MANAGEMENT OF ENGLISH AND WELSH INSHORE WATERS AND THE MARINE AND COASTAL ACCESS BILL

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This article traces inshore sea fisheries management in England and Wales from its inception to the present day and outlines the changes that the Marine and Coastal Access Bill now going through the UK Parliament seems likely to make. It is predicated on the clauses in the Marine and Coastal Access Bill as printed for the House of Lords in December 2008. It takes no account of the current proceedings on the Bill in Parliament.[2]

THE BEGINNING

Population increase, the development of industrial towns as markets needing cheap food and the growth of the railway network progressively provided the incentives that after about 1830 saw a massive expansion in the fish catching capacity of the United Kingdom fishing fleet. The same period also saw the rapid change over from age old fishing methods using lines and hooks for whitefish[3] to using trawl nets,[4] which had a much greater ability to capture significant quantities of fish. Over much the same period the number, size and efficiency of drift nets used to catch species such as herring and mackerel improved markedly. Fisheries science was in its infancy but trawling vessel fleet owners became aware quite quickly that the size of fish being landed was decreasing. And so an early symptom of the trend towards 'overfishing' had arrived.

Royal Commissions were established in 1863 and 1883 and other authoritative inquiries met and reported in the intervening years. As so often in British public life the thrust of the reports of these bodies moved the argument forward as time passed; knowledge was gained and presumptions changed. The 1863 Commission reported that the use of the beam trawl in the open sea was not injurious to the fisheries (contrary to the fishermen's observations); the 1883 Commission reported in favour of a single body for the management of the country's fisheries. This was a complete change of view in 20 years from 'there is no problem' to 'Government intervention is needed'.

Over much the same timescale the scientific community was arguing for government funding for fisheries science. This led to the Marine Biological Association opening a laboratory at Plymouth in 1888. The Government's fisheries research facility at Lowestoft followed in 1902. Fisheries science had begun in earnest and it was not before time. One of the most quoted of the fisheries scientists in the United Kingdom was probably Thomas Huxley. In a paper given at the London Fisheries Exhibition in 1883 (or perhaps I should note as late as 1883) he stated that:

> I believe that it may be affirmed with confidence that in relation to our present modes of fishing, a number of the most important sea fisheries such as the cod fishery, the herring fishery and the mackerel fishery are inexhaustible.

And later in the paper:

> … nothing we do seriously affects the number of fish …. And that any attempt to regulate these fisheries seems consequently from the nature of the case to be useless.

As far as I can see at this remove Huxley's remarks were a generalisation based on the seemingly limitless herring in the North Sea at that time rather than a conclusion based on any scientific data. Once data were available from landings and so forth collected after 1888 by the Sea Fisheries Committees and others, Walter Garstang, an early member of the fisheries laboratory at Lowestoft, published a paper[5] in 1901 in which he reported that:

> … the bottom fisheries are not only exhaustible, but in a rapid and continuous process of exhaustion … the rate at which sea fishes multiply and grow … is exceeded by the rate of capture.

Garstang had also built on the work of others and produced tables of what he termed [fishing] smack effort or in our terms catch per unit effort. They showed that catches per vessel had been declining for some time and doing so quite steeply.

THE SEA FISHERIES COMMITTEES

In the late 1880s the government decided that there must be fisheries management. In 1888 the Sea Fisheries Regulation Act reached the statute book. It applied only in England and Wales; Scotland went its

1 The association represents the wider interest of the 12 Sea Fisheries Committees of England and Wales charged by Parliament with fisheries and marine nature conservation management in the 6-mile zone of the UK territorial sea.

2 The article is based upon a talk given at the United Kingdom Environmental Law Association Water Working Party seminar held on 17 March 2009.

3 Cod, haddock, plaice, sole etc are included within this description.

4 Trawlers working under sail used beams to keep the nets open and on the sea bed. Once steam came into the fleet after 1881, when the first purpose built steam trawlers were launched, these vessels used otter trawls to extend the mouth of nets. Very quickly the open mouth of a net in use doubled in size.

5 'The Impoverishment of the Sea'.

own way. There was to be no single manager as recommended by the 1883 Royal Commission but instead each county or county borough council[6] could apply for a Sea Fisheries Committee to manage the fisheries of its district. This Act provided the mechanism for the Board of Trade[7] to create Sea Fisheries Committees (SFCs) and for the day to day work of these SFCs, which were committees of the new county council or county borough councils, to be done by them.

