

Guidelines for Sustainable Intertidal Bait and Seaweed Collection in Wales

LEGISLATIVE REVIEW

Authors

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Abbreviations

IROPI	Imperative Reasons of Overriding Public Interest
MCAA	the Marine and Coastal Access Act 2009
NRW	Natural Resources Wales
PCNPA	Pembrokeshire Coast National Park Authority
SAC	Special Area of Conservation
SPA	Special Protection Area
SSSI	Site of Special Scientific Interest
WCA	Wildlife and Countryside Act 1981

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EXECUTIVE SUMMARY

The foreshore is subject to various public rights including the public right to fish in tidal waters. Ancillary to this right is the public right to collect, for personal use, bait on the foreshore and floating seaweed from the tidal waters.

The collection of bait for commercial purposes is not permitted by the public right to fish, nor can it be the subject of a customary right. The collection of fixed seaweed or seaweed deposited on the shore cannot be the subject of a customary right either. To be legal, any such activities must be permitted by an acquired legal right known as a ‘profit à prendre’, which must be established either by an express grant, or by prescription (usage over time), or by permission of the land owner. This means that the legal position of persons carrying out activities on the intertidal area may well vary from site to site, depending on the nature of the relationship between the users and the landowner.

The conservation legislation applicable in Wales comprises two main pieces of legislation; the Wildlife and Countryside Act 1981 and the Habitats Directive (implemented in the UK by the Conservation of Habitats and Species Regulations 2010).

The Wildlife and Countryside Act provides the mechanism to designate an area as a Site of Special Scientific Interest and then protects those areas against both occupiers of the land and third parties that may damage the flora, fauna, or features for which the area was designated. Occupiers have a higher degree of responsibility for activities which they permit on their land.

The Habitats and Birds Directives each require areas of land, foreshore and sea to be designated and managed for the conservation of particular habitats and species. In addition, the Habitats Directive places positive obligations on various public bodies to manage the designated areas so as to comply with the Habitats Directive.

Both these pieces of legislation require active management of bait collection on the foreshore.

The public right to collect bait (when exercised as part of the public right to fish generally) and the public right to collect seaweed cannot be curtailed other than by the Welsh Government by Act of Parliament. It may be regulated by byelaw, but such byelaws will need to be drafted carefully and be in line with enabling legislation.

Collection activities can be regulated in a number of ways and by a number of different bodies. The most obvious being:

- the Welsh Ministers under the Marine and Coastal Access Act 2009 and Sea Fish (Conservation) Act 1967;
- National Resources Wales under either the National Parks and Access to the Countryside Act 1949 or the Wildlife and Countryside Act 1981; or
- the relevant County Council under the Public Health Acts Amendment Act 1907.

Regardless of any byelaws created under any of the above legislation, any collection activities not covered by the public right also need the permission of the occupier of the land in question.

There can be no ‘one size fits all’ approach to bait digging management, as the key is to ensure that any management strategy is backed up by reliable scientific evidence specific to the area in question. The level of bait digging activity that may be acceptable for one area of foreshore cannot be extrapolated to apply to all areas of the coast.

As well as a tailored approach suiting the specific area in question, any management strategy must include (as an integral part of that strategy) a package of enforcement measures which seek to ensure that the strategy is adhered to by all users of the foreshore. A strategy which is not backed up with adequate enforcement measures is likely to fail and may expose the implementing authority to the risk of infraction proceedings under the Habitats Directive.

CRYNODEB GWEITHREDOL

Mae yna hawliau cyhoeddus amrywiol mewn grym ar y blaendraeth, gan gynnwys yr hawl cyhoeddus i bysgota mewn dyfroedd llanwol. Yn ategol at yr hawl hwn, mae'r hawl cyhoeddus i gasglu abwyd ar y blaendraeth, a gwymon sy'n arnofio o'r dyfroedd llanwol, at ddefnydd personol.

Nid yw'r hawl cyhoeddus i bysgota yn caniatáu casglu abwyd at ddibenion masnachol, ac ni all fod yn destun hawl arferol. Ni all casglu gwymon sefydlog neu wymon sydd wedi ei ddyddodi ar y lan fod yn destun hawl arferol chwaith. Er mwyn iddo fod yn gyfreithlon, rhaid bod unrhyw weithgarwch o'r fath wedi'i ganiatáu gan hawl cyfreithlon a gaffaelwyd, a elwir yn '*profit à prendre*', a rhaid sefydlu hyn naill trwy addefiad union, neu trwy ragnodiad (defnydd dros amser), neu trwy ganiatâd perchennog y tir. Oherwydd hyn, fe all sefyllfa gyfreithiol y rheiny sy'n ymgymryd â gweithgareddau yn yr ardal rhynglanwol, amrywio o safle i safle, gan ddibynnu ar natur y berthynas rhwng y defnyddiwr a pherchennog y tir.

Mae'r ddeddfwriaeth cadwraeth sy'n berthnasol i Gymru'n cynnwys dau brif ddarn o ddeddfwriaeth; Deddf Bywyd Gwyllt a Chefn Gwlad 1981 a Chyfarwyddeb Cynefinoedd (a weithredir yn y Deyrnas Unedig gan Reoliadau Gwarchod Cynefinoedd a Rhywogaethau 2010).

Deddf Bywyd Gwyllt a Chefn Gwlad yw'r mecanwaith ar gyfer dynodi ardal yn Safle o Ddiddordeb Gwyddonol Arbennig ac yna mae'n gwarchod yr ardal honno rhag deiliaid y tir ac unrhyw un arall a allai niweidio'r blodau, y ffawna neu nodweddion y dynodwyd yr ardal o'u herwydd. Mae gan ddeiliaid fwy o gyfrifoldeb dros weithgareddau y maen nhw'n eu caniatáu ar eu tir.

Mae'r Cyfarwyddebau Cynefinoedd ac Adar yn gofyn am ddynodi ardaloedd o dir, blaendraeth a môr, a'u rheoli, er budd cadwraeth cynefinoedd a rhywogaethau penodol. Yn ychwanegol at hyn, mae'r Gyfarwyddeb Cynefinoedd yn gosod rheidrwydd positif ar gyrff cyhoeddus amrywiol i reoli'r ardaloedd a ddynodwyd er mwyn cydymffurfio â'r Gyfarwyddeb Cynefinoedd.

Mae'r ddau ddarn yma o ddeddfwriaeth yn gofyn am reoli gweithgarwch casglu abwyd yn weithgar ar y blaendraeth.

Ni ellir cwtogi ar yr hawl cyhoeddus i gasglu abwyd (pan gaiff ei arfer fel rhan o'r hawl cyhoeddus i bysgota'n gyffredinol) na'r hawl cyhoeddus i gasglu gwymon, ac eithrio gan Lywodraeth Cymru drwy Ddeddf Seneddol. Gellir ei reoleiddio trwy is-ddeddf, ond fe fydd angen drafftio is-ddeddfau o'r fath yn ofalus a rhaid eu bod yn cydymffurfio â deddfwriaeth sy'n galluogi.

Gall nifer o gyrff gwahanol reoleiddio gweithgarwch casglu, a hynny mewn sawl ffordd. Dyma'r rhai mwyaf amlwg:

- Gweinidogion Cymru dan Ddeddf y Môr a Mynediad i'r Arfordir 2009 a Deddf Pysgod Môr (Cadwraeth) 1967;
- Cyfoeth Naturiol Cymru dan Ddeddf Parciau Cenedlaethol a Mynediad i Gefn Gwlad 1949 neu Ddeddf Bywyd Gwyllt a Chefn Gwlad 1981; neu
- Y Cyngor Sir perthnasol dan Ddeddf Diwygio Deddfau Iechyd y Cyhoedd 1907.

Waeth beth yw'r is-ddeddfau sydd wedi cael eu creu dan unrhyw rai o'r deddfwriaethau uchod, mae angen caniatâd ar unrhyw weithgarwch casglu nad ydyw'n dod o dan yr hawl cyhoeddus, a hynny gan ddeiliad y tir dan sylw.

