, the economic assessment will inform on the appropriate limit on access to the fishery.</p>
<p>Permits should be issued to the fishermen rather than the vessel. There should only be one permit per person.</p>	<p>To whom the permit is issued will be considered further and will be subject to further consultation with industry as draft policies are prepared.</p>

<p>Permits should not be transferrable or have value under any circumstances.</p>	<p>As outlined in objective 7, we recognise the importance of continuing to prevent permits from having value or being transferrable, as is currently the case under the WFO1992.</p> <p>This does however need to be balanced against enabling normal business practices. The contradictory nature of these elements is acknowledged and the feedback from the consultation will help inform how best to prioritise these objectives.</p>
<p>The current licence system provides progression to gradual retirement for fishermen, providing them with income from the use of their licence by family members in later years.</p>	<p>It is understood that there are some members of the fishery for whom their licence is considered as part of their retirement. It is also understood that this practice is not supported by all members of industry, with some considering that the holding of licences beyond active participation restricts the involvement of new fishermen as licences are returned and re-issued. This issue will be considered as replacement policies are developed.</p>
<p>Eastern IFCA needs to spend more time considering the needs of all the different business models in The Wash and balance the needs of smaller scale businesses with larger businesses.</p>	<p>We recognise the need to meet the requirements of all fishing activity in the Wash, at all scales, and this will be a consideration in the development of policies.</p>
<p>The Wash Fishery Order should not be changed; it should be given credit for what it has achieved. If it is to be replaced it should only be adjusted, rather changed completely. Changes to fisheries management can end up with the same issues or worse in a new system. Eastern IFCA needs to make clearer to industry why a permit Byelaw would be better than an Order.</p>	<p>The Wash Fishery Order 1992 expires after its 30-year term in January 2023 and therefore must be replaced. Any replacement, be it another Order or a Byelaw, would involve a review because much has changed in fisheries activity and management since 1992 and because we must take into account the views of those presently denied access to the fishery.</p> <p>When the WFO1992 was introduced Sea Fisheries Committees (SFCs) had Byelaw making powers under the Sea Fisheries (Regulation) Act 1966 that were more restricted than is currently the case. Therefore, the use of a Regulating Order under the 1967</p>

Shellfish Act was an attractive prospect as it provided the advantages of more flexibility compared with powers under the 1966 Act. The 1967 Act allowed the ESFJC to make regulations which could, to an extent, be altered and tailored more than a Byelaw, and covered a slightly wider range of regulatory powers than a Byelaw.

However, under the Marine and Coastal Access Act 2009, IFCA's have a much wider remit than the SFCs and their ability to manage fisheries is increased because of the range of specific provisions for which they can make Byelaws. In particular, so called 'permit Byelaws' are able to provide rules for a fishery and also provide a procedure by which the IFCA can review and alter measures, without having to remake the whole Byelaw. It provides a more flexible approach and allows the IFCA to be more "fleet of foot" in terms of reacting to changes and pressures on the fishery.

A byelaw would provide consistency for fisheries management throughout the district, enhancing transparency. In addition, whilst byelaws require review at least every six years, they do not expire (as does an Order) and are more readily amended (albeit via consultation and with the consent of the Secretary of State) to suit the needs of a fishery at any given time.

The aims and objectives of the Regulating Order can now be achieved just as well under the Authority's modern powers pursuant to the 2009 Act, and it is for these reasons that the Authority decided to replace the Order with a Byelaw.

We agree that while adjustments are required, it is not necessary to change all aspects of the current management regime under the new Permit Byelaw. It is also noteworthy that the Authority directed Officers to review the policies