This was the first attempt at sea fisheries management in England and Wales[8] and in 1888 the Act was the only vehicle to manage fisheries within the territorial sea.[9] At that time all waters outside three miles were regarded as the high seas and such management as there was depended on agreements between like-minded states. For all practical purposes the 1888 legislation remained in force until 1966 when, together with some minor measures dating back to the 1930s, it was consolidated as the Sea Fisheries Regulation Act 1966. That 1966 Act is still on the statute book, so it should come as no surprise when, occasionally, the SFCs look to be behind the game for they are of necessity working within legislation originally drafted when sail and oar powered the fishing fleets and a cart met landing vessels. Today, of course, the SFCs have to manage a 21st century activity where diesel engines, global positioning satellites and 40 tonne lorries are the norm.

The SCFs' first main task was to keep those trawlers capable of working well offshore out of inshore waters, for it was now agreed that they were indeed destroying spawn and small fish as the fishermen had contended for many years. Progressively the SFCs turned their attention to mesh sizes in nets, landing sizes of fish and shellfish and in fact to many of those activities that are now common to all fisheries management schemes.

It is a tribute to all concerned that the practical, local and sympathetic management of the 0–6 mile zone[10] by the SFCs has ensured that very considerable areas were and are in sufficiently good condition to be accepted by the European Commission as appropriate for designation as European Union Marine Special Areas of Conservation (EU MSACs) under the Habitats Directive and that the Joint Nature Conservation Council and Natural England are currently working hard to plan the new Marine Conservation Zones (MCZs) that are expected to be designated after the Marine and Coastal Access Bill[11] has been enacted. Inevitably many of the sites that will be proposed will be found to be within the inshore areas managed by the SFCs.

Much of this environmentally appropriate work was done by the SFCs before they were obliged by law to be conservation minded. This task was rightly added to the remit first by the Sea Fisheries (Wildlife Conservation) Act 1992 and then by the Conservation (Natural Habitats &c) Regulations 1994, which gave the SFCs the status of 'competent authority' for the purposes of the EU Habitats Directive, and by the Environment Act 1995.[12]

This new burden of very necessary environmental law brought home to the SFCs just how inadequate their basic legislative tools had become in the late 20th century. Therefore some 10 years ago the SFCs began the long task of persuading government that radical change was essential. In this they have been very largely successful. Ministers have concluded, after reviews, that the SFC model, which brings professional managers together with inshore stakeholders within a decision-making body that has the power to legislate by byelaw, remains appropriate to modern day circumstances. Equally importantly, they also agreed that radical change to the SFCs' powers and duties were needed to bring them into the 21st century. Clauses 145–179 of the Marine and Coastal Access Bill[13] and certain other clauses in the Bill are the result.

THE MARINE AND COASTAL ACCESS BILL AND INSHORE FISHERIES AND CONSERVATION AUTHORITIES

Fisheries management is a devolved subject within the United Kingdom. Whilst the international aspect of fisheries policy is reserved to Westminster, the domestic issues have been devolved. Thus, while England will reform the SFCs, the Welsh Assembly Government has announced that it will take SFC work and all other fisheries management and enforcement work in-house. There are clauses[14] in the Bill that allow the Welsh Assembly Government to take on the powers of the successor bodies to the SFCs, although there appears to be nothing in the Bill that obliges the Welsh Assembly Government to take on the duties that the Bill places upon these successor bodies. So in Wales the SFCs will disappear and from now on my remarks will relate to the successor bodies to England's SFCs.

Whilst it would be untrue to say that the existing SFC legislation is permissive, there is no duty to do anything in particular. The Marine and Coastal Access Bill abolishes SFCs and their districts and substitutes Inshore Fisheries Conservation Authorities (IFCAs) and districts and rectifies the duty point by introducing two duties. These are:

6 Brought into being by the Local Government Act 1888.

7 The fisheries functions of the Board of Trade were subsequently transferred to the Board of Agriculture and Fisheries (1889), thence to the Ministry of Agriculture and Fisheries (1919) which became the Ministry of Agriculture, Fisheries and Food (MAFF). The national government fisheries function is now within the Department for Environment, Food and Rural Affairs (Defra).