Ni ellir cael un ymagwedd at bob sefyllfa wrth drafod rheolaeth gweithgarwch palu am abwyd, oherwydd yr allwedd yw sicrhau bod unrhyw strategaeth rheolaeth yn seiliedig ar dystiolaeth wyddonol ddibynadwy sy'n benodol i'r ardal dan sylw. Ni ellir cymryd y lefel gweithgarwch palu am

abwyd sy'n dderbyniol mewn un ardal o'r blaendraeth, a'i ddefnyddio ar gyfer pob ardal ar yr arfordir.

Yn ogystal ag ymagwedd wedi ei theilwra sy'n addas i'r ardal benodol dan sylw, rhaid i unrhyw strategaeth rheolaeth gynnwys (fel rhan annatod o'r strategaeth) becyn o fesurau gorfodi sy'n ceisio sicrhau bod pob un sy'n defnyddio'r blaendraeth yn cadw ati. Mae strategaeth sydd heb fod yn seiliedig ar fesurau gorfodi digonol yn debygol o fethu, ac fe allai olygu bod yr awdurdod gweithredol mewn perygl o wynebu achos o dorri cyfraith Ewropeaidd dan Gyfarwyddeb Cynefinoedd.

SECTION A: SCOPE OF RIGHTS OVER THE FORESHORE

Summary

The foreshore is subject to various public rights including the public right to fish in tidal waters. Ancillary to this right is the public right to collect bait on the foreshore for personal use and the public right to collect floating seaweed from the tidal waters.

The collection of bait for commercial purposes is not permitted by the public right to fish, nor can it be the subject of a customary right. The collection of fixed seaweed or seaweed deposited on the shore cannot be the subject of a customary right either. To be legal, any such activities must be permitted by a *profit à prendre*¹, which must be established either by an express grant or by prescription (usage over time) or by permission of the land owner. This means that the legal position of persons carrying out activities on the intertidal area may well vary from site to site, depending on the nature of the relationship between the users and the landowner.

1. The Extent of the Foreshore

The foreshore is generally known as the area between the high water mark and the low water mark of ordinary tides, meaning the medium tide between the spring and neap tides. However, case law has concluded that the lower limit of the foreshore also includes all that area of the seashore that is exposed by the tides from time to time². This would therefore include the area of the shore that is only exposed during low water spring tides.

The Crown is the *prima facie* owner of the foreshore and the seabed out to 12 miles by virtue of prerogative right³. This right may be subject to either an express grant from the Crown to a third person or proof of adverse possession for a period of 60 years or more, in which cases a grant by the Crown will be presumed.⁴ Today The Crown Estate owns around half of the foreshore around England and Wales, although large parts are leased to third parties such as local authorities, National Parks⁵, and the National Trust. The remainder of the foreshore is owned by bodies including port authorities, local authorities, statutory bodies and government departments, and some private individuals.

The foreshore, like any other land, can be subject to the doctrine of adverse possession⁶ (squatters' rights). It can also be registered as a Town and Village Green under the Commons Act 2006.⁷

2. The Rights of an Owner of Foreshore Land

An owner of foreshore land has the same rights as an owner of any other piece of land. These rights include the right to occupy the surface of that land to the exclusion of all others and the right to take any natural products found on the land (not including 'sea fish'). The foreshore owner's rights are

¹ A right to enter another's land to take something.

² *Anderson v Alnwick D.C.* [1993] 1 WLR 1156, per Evans LJ.

³ *Halsbury's Laws of England*, Crown Property Vol. 12(1) (Reissue), 242.

⁴ *Halsbury's Laws of England*, Constitutional Law and Human Rights Vol. 8(2) (Reissue), 869.

⁵ www.thecrownestate.co.uk accessed 14 February 2014.

⁶ See *Roberts v Swangrove Estates Ltd* also known as *Roberts v The Crown Estate Commissioners* [2007] 2 P & CR 17. In this case The Crown Estate and other parties were treated as squatters and had to prove their possession against a paper title holder. The claim of the Commissioners in respect of the foreshore of a river succeeded.

⁷ *R (on the application of Newhaven Port and Properties Ltd) v East Sussex County Council* [2013] 3 WLR 1389.

subject to various rights (in favour of the general public and/or specific parties) peculiar to the foreshore, which are detailed below.

An owner of foreshore may have an exclusive right to fish in the waters adjoining it (a several fishery), but this does not follow as a matter of course and would need to be established as detailed below and the more usual position is for the foreshore to be subject to the public right to fish.

3. The Rights to which Foreshore Land is Subject

3.1 The public right to fish

Foreshore owners are subject to the public right to fish (described by Hall, in his *Essay on the Rights of the Crown in the Seashore*,⁸ as a “beneficial privilege enjoyed by British subjects, time out of mind”). It is delineated by Moore and Moore⁹ as follows:

“In tidal waters, estuaries and arms of the sea below the high water mark of ordinary tides situate within the limit of the kingdom... the public as subjects of the realm, have the right to fish to the exclusion of the subjects of all foreign powers, except in such parts of those tidal waters as have been legally appropriated as private fisheries.”

The public right to fish in tidal waters extends to land which is the foreshore when the tide is out, but which is covered with water when the tide is in. Furthermore, the public right to fish includes a right to take or catch “shellfish” on the foreshore.¹⁰ That this includes times when the tide is out and the foreshore is not covered in water, was confirmed in *Adair v The National Trust*.¹¹ The public therefore have a right to fish from and collect shellfish from all parts of a beach that are subject to the tides, even when the tide is out.

3.1.1 Exclusion of the public right to fish

The public right to fish can be excluded by a private right to fish granted by the Crown or acquired through prescription. A private right to fish carries with it the right to exclude the public from exercising any public right of fishery within its area.¹²

Although erroneous,¹³ it has long been settled law that the Magna Carta (chapter 16) prevents the Crown from granting any new private fisheries. A party claiming a private right to fish, other than by prescription, must therefore technically show an express grant or charter from the Crown pre-dating the Magna Carta. In reality:

“if evidence be given of long enjoyment of a fishery, to the exclusion of others, of such character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that its origin was modern, the result is, not that you say, this is usurpation, for it is not traced back to the time of Henry II, but that you presume that the fishery being reasonably shown to have been dealt with as property, must have

⁸ Included in Moore S. (1888) *History & Law of the Foreshore & Sea-shore*, London: Stevens and Haynes. 3rd ed.

⁹ Moore, S. and Moore, H.(1903)*The History and Law of Fisheries*, London: Stevens and Haynes, p. 95.

¹⁰ Hall’s *Essay*, 865.

¹¹ *Adair v The National Trust* (1997) Northern Ireland Unreported Judgments.

¹² *Loose v Lynn Shellfish Limited* [2103] EWHC 901 (Ch).

¹³ See Bonyhady, T. (1987) *The Law of the Countryside; The Rights of the Public*, Oxford: Abingdon, pp. 243–246 for an explanation of the root of the erroneous assumption.

become such in due course of law, and therefore must have been created before legal memory”¹⁴

The public right to fish can be restricted by legislation. The role of such legislation is discussed in detail later in this report.

3.1.2 Rights ancillary to the public right to fish

3.1.2.1 The right to pass along the foreshore

There is no general right for the public to access the foreshore. However, “as the public right of fishery cannot be enjoyed without making use of the sea-shore for egress and regress, and for other essential conveniences which the fishery requires..., the use of the sea-shore for all purposes essential to the enjoyment of the right of fishery, necessarily accompanies such right”.¹⁵

3.1.2.2 The right to collect bait

There is no explicit definition of the term bait. The term relates to captured marine or intertidal organisms to be used for commercial or recreational fishing.

*Anderson v Alnwick District Council*¹⁶ confirmed that the right to dig for bait on the foreshore is ancillary to the public right to fish “when the bait is taken by or on behalf of persons who require it for use in the exercise of [the public right to fish]”. That case also confirmed that commercial bait digging, meaning collection of bait to sell or give to third parties to use, is not permitted by the ancillary bait collection right enjoyed by the public.