	<p>which underpin access to the fishery prior to the decision to use a byelaw mechanism in the context that the current system (under the WFO) had flaws and limitations, not least those highlighted by the industry. With this in mind the revised WFO 1992 regulations will be incorporated in the Byelaw and the Fisheries Management Plans, which are a significant contributory factor in the success of the fisheries, will remain in place.</p> <p>We also recognise the challenges in making changes to fisheries management regimes and we will seek to avoid introducing new problems.</p>
<p>Eastern IFCA has delayed the application of an Order and now there may be insufficient time remaining.</p>	<p>The Authority carefully considered the matter and decided to replace the Order with a Byelaw. As such there has been no delay in applying for an Order because it is not intended to do so.</p> <p>The Byelaw process can take time to progress through the MMO and Defra, and with this in mind it is intended to make the Byelaw as soon as possible to avoid any gap upon expiry of the WFO 1992.</p> <p>Discussions on the policies, eligibility criteria and permit conditions that will sit under the Byelaw will be continued in the coming months.</p>
<p>If the Several Order managing the mussel lays is being renewed, so too should the Regulating Order.</p>	<p>There is no other management mechanism that can suitably recreate the management of the lays under the Several Order, therefore the Authority is pursuing a replacement Several Order for the lays. Under this Several Order, as with the regulated fishery, the policies and lease conditions will be guided to the same aim and objectives as are agreed here.</p>
<p>A permit system could create more loopholes and legal challenges for Eastern IFCA.</p>	<p>Due to this concern being raised during industry meetings, we sought legal advice as to whether this would be the case.</p>

	<p>That advice is clear that any stakeholder who wishes to challenge the operation of a Byelaw has the same suite of options available to them as under an Order. The rights of the individual are no different as between the two methods of management.</p> <p>Therefore, there is no additional capacity for challenge under a Byelaw than there is already under an Order.</p>
<p>Fisheries Orders provide protection against conservation objectives pushed by government and wealthy businesses; these protections are being further eroded by permit schemes.</p>	<p>Wherever possible the Authority will seek to balance conservation objectives with the ongoing sustainability and viability of industry, as written in to our <a href="#">vision statement</a> , but an Order does not provide protection against environmental conservation measures.</p> <p>Eastern IFCA is a "public body", and consequently a "competent authority" for the purposes of reg. 7 of the Conservation of Habitats and Species Regulations 2017/1012. As a result we are under a duty to comply with reg. 9 of the 2017 regulations and to exercise our functions so as to secure compliance with the Directives. This obligation is confirmed in the guidance issued to IFCA's under section 153 of MACA 2009.</p> <p>As a grantee of an Order we would still be bound by these statutory requirements in exercising our functions as grantee because reg.9(2)(j) of the 2017 Regulations refers to functions exercised by a competent authority under the "Sea Fisheries Acts", which includes the Sea Fisheries Shellfish Act 1967.</p> <p>Similarly, under section 154 of the Marine and Coastal Access Act, the conservation duties of an IFCA must sometimes take precedence over fisheries management.</p> <p>It is relevant to note that our management of the Wash cockle and mussel fisheries already accounts for conservation issues and if it did not the</p>

	<p>fisheries would not be able to take place.</p>
<p>An Order provides more rights and protections for fishermen than a Byelaw</p>	<p>In order to address concerns expressed during meetings, legal advice was also sought on this point.</p> <p>The advice is clear that there are no differences. The new byelaw making powers and the flexible nature of the byelaws are in effect a replacement for the provisions of the 1967 Act so far as IFCA's are concerned. Any stakeholder who wishes to challenge the operation of the Byelaw by the IFCA has the same suite of options available to it as under an Order, those being, consultation and participation in the Byelaw making process, and the ability to challenge by way of judicial review, or through the criminal courts if prosecuted for an infringement.</p> <p>The advice suggests that it could be argued that under the provisions contained in Byelaws for the review of flexible byelaw conditions, which are prescriptive, there is more opportunity to challenge than under an Order. It is clear that there are certainly no less powers and rights for stakeholders, and arguably there are more under a Byelaw compared to an Order because a Byelaw specifies a requirement to consult with stakeholders and take into account the impacts of any the associated measures.</p>
<p>Eastern IFCA should increase communication with industry, through ongoing meetings, more regular updates, or an email newsletter.</p>	<p>As we have acknowledged in objective 2, we understand the importance of ongoing communication with industry and will seek to continue to prioritise this in future work. We welcome any suggestions from industry on how to improve our communication in this regard.</p> <p>The development of a newsletter is planned and there is now the option to subscribe to a mailing list on the front page of our website.</p>