8 Scotland had had 'Fisheries Boards' for some time.

9 There were a number of international agreements in the 1880s, for example, in which states recognised each others' territorial sea as being three miles. One example is the North Sea Convention 1882.

10 In 1992 the Ministry of Agriculture, Fisheries and Food announced that responsibilities of the SFCs extended out to six nautical miles from baselines.

11 Clauses 113–143 of the Bill deal with MCZs to be designated by the Secretary of State.

12 Other environmental obligations are set out in the Wildlife and Countryside Act 1981, the Countryside and Rights of Way Act 2000 and the Natural Environment and Rural Communities Act 2006.

13 Where clauses in the Bill are referred to they are as in the print introduced to the House of Lords in December 2008.

14 Clauses 180 et seq.

- to manage the exploitation of sea fisheries resources in its district (clause 149(1))
- to further the conservation of any MCZs that are created in any district following enactment of the Bill (clause 150).

Also, although not in the Bill but part of the IFCAs' inheritance, there is a duty to manage fisheries in existing or new EU MSACs so as to secure the purpose for which the designation was made.

Each IFCA is enjoined by clause 149(2) that in the performance of the clause 149 duty in its district it should:

- seek to ensure that the exploitation of sea fisheries resources is carried out in a sustainable way
- seek to balance the social and economic benefits of exploiting the sea fisheries resources with the need to protect the marine environment, or to promote its recovery from the effects of such exploitation
- seek to balance the different needs of people engaged in exploitation of sea fisheries resources
- ensure that nothing in the performance of the clause 149 duty is to affect the performance of the duty imposed by clause 150.

Underneath those duties and precepts the Bill expresses a desire, sometimes latent, for each IFCA to:

- undertake an assessment of its inheritance – and thus to decide what SFC byelaws to keep (revised as necessary) and which to revoke
- regulate and enforce commercial fisheries and linked nature conservation measures
- regulate, enforce and implicitly assist the development of recreational fishing and angling
- regulate bait collection
- develop fisheries
- legislate through byelaws made by the IFCA but signed into law by the Secretary of State[15]
- legislate on their own initiative by emergency byelaws where the need to make a standard byelaw could not reasonably have been foreseen. (These emergency byelaws may be brought into force without prior reference to the Secretary of State. He must, however, be notified immediately afterwards and they have to be justified to the Secretary of State within 12 months (or 18 months if the Secretary of State allows an extension). Otherwise, they fall. If justified they are to be remade, with or without modifications, as standard byelaws.)
- enforce national or EC fisheries conservation regulations
- enforce national nature conservation regulations (probably)[16]
- work closely and effectively with the Marine Management Organisation (MMO) – and the Bill gives the MMO powers to transfer work to IFCAs
- work closely with the Environment Agency and other public authorities that exercise functions relating to activities in the sea
- collect information for management purposes; and to make information available to the Secretary of State
- work in accordance with guidance from the Secretary of State. (The potentially wide scope of this guidance is limited at clause 149(5) by the requirement that the Secretary of State must take into account the functions of the IFCAs, the functions exercisable in IFCA districts by other bodies and persons and the resources available or likely to be available to each IFCA.)
- prepare an annual plan and send it to the Secretary of State
- report to the Secretary of State each year in a form he specifies and publish the report and (implicitly) provide the Secretary of State with the material he needs to meet his obligation in clause 174 to report to Parliament every fourth year about the conduct and operation of the IFCAs.

IFCAS AND THE ENVIRONMENT AGENCY

The establishment of the IFCAs brings a new division of labour with the Environment Agency. Today there are really two outfits set up as SFCs. One is the SFCs proper (if I may use that term) and the other is the Environment Agency, which can use the powers available to SFCs in some instances. This is a source of confusion that the Bill will sweep away. Instead IFCAs are to be responsible for 'sea fisheries resources' which are defined at clause 149 of the Bill as meaning 'any animals or plants, [other than those fish falling within the Environment Agency's purview,] that habitually live in the sea, including those that are cultivated in the sea' and the Environment Agency's species are stated to be 'salmon, trout, eels, lampreys, smelt, shad, any other fish of a kind which migrates from fresh to salt water, or from salt water to fresh water, in order to spawn, and any freshwater fish'.