There are two interpretations of the phrase ‘commercial bait digging’. The first is the scenario in *Anderson*, where the person digging for bait intends to sell (or exchange) the bait to third parties for their use in fishing. This is clearly not permitted. However, the second is the scenario in which the person digging for bait intends to use the bait in his own commercial fishing operations. This would appear to be permitted by the judgment in *Anderson*.

The type of bait collected is also important, since the right to fish applies to fish and shellfish species. Where bait collected is classified as ‘fish’ (such as peeler crabs) then it can be argued that there is a prima facie right to collect it directly under the public right to fish. Other marine organisms (such as rag worms) can only be collected ancillary to the public right to fish and must therefore be directly used for fishing by the collector, hence the absence of a right to resell.

If the public right to collect bait is ancillary to the public right to fish, the query arises as to what happens when the public right to fish has been excluded; such as where a several fishery exists. There is no case law directly answering the question as to whether the exclusion of the public right to fish also excludes the ancillary right to collect bait from the affected area. However, the judgment in *Anderson v Alnwick District Council* allowed that bait collection did not have to take place in the immediate environs of the location that the right to fish was practised. The case involved a byelaw made by Alnwick District Council that prohibited bait digging on certain beaches.¹⁷ The Court held,¹⁸

¹⁴ *Malcolmson v O’Dea* (1863) 27 JP 820, 10 HL Cas 593, 9 Jur NS 1135. This approach was confirmed in the recent case of *Loose v Lynn Shellfish Limited* [2013] EWHC 901 (Ch).

¹⁵ Hall’s Essay, 717.

¹⁶ Op Cit per Evans LJ 1170.

¹⁷ Discussed in more detail below.

¹⁸ Op Cit per Evans LJ 1170.

inter alia, that the byelaw was not ultra vires, as the rule prohibiting bait collection in Boulmer Haven covered:

“only a small part of the foreshore within the local authority’s area, and an even smaller part of the Northumbrian foreshore. They can thus be said to be regulatory byelaws, making a rule in respect of an area larger than fishermen would like, but still not such as to prohibit them obtaining worms reasonably close by”.

3.1.2.3 The public right to collect seaweed

There would appear to be a common law right for the public to collect floating seaweed from tidal waters (see below), but the position of fixed seaweed or seaweed deposited on the foreshore by the action of the tides is less clear. Seaweed collection is examined in more detail below.

3.2 Customary rights

A customary right is a particular rule which has existed either actually or presumably from time immemorial and has obtained the force of law in a particular locality although contrary to or not consistent with the general law of the realm.¹⁹

A party seeking to establish a customary right must show that the right claimed (i) has been in existence from legal time immemorial (meaning since before 1189) and has continued without interruption, (ii) is reasonable, and (iii) is certain in respect of its nature and locality.²⁰ With regard to the reasonableness requirement, an alleged custom will be unreasonable if it would destroy the subject matter of the right. For this reason a profit à prendre (meaning a right to take something from land belonging to someone else) cannot be the subject of a customary right.

A customary right to do something cannot arise where there is a common law right to do the same thing already in existence. There can therefore not be any customary right to collect bait for the collector’s own use as this is the subject of a common law right. With regard to the collection of bait for commercial purposes, while there is no common law right permitting this, it can still not be permitted by a customary right as it is in the nature of a profit à prendre and therefore does not pass the reasonableness test for establishing a customary right.

The position with regard to the collection of seaweed is less clear. Moore’s History and Law of the Foreshore²¹ cites *Howe v Stawell*²² as stating that the only common law rights are those of piscary and navigation, and that there is no common law right to access the foreshore to take seaweed. Halsbury’s confirms this.²³

Bonyhady²⁴ states that rights in respect of seaweed collection depend upon whether such seaweed is fixed to the seabed or merely floating in the sea. He suggests that, with regard to floating seaweed, case law from the USA confirms that there should be no distinction between animal and vegetable products of the sea and so, just as the public have a common law right to fish in tidal waters, they should be regarded as having a common law right to take vegetable and mineral

¹⁹ *Adair v The National Trust* (1997) Northern Ireland Unreported Judgments.

²⁰ Ibid.

²¹ Op Cit 464.

²² Alcock & Nap. 348.

²³ *Halsbury’s Laws of England, Water and Waterways* Vol. 100 (2009) 5th Ed., 61.

²⁴ *The Law of the Countryside; The Rights of the Public*, Tim Bonyhady (1987).

products from the sea floating in the same area.²⁵ Indeed, in the later case of *Adair v The National Trust*, Girvan J, in considering the extent of any rights of access for seaweed collection, assumed that the public have a common law right to collect floating seaweed:

“The fact that members of the public have a right to swim or bathe in the sea²⁶ does not imply a right to cross the foreshore to exercise that right. Similarly the right of members of the public to take seaweed floating in the sea does not mean that they have a right to lift seaweed lying on the foreshore. Thus Lawson J in *Brew v Haren*²⁷ stated –

“In cases where the seashore remains in the King, seaweed driven above the high water mark, of course, belongs to the owner of that land. The right of the public to take it when floating provided he can do so without trespassing on the soil of an individual is as clear as their right to catch fish in the ocean but when seaweed has once touched the shore and can only be taken from it the public right ceases and that of the Crown or its grantee commences.”

It is submitted that floating seaweed can be collected by boat as of public right, although there is no automatic public right to go over the foreshore to get to the tidal waters. Since much of the foreshore is in public ownership that may not mean the public do not have permission, as the public owner may be happy to allow public access, but the public are not be able to claim strict right. Access by boat is covered under the public right of navigation. Seaweed that is fixed in tidal waters belongs to the seabed owner and seaweed that has been deposited upon the foreshore by the action of the tides belongs to the owner of the foreshore²⁸.

As the taking of seaweed from someone’s land cannot be the subject of a customary right, if anything at all, it must be either the subject of an express grant from the landowner or a profit à prendre. The absence of a strict right means the land owner may have the potential to sue the picker for trespass and either seek damages or an injunction, and it could potentially rank as theft, but in practice both the Police and private land owners tend to tolerate this action. This approach would probably change if the was a case of intensive operations without the land owner’s consent.

It is important to recognise that the only public rights relate to floating seaweed and fishery. There are no other public rights to gather organic or inorganic matter from the foreshore, so instances of wild gathering constitute a potential trespass unless otherwise authorised.

3.3 Profits à prendre

A profit à prendre is a right to enter another’s land and take something (that thing being both capable of ownership and a product of nature). It can take one of many forms.

A several profit is a right exercisable only by the party to whom the profit was granted²⁹ (a right to fish is presumed to be a several profit unless the grant contains words to the contrary³⁰). A profit in common is a right that benefits more than one party and also the landowner. A profit can attach to land in the same way as an easement, in which case it is called a profit appurtenant. Profits

²⁵ Ibid. 209.

²⁶ This is an error in the judgment – there is no public right to swim in the sea.

²⁷ (1877) 11 ILTR 66

²⁸ *Halsbury’s Laws of England, Water and Waterways* Vol. 100 (2009), 61.

²⁹ A several profit excludes the landowner unless it has reserved the same right, in which case the landowner exercises the right as a beneficiary of the profit and not as landowner.

³⁰ *Hanbury v Jenkins* [1901] 2 Ch 401.

appurtenant pass automatically to each successive owner of the land.³¹ The final class is profits in gross, which do not attach to any dominant land.

A profit à prendre cannot be claimed under an alleged custom,³² nor can it be claimed in favour of an indefinite and fluctuating body of persons (such as the general public or the inhabitants of a county), as this would exhaust the subject matter of the profit and so be unreasonable.³³ This was confirmed in *Adair v The National Trust*³⁴ with reference to bait collection. The court held that there could be no customary right to collect bait for commercial purposes (meaning for the purposes of selling such bait on to other fishermen). The collection of bait amounts to a profit à prendre (i.e. taking something from land belonging to someone else) and the collection of it for commercial purposes would destroy the subject matter of the right and so fail the reasonableness test.