	<p>As industry are aware and have accommodated, we have adapted to new ways of working at Eastern IFCA because of the Covid-19 pandemic—such as hosting meetings online that would otherwise have been attended in person. We hope to resume in-person meetings when the circumstances allow. Until that time we will utilise technology available to us to ensure that communication is maintained.</p>
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Further comments and observations were made in response to the consultation and [brief responses](#) are provided:

- Industry requires more certainty on the policies and permit conditions before the permit Byelaw can be considered as a viable option for management.
  - [We understand this but we are unable to provide certainty at this stage because to do so would invalidate the consultation process on the aim and objectives for the fishery. We are optimistic that when we get to the stage of providing draft policies many of the concerns of industry will be allayed. It should be noted that the same review of policies would be taking place if a replacement Order were being pursued.](#)
- The economic assessment that Eastern IFCA is undertaking to better understand the economic viability of the fishery, that will help to inform the number of licences the fishery can support, is not relevant as an assessment of the fishery was conducted 10 years ago and recommended that the number of licences be reduced.
  - [The previous assessment referred to was undertaken by a consultancy named Marinx and was not an economic assessment but was instead a review of cockle and mussel policies. It did refer to issues associated with ‘sleeping licences’ and the desirability of reducing these in the context of developing the fishery but no specific number was recommended. A new economic assessment will provide up to date information to help inform decisions.](#)
- The wording of the aim and several objectives should be revisited for clarification and purpose.
  - [The purpose of this consultation was to seek views on the aim and objectives, and they will be reviewed in light of the consultation responses.](#)
- Support should be prioritised to active fishermen, from whose support processors and shore-based businesses will benefit. To support the latter over the former is often the outcome attained at the expense of the fishermen themselves.

- As previously outlined, it is important that we consider all business models operating in the fishery and seek to achieve the right balance.
- The CEO suggested that access to the fishery could be decided by drawing lots. This suggests that Eastern IFCA is not aware of the implications.
  - The CEO did not suggest that this would be a viable option but said it during a discussion on management options with industry members, in order to highlight the challenges involved if the number of permits were to vary in line with the TAC each year. This context has not been reflected and as such the CEO has been misquoted.
- If the Order is not to be renewed it is accepted that it would be probably possible to produce a Byelaw or set of Byelaws which replicate accurately the full effect of the WFO, however these should be able to be scrutinised by industry.
  - We are in agreement that a Byelaw can provide what a Regulating Order can provide. We also agree that industry should be consulted on the Byelaw and associated policies.

## Outcome

As documented in the table above, we reviewed all responses to the consultation and will undertake the following:

- Review the wording of the aim and objectives for clarity and purpose.
- Use the better formed understanding of industry priorities learned through this consultation to inform the development of the new policies and permit criteria.
- Continue to consult with industry on the policies, the Byelaw, and the Several Order for the lays, as they are developed.
- To seek to improve communication with industry, prioritising prompt responses and clear discussion.
- To mitigate the current uncertainty felt by fishermen by prioritising the security and continuity of fishing activity in The Wash through the development of the new policies and Byelaw.

## Next Steps

The Authority will seek to make the Byelaw at its meeting on 10<sup>th</sup> March 2021 and the views expressed by industry will be considered in this process. As discussed in this consultation, the key elements relating to access to the fisheries will be addressed in policies, eligibility criteria and permit conditions that will sit under the Byelaw. These are being consulted on separately to the consultation on the making of the Byelaw. As such, the Byelaw making process does not need to be delayed, reducing any risk of a gap when the WFO expires, and dialogue can continue to seek appropriate solutions.

The development of the Several Order to manage the lays will also be progressed in the coming months and external consultants will be talking to industry as part of the economic assessment of the Wash fisheries that has been commissioned by the Authority.

We recognise the burden that this amount of consultation places on industry. Your continued engagement is critical to the development of a Byelaw and associated policies that will best suit the needs of industry. Thank you for your engagement with this work so far.

You can find out more about the ongoing work of reviewing and replacing the Wash Fishery Order 1992 and future consultation work, for this Byelaw and other ongoing management work in our district, on our website: [www.eastern-ifca.gov.uk](http://www.eastern-ifca.gov.uk)