This division of labour as drafted is, of course, far sharper than the fish will recognise in estuaries. The IFCA districts are to be delineated inland by the inland boundaries of the local authorities that form an IFCA. IFCAs may also operate inland to the point to which the tidal stream flows at high water spring tides. (Clause 40 defines 'sea' in this sense.) Taken literally the IFCAs' responsibility would run inside the Norfolk Broads, for example. The reality is that IFCAs and the Environment Agency will need to agree local demarcation lines in the estuaries and similar waters and work through cross-warranting arrangements to ensure that each other's byelaws are enforced where there is a need. Both parties agree that this arrangement will work. IFCA officers do not need to go far inland to enforce their byelaws. Where the 'sea fisheries resources' that the IFCAs are to manage find their way inland by water and there is a need to enforce IFCA byelaws, then Environment Agency bailiffs can do what is needed. Similarly Environment Agency bailiffs do not need to go to sea to check their salmonid legislation. IFCA officers and Environment Agency officers will be cross-warranted.

15 The Secretary of State has power to amend or revoke byelaws (cl 148).

16 The exact nature of the practical responsibility to enforce nature conservation byelaws and to work closely with the Marine Management Organisation (MMO) still has to be teased out. What is certain is that neither IFCAs nor the MMO will have so many resources that they could live with duplication of effort.

This common approach to enforcement will be helped hugely by new common form enforcement provisions provided in the Bill at clauses 235–251. These provisions and powers will be common to MMO officers,[17] Royal Navy officers in the Fisheries Protection Squadron, IFCA officers and Environment Agency officers. Training will be delivered through the MMO and warrants allowing use of the powers will naturally enough only be issued after training.

WHAT IS AN IFCA?

Like a SFC, an IFCA is to be a sole committee of a single upper tier local authority if that one authority covers the whole of an IFCA district or a joint committee where two or more upper tier local authorities cover an IFCA district between them.[18] In England today there are 10.5 SFCs (the half is the England end of the North Western and North Wales SFC). How many IFCAs will there be? Defra is currently consulting on this very point.[19] The consultation is framed on two bases. One is to reduce the number to six regional bodies on the basis of an assertion that large must be better – an assertion that as far as I know had not been tested in the context of inshore fisheries when it was first uttered some eight years ago – and which still has not been tested. This regional solution would also ensure that the much prized 'localness' and effective stakeholder engagement that Defra is known to regard as essential to inshore management (and that is known to work) will be thrown away. The other option in the consultation is to have 10 IFCAs with districts broadly comparable to the SFC districts. There are two necessary changes. Cumbria and the rump North Western England would be brought together to manage the area from the Solway to the Dee, and Devon would take over the Environment Agency SFC role in the Severn Estuary and so extend from the Bristol Channel east from North Devon through Somerset and Gloucester and round to the Welsh Border at Chepstow. Devon, of course, would also manage its English Channel waters.

I would prefer to start with 10 IFCA districts into which the 120 years of SFC experience can be channelled. If further amalgamation of IFCAs becomes necessary in the future it will be far better that it comes about from practical experience of delivering the tasks required by the Bill rather than being done now on a theoretical and necessarily arbitrary basis.

WHO WILL BE AN IFCA?

An IFCA will consist of a mix of elected councillors from each authority that, as the Bill says, 'defrays the expenses' of an IFCA; one person from the MMO, one from Natural England, one from the Environment Agency and others to be appointed by the MMO. They are to represent what the Bill describes at clause 147 as 'persons acquainted with the needs and opinions of the fishing community[20] of the [IFCA] District and persons with knowledge of, or expertise in marine environmental matters'. The latter phrase is defined to include geological or physiographical features of marine or coastal areas, features of archaeological or historic interest, and flora or fauna dependent on or associated with a marine or coastal environment.

The exact mix will be specified in due course by statutory instrument as will the way in which byelaws are to be made and the IFCAs administered. Whilst that is in the future, it is a future that Defra is already contemplating.

WHO WILL PAY?