However, although profits à prendre cannot be claimed by local custom, there are still options open to parties claiming rights over other's land:

3.3.1 Lost modern grant and prescription

If the fact of the matter is that certain rights have been enjoyed for a very long time, it may be possible to uphold them either under the doctrine of lost modern grant or by prescription (either at common law or under the Prescription Act 1832).

Common law prescription and the doctrine of lost modern grant are similar concepts. Both allow a presumption of an express grant of a right (such as a profit à prendre), if it can be shown by the party seeking to establish the right that the right has existed for a long period of time³⁵.

If the claimed profit attaches to land (i.e. is a profit appurtenant), then the Prescription Act 1832 will apply. This Act requires evidence that an activity has taken place as of right for at least 30 years in order to establish a profit à prendre. If the activity has taken place for more than 60 years as of right, then it is deemed absolute and indefeasible, unless it appears that it was enjoyed by consent or written agreement.

Whether or not a profit à prendre permitting the collection of seaweed affects any area of foreshore is therefore difficult to state for certain and depends on the exercise of rights by individuals over a specified area of foreshore.

3.3.2 Constructive trust

In *Goodman v Saltash Corporation*³⁶ the House of Lords considered the case of oyster fishing in a tidal section of the river Tamar. The Corporation claimed a several fishery on the basis of prescription and brought an action for trespass against members of the public residing in Saltash who had been fishing for oysters in the Tamar. The Corporation's several fishery was upheld, but it was also held that the free inhabitants of the ancient tenements of Saltash had, since time immemorial, fished for oysters in the Tamar between Candlemas and Easter (about half the oyster season). The free inhabitants could not claim a profit à prendre as they were an indefinite and

³¹ By virtue of section 62 of the Law of Property Act 1925.

³² *Halsbury's Laws of England*, Custom and Usage Vol. 32 (2012), 31.

³³ *Ibid.* 32.

³⁴ *Op. Cit.*

³⁵ For further details on the differences between the two constructs and the length of user required to establish a presumed grant through either method see *Halsbury's Laws of England*; Real Property and Registration, Vol. 87 (2012), 874 onwards.

³⁶ (1882) 7 App. Cas. 633.

fluctuating group of people. However, the Court held that the Corporation's prescriptive fishery had to be construed as being granted subject to a condition or proviso that the free inhabitants should be entitled to fish for oysters every year between Candlemas and Easter. As such it was a charitable trust. The action for trespass failed.

It is therefore possible for the inhabitants of a particular location to establish a right to go onto the foreshore and collect bait, by establishing the existence of a charitable trust in their favour.³⁷

³⁷ This was attempted in *Alfred F Beckett Ltd & another v Lyons & others* [1967] 1 All ER 833, where it was claimed that the inhabitants of the county of Durham had the right to enter onto certain beaches to collect sea coal by virtue of a charitable trust as in *Goodman v Saltash*. The claim failed on the basis that there was not enough evidence to show sufficient exercise of the alleged right by a sufficiently wide number of people within the county of Durham.

SECTION B: CONSERVATION LEGISLATION

Summary

The conservation legislation applicable in Wales comprises two main pieces of legislation; the Wildlife and Countryside Act 1981 (WCA) and the Habitats Directive³⁸ (implemented in the UK by the Conservation of Habitats and Species Regulations 2010 (the “Habitats Regulations”).

The WCA provides the mechanism to designate an area as a Site of Special Scientific Interest and then protects those areas against both occupiers of the land and third parties that may damage the flora, fauna, or features for which the area was designated. Occupiers have a higher degree of responsibility for activities which they permit on their land.

The Habitats and Birds Directives each require areas of land, foreshore and sea to be designated and managed for the conservation of particular habitats and species. In addition, the Habitats Directive places positive obligations on various public bodies to manage the designated areas so as to comply with the Habitats Directive.

This section has focused on the activity of bait collection but the same rules will apply to other intertidal activities, such as seaweed collection.

1. The Wildlife and Countryside Act 1981

1.1 Designation

The WCA places a duty on Natural England (in England) and Natural Resources Wales (NRW) (in Wales) to notify land and the power to confirm that notification of land as a Site of Special Scientific Interest (known as a SSSI).³⁹

When a site is designated a SSSI, NRW must specify the flora, fauna or features which have resulted in the designation and a list of any operations that appear to NRW to be likely to damage such flora, fauna, or features.⁴⁰ The owner or occupier of land within the site is then under an obligation not to cause or permit to be carried out any of the listed operations unless:

- a. it has first notified NRW of the proposed operation specifying its nature and the land upon which it is proposed to carry it out; and
- b. the operation has NRW’s prior written consent or is carried out in accordance with a management scheme or management notice issued under the WCA.⁴¹

1.2 Compliance

³⁸ Directive 1992/43/EEC.

³⁹ Under section 28(1) WCA, NRW can only designate “land”. However, section 28(1A) defines “land” as including any land lying above mean low water mark and any land covered by estuarial waters. Section 28(1B) allows land that otherwise falls outside of this definition (such as land only exposed by the spring tides) (“Area B”) to be included in the designation, provided that it is adjacent to land being designated that does fall within the definition (“Area A”). Area B must also either share the same flora, fauna or features leading to the notification as Area A, or the flora, fauna or features leading to the designation of Area A must be dependent on something which takes place or is present in Area B. The whole of the area that is subject to the bait collection activities will therefore be within the SSSI.

⁴⁰ Section 28(4) Wildlife & Countryside Act 1981.

⁴¹ Section 28E *ibid*.

Each SSSI will vary, but it is assumed for the purposes of this Report that bait collection on a scale equivalent to that experienced when the collection is carried out for commercial gain, is an operation likely to damage the flora, fauna, and/or features for which land is designated as a SSSI. Assuming also that bait collection is not part of a⁴² management scheme for a SSSI, the occupier of land upon which commercial bait collection is taking place, where the occupier permits it to take place, or it is proposed to take place, will therefore need to apply for consent to carry on the operation from NRW.

But bait collection by recreational or commercial fishers for their own use is an operation that may or may not be likely to damage the flora, fauna and/or features for which land is designated a SSSI. This will depend upon the basis for the designation of the land in question and the extent to which bait collection is being undertaken. The occupier of the land in question will therefore need to understand the extent of the activity and determine whether a consent application would be prudent. Whether other activities on the intertidal area (such as seaweed collection) are notifiable operations will vary from site to site, and so the list of notifiable operations needs to be checked carefully for any particular site where such activities are at issue. But since the public right to fish does not apply to these other activities either the occupier of the land or the owner would need to notify NRW.

1.2.1 Notification, consent and offences

If an occupier or owner of land within a SSSI applies to NRW for their consent to carry on the operation of bait collection upon that land and the operation is in or affects a 'European Site' established under the Habitats and Birds Directives, NRW will need to consider whether the operation is likely to have a significant effect under Article 6 of the Habitats Directive (see below).

Where it is necessary unless and until consent for the operation is given by NRW, operations carried out within a SSSI are likely to be a breach of section 28P(6) WCA. This section provides that any person who intentionally or recklessly destroys or damages any of the flora, fauna, or geological or physiographical features by reason of which land is of special interest, and knew that what he destroyed or damaged was within a SSSI, is guilty of an offence and liable on summary conviction to a fine of up to £20,000 or on indictment to a fine.

It is also an offence not to notify NRW of an operation as required by either section 28H(1) or 28I(1) WCA for public authorities and section 28E(1) WCA for all other occupiers.⁴³ On summary conviction the fine can be up to £20,000, while on indictment the fine can be unlimited.

1.2.2 The public authority exception

It should be noted that the obligation to notify and seek the consent of NRW, as set out above, does not apply if the owner or occupier of the land in question is an authority to which section 28G WCA applies⁴⁴ and that authority is acting in exercise of its functions.

In such cases, the authority is subject instead to a general duty "to take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest".

⁴² There are very few (if any) management schemes in place for SSSIs in Wales, hence the use of 'a'.

⁴³ See sections 28P(5A) and 28P(1) WCA.

⁴⁴ Section 28G WCA sets out various public bodies to which it applies and also includes a catch-all provision including 'any other public body of any description' within its ambit.

It is also subject to specific duties of notification depending on whether it is carrying out the operations itself or authorising a third party to carry out the operations. In the case of authorisation,⁴⁵ the obligation on the authority is to notify NRW of the proposed operations and take any advice received from NRW into account in deciding whether to authorise the operations. If it decides not to follow NRW's advice, it must give notice of the grant of the authorisation to NRW (together with a statement of how it has taken NRW's advice into account) and wait 21 days before allowing the operations to commence.

2 The Habitats Directive

Article 6 of the Habitats Directive relates to activities which affect European Sites.⁴⁶ Articles 6(1) and 6(2) contain general duties on Member States with regard to European Sites and Articles 6(3) and 6(4) relate to obligations in relation to plans or projects proposed to be carried out which affect (either alone or in combination) a European Site.

2.1 Article 6(1)

Article 6(1) (unlike the rest of Article 6) applies only to Special Areas of Conservation (SACs). It places a general duty on member states to establish the necessary conservation measures involving, if need be, appropriate management plans and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the habitat types and species present in the SAC.

Article 2(2) of the Habitats Directive states that the measures taken shall be designed to maintain at, or to restore to, favourable conservation status the natural habitats and species of wild fauna and flora of Community interest.

2.2 Article 6(2)

Article 6(2) obliges Member States to take appropriate steps, with regard to European Sites, to avoid the deterioration of natural habitats and the habitats of species, as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive.

This obligation is transposed into UK law by regulation 9 of the Habitats Regulations. Regulation 9(1) of the Habitats Regulations places a duty on nature conservation bodies (including NRW) and competent authorities to exercise their functions under any enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive. The regulations clarify that this duty applies in particular to functions under the SSSI provisions of the Wildlife and Countryside Act 1981, the Natural Environment and Rural Communities Act 2006 and the Habitats Regulations.

In addition, regulation 9(5) adds that a competent authority, in exercising any of its functions, must have regard to the requirements of the Habitats Directive, so far as they may be affected by the exercise of those functions.

2.3 Article 6(3)

⁴⁵ See sections 28(2) – (6) WCA.

⁴⁶ Meaning Special Areas of Conservation designated under the Habitats Directive and Special Protection Areas designated under the Birds Directive.

2.3.1 The obligation

Article 6(3) is transposed into English and Welsh law by the Habitats Regulations. This provides that a ‘competent authority’, before deciding to undertake or give consent, permission or authorisation for a ‘plan or project’ which is likely to have a significant effect on a European Site and which is not directly connected with or necessary to the management of the site, must carry out an ‘appropriate assessment’ of the implications of the plan or project on the site, in view of the site’s conservation objectives.

2.3.2 The competent authority

Where there is more than one competent authority, regulation 65 of the Habitats Regulations states that nothing requires a competent authority to assess any implications of a plan or project which would be more appropriately assessed by another competent authority.

2.3.3 Plan or project

The Habitats Directive does not define the phrase “plan or project”. However, case law (most notably the *Waddenzee* case⁴⁷) has confirmed that a “project” includes “the execution of construction works or of other installations or schemes and other interventions in the natural surroundings and landscape”. Bait collection is clearly an ‘intervention in the natural surroundings and landscape’.

The *Waddenzee* case also confirmed that the extension of an existing activity, where the activity itself is a plan or project, can in principle be regarded as a plan or project. In that case, mechanical cockle fishing had been carried on for many years, authorised by way of an annual permit. The court held that each annual renewal of the permit constituted a plan or project and, where it was likely to have a significant effect, should be preceded by an appropriate assessment under Article 6(3) of the Habitats Directive.

A proposal to permit commercial bait collection would therefore be a plan or project. It is assumed for the purposes of this Report that such a proposal would be likely to have a significant effect on the SAC and that an appropriate assessment would therefore be required. Recreational bait collection is harder to construe into the wording of Article 6(3) because it takes place under the public right to fish and therefore is not directly authorized. The public right to fish emanates from the common law and has existed since the middle ages, so there is no straightforward grant which triggers a direct authorisation of a “plan or project”. While it may be possible to construe an application of Article 6(3) on individual collectors it would be more practical to actively manage sites affected under Article 6(2).

2.3.4 Habitats Regulations assessment process

The appropriate assessment process has four key stages. There is extensive guidance on the process.⁴⁸

2.3.4.1 Screening

⁴⁷ *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (C-127/02) [2005] 2 CMLR 31, confirmed in *R on the application of Akester & another (on behalf of the Lymington River Association) v DEFRA and Wightlink Limited* [2010] EWHC 232 (Admin)

⁴⁸ Detailed guidance on carrying out an Article 6(3) assessment can be found at: accessed 14 February 2014

The competent authority must identify the likely impacts of the plan or project and whether (either alone or in combination with other plans or projects) they are likely to have a significant effect on the site. Following emphasis on the precautionary approach set out in the *Waddenzee* case this screening stage has a low threshold.

2.3.4.2 Appropriate assessment

If (either alone or in combination with other activities) the plan or project is likely to have a significant effect on the site, the competent authority must then consider in detail the impacts of the plan or project on the integrity of the site, with regard to the structure and function of the site and its conservation objectives.

After this detailed assessment, the competent authority must consider whether the activity has an adverse effect on the integrity of the site.⁴⁹ If the assessment concludes that the activity will have an adverse impact on the integrity of the site, or it cannot ascertain that it will not have that adverse impact, then the authority must refuse consent to the activity, unless there are overriding reasons of public interest (see below). No reasonable scientific doubt must remain, so that consent can only be granted where the authority is convinced that the activity would not adversely affect the integrity of the site.⁵⁰

Regulation 61(6) states that in considering whether a plan or project will adversely affect the integrity of a site, the competent authority must have regard to the manner in which the plan or project is proposed to be carried out, or to any conditions or restrictions subject to which the proposed consent, permission, or other authorisation should be given.

2.3.4.3 Imperative reasons of overriding public interest (IROPI)

Where the assessment by the competent authority is that there is likely to be an adverse effect on the integrity of the site and no alternative solutions exist, Regulation 61(2) permits the authority to authorise the plan or project if it considers that it must be carried out for IROPI. IROPI can include reasons of a social or economic nature, unless the site concerned hosts a priority natural habitat type or a priority species.

For the purposes of this report, it is assumed that commercial bait collection is not an activity that is likely to need to be continued for IROPI.

2.3.4.4 Application to bait collection

⁴⁹ The meaning of “adversely affect the integrity” of the site was considered by the ECJ in *An Bord Pleanála* [2013] EUECJ C-258/11 (April 2013). The case related to a road scheme that would permanently destroy 1.47 ha of a site that was 270 ha in total. The ECJ ruled that if a plan or project would lead to a lasting and irreplaceable loss of the whole or any part of a priority natural habitat type (whose conservation was the objective that justified the designation of the site as a Site of Community Interest), then the plan or project will adversely affect the integrity of the site.

It was also considered in the *Waddenzee* case, where the court stated that the significant adverse effects must be linked to the site’s conservation objectives, so that where the plan or project is likely to undermine the site’s conservation objectives then it must be considered likely to have significant adverse effects on the integrity of site.

⁵⁰ In the *Waddenzee* case the court held that the competent authority must take a decision having assessed all the relevant information. The conclusion of the assessment is, of necessity, subjective in nature and so the competent authority can, from their point of view, be certain that there will be no adverse effects, even though, from an objective point of view, there is no absolute certainty. It goes further to state that if no certainty can be established, having exhausted all scientific means and sources, it will be necessary to work with probabilities and estimates, although these must be fully identified and reasoned in the assessment.