Clause 171 of the Bill states that the expenses incurred by the IFCAs are to be defrayed by the relevant council or councils. SFCs today run on about £500,000 each as an average figure; not a huge amount given that sea going and beach enforcement capabilities are needed. Defra initially announced that the new burden it would have to fund for local authority support grant purposes amounted to an additional £1.7m.[21] The association was allowed to see Defra's working assumptions which indicated that Defra was expecting IFCAs to deliver three times the output of the SFCs. Against that background and with the benefit of up to date equipment and delivery cost information Defra's assumptions were re-evaluated, establishing the new burden cost at £7.1m. The association also pointed out quite clearly to Defra two areas (management of recreational fishing and of bait collection) for which neither Defra nor the SFCs had prepared costs because the nature of the task was not known. The revised figure of £7.1m has never been seriously challenged. The investment appraisal accompanying the Bill gives a figure of some £4–6 million of new money but Defra officials are now assuming only twice the output. If the government wants the new inshore management system to work it has to put the money into the system. Equally the association and the putative IFCAs have to recognise, and do recognise, that when work started on the Marine Bill the country was in the halcyon days of prosperity and easy money. That has all changed. The Treasury will of necessity have to claw money out of Whitehall to offset the funds it has made available for the banking sector and so both sides need to be realistic. But the IFCAs cannot deliver what is not funded.

WHEN WILL THE CHANGES HAPPEN?

Subject to the Bill receiving royal assent during this session of Parliament the MMO is expected to operate from 1 April 2010 and the IFCAs from 1 April 2011. The

17 The MMO is created by clauses 1–38 of the Bill. As far as fisheries are concerned the former Sea Fisheries Inspectorate (now a component of the Marine and Fisheries Agency) will become part of the MMO with new duties and powers including enforcement powers. The latter include a responsibility for nature conservation as well as fisheries.

18 Clause 146.

19 The consultation closed on 22 April 2009.

20 This phrase encompasses the commercial fishing sector including fish merchants and other support services as well as recreational sea fishing including boat charter and its other support services.

21 Page 86 of the Partial Regulatory Assessment published with 'A Sea Change: A Marine Bill White Paper' Cm 7047 March 2007.

Welsh Assembly Government has indicated that it intends to bring its own fisheries management and enforcement operation into being on 1 April 2010.

WILL THE NEW SYSTEM WORK?

The inshore fisheries provisions in the Bill provide the new statutory foundations for which the SFCs have been asking for so long. The SFC model of local engagement between professional managers and local knowledgeable people is one that has been admired throughout the world. The government has managed to keep the best – the model – and to re-equip it with a legislative basis suitable for a modern purpose in a modern age. The IFCAs will not replicate SFCs. They will need to be more dynamic and forward looking. They will have to learn to balance the expectations and needs of those who work or take their leisure at sea with the aspirations of lobby groups and others concerned about the marine environment in the broadest sense. The change from SFC to IFCA is very much more than 'all change' to stand still.

The IFCAs will have the power to distinguish between the needs of one type of fishing rather than another. They will, therefore, be right to say that, fishing type x is relatively benign and beneficial and has its place, let us say, in square number 5 on the chart. It can also say that fishing type y just does not belong on the same type of ground as fishing type x and so will not be allowed in square number 5. The IFCAs must further marine conservation within the terms of the Bill – so it can say that there must be no fishing if that is the only way in which the designated purpose of a MCZ can be met. But equally it can take the view that the purpose of the MCZ can be furthered by allowing a particular fishing activity while prohibiting or restricting others or, indeed, by allowing all fishing to continue. The driver will always be the need to further the purpose for which a MCZ has been established.

Expectations will be high; possibly too high where the reality is that no IFCA can control the natural processes in the marine environment and many of the species that are to be found inshore at some stage of their lives will also be affected by decisions taken by other managers elsewhere. IFCAs can only seek to manage man's intrusions into their local inshore environment but by doing so they will contribute towards putting healthy foodstuff on the table in an increasingly sustainable way and, most importantly, to the improvement of the inshore marine environment as a whole.

All parties have to move away from the notion that all fishing is bad in all places at all times. The need now is to take progressive steps to ensure healthy foodstuff from the marine environment is taken in ever more sustainable ways. Fishermen have undoubtedly played a huge part in shaping some areas of the marine environment over millennia and their interactions with and within the marine environment have certainly grown rapidly since the 1830s. But despite this, I return to the point that inshore management by the SFCs in the 120 years since their inception has provided the circumstances, the habitats and the marine scapes that government nature conservation advisers now desire to have conserved on both the international and national scale.