Where a public authority in some way licensed or authorised bait collection (which a public land owner, such as the Crown Estate Commissioners or a local authority, would have to do for commercial bait collection), it is clear that Article 6(3) should apply to that licensing process. There is an argument that because the public body is acting as an owner of the land in question it may not be giving a consent in the sense meant by the Directive. It is important to note that the Habitats Directive itself makes no distinction between the owner / regulator role of competent authorities and it is safest to assume that the Article 6(3) would apply, particularly in the absence of another regulator. The position for commercial bait collection in practice is more nuanced as it is very hard evidentially to distinguish between personal and commercial collectors, and indeed simply regulating commercial collectors, so in effect many commercial collectors take on the status of tolerated trespassers, simply because they are so difficult to regulate. So in practice it may be more effective to manage bait digging under Article 6(2) than 6(3).

2.3.5 Failure to comply with the legislation

2.3.5.1 Lack of compliance under the Habitats Regulations

Regulation 20 of the Habitats Regulations then provides that the carrying out of that activity (and the permitting of it) will be an offence liable on summary conviction to a fine not exceeding level 4 on the standard scale, and that NRW (as the appropriate conservation body) may take such steps as may be necessary for the purpose of enforcing this regulation.

NRW can bring proceedings for an offence under regulation 20 and (subject to the usual requirements for bringing proceedings) will arguably be obliged to do so by its general duty under regulation 9(1) to exercise its functions under the Habitats Regulations and the WCA so as to ensure compliance with the requirements of the Habitats Directive.

2.3.5.2 Lack of compliance of the EU Directive

European law binds the UK Government and UK public bodies under the section 2 of the European Communities Act 1972. This entitles aggrieved parties to seek judicial review in the domestic courts for failure to comply with the Directive.⁵¹ It is also possible for infraction proceedings to be launched in the European Court of Justice by: the European Commission, the European Parliament, other member states, and, potentially, interest groups.⁵² Individuals can also complain to the European Commission over lack of implementation of the Directive and this can lead to infraction proceedings by the Commission.

2.4 The Relationship between Articles 6(2) and 6(3)

The *Waddenzee* case looked at the relationship between these two Articles. The Court held that Article 6(2) established an obligation of general protection, aimed at avoiding deterioration and disturbances, while Article 6(3) established a set procedure intended to ensure that any plan or project not connected with the management of the site, but which was likely to have a significant effect on that site, was authorised only to the extent that there was no reasonable scientific doubt that it would not adversely affect the integrity of the site.

2.4.1 What is management?

⁵¹ See for instance *R v The Secretary of State for Trade and Industry ex parte Greenpeace Ltd.* CO/1336/199.

⁵² Though this latter group may struggle to be heard in court, see cases T-338/08, *Stichting Natuur en Milieu v Commission* and T 396/09, *Vereniging Milieudefensie v Commission*.

As stated above, Article 6(3) establishes a set procedure to follow for plans or projects that are not connected with the management of the site. Anything that is connected with the management of the site must be considered under the general duty in Article 6(2) to avoid deterioration and disturbance.

On this basis, where bait collection has been identified as an issue of concern for a particular site, a proposal to implement a management strategy to control bait collection activities at that site should not trigger an Article 6(3) assessment. This is on the basis that the management measures proposed have been designed to limit bait collection activities to a level scientifically established as acceptable level for the site; being one that does not risk the deterioration of the habitats at the site or the significant disturbance of species at the site.

To illustrate with an example; if the scientific evidence shows that any level of bait collection activities will put the habitats for which a particular site is designated at risk of deterioration, then the only acceptable management measure is to prohibit the activity altogether. Any proposal to allow the activity, however restricted, would not be backed up by the scientific evidence and so would be classed as a plan or a project triggering the operation of Article 6(3).

The key in distinguishing between a management measure and a plan or a project triggering an Article 6(3) assessment is therefore to look at whether the measure would allow a level of activity that would risk the deterioration of habitats or the significant disturbance of species for which the site is designated. This assessment must be based on reliable scientific evidence.

2.4.2 Where an Article 6(3) assessment is required

If a proposed measure is not classed as a management measure then it will trigger an Article 6(3) assessment. A competent authority should consider its duty under Article 6(2) when carrying out an Article 6(3) assessment, but if the assessment has been completed and the competent authority has determined that the plan or project can be authorised, then Article 6(2) has no function of its own in addition to Article 6(3). In other words; the authorisation of a plan or project granted in accordance with Article 6(3) necessarily assumes that that plan or project was considered not likely to adversely affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).

This means that if the competent authority carries out an assessment pursuant to Article 6(3) and concludes that the plan or project cannot be authorised, then Article 6(2) continues to apply. So that where the plan or project relates to an activity that is already taking place (such as bait collection at many SACs within Wales), the competent authority/authorities is/are arguably required to take action to prevent that activity taking place in order to comply with Article 6(2).

3 Natural Environment & Rural Communities Act 2006

Section 40 of the Natural Environment and Rural Communities Act 2006 (NERC) imposes a duty on every public authority, in exercising its functions, to have regard to the purpose of conserving biodiversity, so far as is consistent with the proper exercise of those functions. This is sometimes referred to as “the biodiversity duty”.

In this context, a public authority includes any public body and any person holding an office created or continued by a public general Act of Parliament and/or remunerated out of Parliament funds.⁵³ “Conserving biodiversity” includes, in relation to a living organism or type of habitat, restoring or

⁵³ Natural Environment and Rural Communities Act 2006, section 40(4).

enhancing a population or habitat.⁵⁴ The guidance provided by DEFRA on the 'biodiversity duty'⁵⁵ confirms that the duty can require positive action to be undertaken and is not simply a matter to take into account when considering third party applications, for example.

⁵⁴ Section 40(3) *ibid.*

⁵⁵ This guidance can be found at www.biodiversitywales.org/en-GB/NERC-Biodiversity-Duty accessed 27 February 2014.

SECTION C: POSSIBLE REGULATORS AND THEIR POWERS

Summary

The public right to collect bait and seaweed cannot be curtailed other than by the Welsh Government by Act of Parliament. It may be regulated by byelaw, but such byelaws will need to be drafted carefully to ensure they sit within the powers delegated to that byelaw making body by Parliament.

Collection activities can be regulated in a number of ways and by a number of different bodies. The most obvious being:

- the Welsh Ministers under the Marine and Coastal Access Act 2009 and Sea Fish (Conservation) Act 1967;
- National Resources Wales under either the National Parks and Access to the Countryside Act 1949 or the Wildlife and Countryside Act 1981; or
- the relevant County Council under the Public Health Acts Amendment Act 1907.

Regardless of any byelaws created under any of the above legislation, any collection activities not covered by the public right will also need the permission of the occupier of the land in question.

1. Regulating a Public Right

Before considering the possible regulators and their powers, it must be noted that, to the extent that the activity of bait or seaweed collection is being carried out in pursuance of a public right, this activity can only be curtailed by an Act of Parliament or an international convention confirmed by statute,⁵⁶ although the right must be exercised reasonably and in accordance with statute law.⁵⁷

Commercial bait collection, not for the use of the collector, is not covered by the public right and so can be regulated as the appropriate regulator sees fit (subject to their powers and duties).

1.1 The Lundy Island 'No Take Zone'

Now enforced by the Devon and Severn Inshore Fisheries and Conservation Authority, Byelaw 28 was made in 2003 and created a no-take zone in part of the waters surrounding the island of Lundy. Within this zone, no person is allowed to take any seafood whatsoever. This has suspended the public right to fish within the zone.

1.2 The Pagham Harbour Example

A set of byelaws made in 1997⁵⁸ in relation to Pagham Harbour in West Sussex are currently suspended pending a full review by West Sussex County Council on the basis that the byelaws restrict activities that are permitted by a public right.

The byelaws prohibit 'taking, molesting, or intentionally disturbing, injuring, or killing any living creature' within the Local Nature Reserve that the site forms part of.⁵⁹ The activity can be carried on

⁵⁶ *Malcolmson v O'Dea* (1863) 10 HL Cas 593.

⁵⁷ *Whelan v Hewson* (1871) IR 6 CL 283.

⁵⁸ Under sections 20, 21(4) and 106 of the National Parks and Access to the Countryside Act 1949 – see <https://www.westsussex.gov.uk/idoc.ashx?docid=26b18bf0-c4ca-4125-a315-dadcdf6c064&version=-1> (accessed 27 February 2014) for the text of the byelaws.

⁵⁹ Op Cit 2(iv).

with a permit from the County Council⁶⁰ and it was their practice to issue 25 fishing permits and 15 bait digging permits per year. The permits allowed the holders to fish or bait dig during certain periods of the year and within defined areas.

The County Council's practice of limiting numbers could have the effect of preventing recreational anglers and bait diggers from fishing and digging for bait. As stated above, the public right to fish and the rights ancillary to it can be restricted, however, in this case, the byelaws specifically state that they:

“shall not operate so as to interfere with the exercise by a person of...(iv) the public rights of fishing and navigation and matters ancillary thereto over the area of Crown foreshore edged blue on [the plan annexed].”

This means that the County Council's practice is potentially putting them in breach of this clause of the byelaws.

2 The Potential Regulators

- The Welsh Government
- Natural Resources Wales
- The Crown Estate Commissioners
- National Park Authorities
- Port Authorities
- County Councils
- Town Councils

3 The Welsh Government

3.1 Constitution and general powers

The Government of Wales Act 1998 provided for the establishment of the National Assembly of Wales and the transfer of all of the powers of the Secretary of State for Wales to the Assembly. The Government of Wales Act 2006 then implemented a formal separation between the Assembly and the Welsh Government. “The environment” is one of the 20 subjects devolved to the Welsh Government, where Welsh Ministers can exercise executive functions and the Assembly has legislative competence to make Assembly Acts.⁶¹

3.2 Specific powers

3.2.1 Sea Fisheries (Shellfish) Act 1967

Under section 1 of the 1967 Act, the Welsh Ministers have the power to make an order granting a right of several fishery, a right of regulating a fishery, or a right combining both. These rights need to be applied for by an interested party and can last for a maximum of 60 years.

The grantee of a regulating order has the power⁶² to impose restrictions on and make regulations respecting the dredging, fishing for, and taking of shellfish within the limits of the regulated fishery.

⁶⁰ Op Cit 3(1).

⁶¹ Government of Wales Act 2006 Schedule 7.

⁶² Under section 15(3) Sea Fisheries Act 1968 and with the consent of the appropriate Minister.

Burry Inlet Cockle Fishery is covered by a regulating order under the 1967 Act and is subject to restrictions on bait digging (made by byelaw and discussed in further detail below) to protect access to the cockle stocks.

Any proposed order relating to seashore belonging to the Crown requires the Minister to have regard to the powers and duties of the Crown Estate Commissioners under the Crown Estate Act 1961.⁶³

3.2.2 Sea Fish (Conservation) Act 1967

Under section 5 of the Act, the Welsh Ministers may make an order restricting fishing for sea fish from a fishing boat. This power has a number of restrictions in respect of bait digging and seaweed collection. Firstly the bait is unlikely to be collected from a boat, and secondly the Act only applies to sea fish, and some species of bait and seaweed will not be within the scope of the Act.⁶⁴

The Act allows the Welsh Ministers fairly broad powers to restrict fishing using temporary closures, species restrictions, gear type, and area based closures.

3.2.3 Sea Fisheries Act 1968

Section 5 of the Act gives the Welsh Ministers further powers to make orders relating to UK and foreign fishing vessels, but again is of limited application in this context.⁶⁵

3.2.4 Special Nature Conservation Order

Where a site is designated as an SAC (or a Special Protection Area for birds) but is not protected through an SSSI notification, the Welsh Ministers can make a special nature conservation order (SNCO) to protect it.⁶⁶

The SNCO will specify operations (which may be within the site or outside of it), which appear likely to destroy or damage the flora, fauna, or geological or physiographical features by reason of which the land is an SAC (or an SPA). An SNCO takes effect as a local land charge, and NRW can serve a stop notice where it considers the SNCO will be breached. The operator will then have to obtain consent to continue the operation. Breach of a stop notice, without reasonable excuse, is a criminal offence.

SNCOs have been used to control bait digging activities. For example, Natural England made an SNCO in respect of Fareham Creek (in Portsmouth Harbour) to protect inter-tidal sediment habitats and wading birds. The SNCO bans commercial bait collection activities within the area protected by the order.⁶⁷

3.2.5 Marine & Coastal Access Act 2009 – marine conservation zones

Section 134(1) will give the Welsh Ministers the power to make one or more orders for the purpose of furthering the conservation objectives of a Marine Conservation Zone (MCZ) in Wales. However,

⁶³ Inserted by section 202 Marine and Coastal Access Act 2009, which also repealed section 1(4) of the 1967 Act. Section 1(4) had initially prevented regulating or several orders from applying to foreshore owned by the Crown.

⁶⁴ *R. v Ministry of Agriculture, Fisheries and Food Ex p. Bray* [1999] C.O.D. 187; (1999) 96(16) L.S.G. 36 (QBD).

⁶⁵ *R. v Ministry of Agriculture, Fisheries and Food Ex p. Bray* [1999] C.O.D. 187; (1999) 96(16) L.S.G. 36 (QBD).

⁶⁶ Regulations 25 and 26 Habitats Regulations 2010.

⁶⁷ See below for further details on the research carried out into the effectiveness of the Fareham Creek SNCO and other bait digging control measures taken in the Solent area.

there are currently no MCZs in Wales. All proposed MCZs in Wales were scrapped in July 2013 after opposition to the consultation on them.⁶⁸

Section 136 will give the ministers the power to make an interim order for the purpose of protecting any feature in any area of Wales, if they think that there are or may be reasons to consider whether to designate an area as an MCZ and there is an urgent need to protect the feature. Such an order can last for a maximum period of twelve months.

At present these sections of the Act are not in force in Wales.

3.2.6 Marine & Coastal Access Act 2009 – Inshore Fisheries Management

Section 155 of the Marine and Coastal Access Act 2009 (MCAA 2009) gives an Inshore Fisheries and Conservation Authority (IFCA) power to make byelaws for the purpose of performing its statutory duties contained in sections 153 and 154. In Wales this power can be exercised by the Welsh Ministers.⁶⁹

3.2.6.1 Statutory duties

The statutory duties are to manage the exploitation of sea fisheries in its district⁷⁰ and to seek to ensure that the conservation objectives of any MCZ within its district are furthered.⁷¹

Section 153(2) states that in performing the duty set out in section 153(1), the Welsh Ministers must (inter alia):

“seek to balance the social and economic benefits of exploiting the *sea fisheries resources* of the district with the need to protect the marine environment from, or promote its recovery from, the effects of such exploitation”.

The term ‘Sea fisheries resources’ is defined⁷² as meaning any animals or plants that habitually live in the *sea*, including those that are cultivated in the sea. ‘Sea’ is defined⁷³ as including any area submerged at mean high water spring tide and the waters of every estuary, river or channel, so far as the tide flows at mean high water spring tide.

Assuming that the mean high water spring tide submerges the area where bait collection activities are carried out, then ‘sea fisheries resources’ will include rag worm, lugworm, seaweed, and peeler crabs. The Welsh Ministers will therefore be under a duty to seek to balance the social and economic benefits of bait and seaweed collection, with the need to protect the marine environment from such collection and to promote its recovery from the effects of such collection to date.

3.2.6.2 Power to make byelaws

Section 155 MCAA 2009 gives the Welsh Ministers the power to make byelaws for the purpose of performing their duties under sections 153 and 154. This power could therefore be used to make

⁶⁸ See www.bbc.co.uk/news/uk-wales-politics-23360964 for more details.

⁶⁹ Marine & Coastal Access Act 2009, section 189.

⁷⁰ Op Cit, Section 153(1).

⁷¹ Op Cit, Section 154.

⁷² Op Cit, Section 153(2)(10).

⁷³ Op Cit, Section 322 and Section 42(3).

byelaws to control bait collection activities,⁷⁴ but some attention needs to be taken in the drafting of these byelaws, as section 189(2) MCAA makes it clear that this byelaw making power is only available insofar as the Welsh Ministers do not have the power elsewhere in enabling legislation.

4 Natural Resources Wales

4.1 Constitution and general powers

NRW was established by the Natural Resources Body for Wales (Establishment) Order 2012⁷⁵. Its main purpose is to ensure that the environment and natural resources of Wales are sustainably maintained, enhanced and used.

The Natural Resources Body for Wales (Functions) Order 2013 transferred the full range of environmental functions to NRW, including:

- Welsh devolved functions of the Environment Agency;
- Welsh devolved functions of the Forestry Commission;
- functions of the Countryside Council for Wales; and
- functions of the Welsh Ministers relating to the environment.

The Establishment Order (as amended by the Functions Order) contains the following relevant provisions:

- Article 9(1) – The Body may do anything that appears to be conducive or incidental to the discharge of its functions. Article 9(2) lists out some examples of what the Body may do, but does not include a power to make byelaws or regulations.
- Article 10E(1) – The Body may institute criminal proceedings in England and Wales.
- Article 5A(1) – The Body must exercise its functions so as to further nature conservation and the conservation and enhancement of natural beauty and amenity.
- Article 5B – In exercising any function relating to nature conservation, the Body must have regard to actual or possible ecological changes.

NRW does not therefore have a general power to make byelaws or regulations, but will have various powers under statute law relating to each of its functions.

4.2 Specific powers

4.2.1 National Parks & Countryside Act 1949

Section 16 of the National Parks and Access to the Countryside Act 1949 (NPCA 1949) permits NRW (as successor to the Countryside Council for Wales' functions), in respect of land to which it appears to NRW to be expedient in the national interest that it should be managed as a nature reserve, to

⁷⁴ Op Cit, Section 156 details the provisions that may be made by byelaws, including restricting exploitation to certain areas, limiting the amount of resources that may be taken or the times at which resources may be taken, requiring permits for exploitation and restricting the methods of exploitation.

⁷⁵ Made by the Welsh Ministers in exercise of their powers under sections 13, 14, 15 and 35 of the Public Bodies Act 2011.

enter into an agreement with every owner, tenant, and occupier of land that the land shall be so managed. Section 20 then authorises NRW to make byelaws for the protection of the reserve.⁷⁶

Section 20(2)(b) specifically enables byelaws that:

“prohibit or restrict the killing, taking, molesting or disturbance of living creatures of any description in a nature reserve, the taking, destruction or disturbance of eggs of any such creature, the taking of, or interference with, vegetation of any description in a nature reserve, or the doing of anything therein which will interfere with the soil or damage any object in the reserve.”

Such byelaws may provide for the issue of permits authorising entry to land or an activity on land, where such entry or activity would otherwise be unlawful under the byelaws.

PCNPA and the local authority can each also exercise this power as set out below.

Any byelaws made in respect of land owned by The Crown Estate would need to have the consent of The Crown Estate Commissioners under section 101(8) of the Act.

4.2.2 Habitats Regulations 2010

Regulation 30 of the Habitats Regulations gives NRW the power to make byelaws under section 20 of the NPCA 1949 in respect of any SAC (i.e. without first needing to enter into a management agreement or declare it a nature reserve).

4.2.3 Wildlife & Countryside Act 1981

Section 28R of the WCA authorises NRW to make byelaws for the protection of a site of special scientific interest.

5 The Crown Estate

The Crown Estate is the owner of a large amount of the foreshore in Wales. If it is the owner of foreshore upon which bait collection activities are taking place, then it may have powers to regulate those activities.

The Crown Estate is constituted as a statutory corporation under the Crown Estate Act 1961. Section 6(1) of that Act gives the Crown Estate Commissioners the power to make such regulations (by statutory instrument), to be observed by persons using land of the Crown Estate to which the public are, for the time being, allowed access, as they consider necessary for securing the proper management of that land and the preservation of order and prevention of abuses on that land.

6 The National Park Authority

6.1 Constitution and general powers

National Park Authorities were created by the Environment Act 1995. They have two statutory purposes:⁷⁷ to conserve and enhance the natural beauty, wildlife, and cultural heritage of the national park, and to promote opportunities for public enjoyment and understanding of its special

⁷⁶ Although see below for an exception to this procedure in the case of SACs contained in the Habitats Regulations.

⁷⁷ Environment Act 1995, section 61.

qualities. The former purpose will take precedence in the event of a conflict between the two.⁷⁸ The authority also has a statutory duty to foster the economic and social well-being of the communities living within the national park.⁷⁹

The authority has the power to do anything, which in its opinion, is calculated to facilitate, or is conducive or incidental to, (a) the accomplishment of the two statutory purposes and/or (b) the carrying out of any function conferred on it by virtue of any other enactment.

6.2 Specific powers

Schedule 9 of the Environment Act 1995 extended sections 21 and 22 of the National Parks and Access to the Countryside Act 1949. This means that national park authorities have the power to provide, or secure the provision of, nature reserves on any land within their national park.⁸⁰ The national park authority then has the power to make byelaws in respect of any such nature reserve for the protection of that reserve. Section 21 of the 1949 Act states that such byelaws may, amongst other things, prohibit or restrict the killing, taking, molesting or disturbance of living creatures of any description in a nature reserve, or the taking of or interference with vegetation of any description in a nature reserve.

7 Port Authorities

If the area in question is within a port, then the relevant Port Authority may have powers to regulate bait collection carried on within the port. Each port authority has its own constituting Acts of Parliament and so reference will need to be made to those Acts to establish whether any specific Port Authority has relevant powers.

With regard to all port authorities, section 48A of the Harbours Act 1964 imposes a duty on them, in formulating or considering any proposals relating to their functions under any enactment, to have regard to [inter alia] the conservation of the natural beauty of the countryside and of flora, fauna, and geological or physiographical features of special interest.

Many harbour authorities have made byelaws regulating bait collection,⁸¹ but these are generally for the purpose of ensuring that the activity does not interfere with the port activities (such as navigation and the safety of structures or vessels).

8 The County Council or County Borough Council

County Councils were generally established under the Local Government Act 1972. They have the following relevant byelaw-making powers:

8.1 Local Government Byelaws (Wales) Act 2012

Section 2 of the Local Government Byelaws (Wales) Act 2012 provides a general byelaw-making power to all county councils and county borough councils in Wales to make byelaws for the good rule and government of any part of its area and/or the prevention and suppression of nuisances

⁷⁸ Environment Act 1996, section 62.

⁷⁹ Ibid.

⁸⁰ Either by providing land owned by the national park authority or by entering into a management agreement with the owner of the land.

⁸¹ Fowler, S.L. (1999) *Guidelines for managing the collection of bait and other shoreline animals within UK European marine sites* English Nature (UK Marine SACs Project) Ch. 4, Table 10 for examples.

within its area. However, this general byelaw-making power cannot be used where there is a more specific power in an Act of Parliament or statutory instrument.⁸²

8.2 National Parks and Access to the Countryside Act 1949

Section 90 of the National Parks and Access to the Countryside Act 1949 permits a local authority, in respect of:

- any land in their area belonging to them and comprised in either a National Park or an area of outstanding natural beauty; and/or
- a waterway to which the public are given access by an agreement or order or as a consequence of a compulsory acquisition under Part V of the 1949 Act;

to make byelaws for the preservation of order, the prevention of damage to the land or waterway or anything on or in it, and for ensuring that people using the land or waterway behave so as to avoid undue interference with the enjoyment of the land or waterway by others.

A local authority in Wales must consult with NRW before making any byelaws under this section.

8.3 Public Health Acts Amendment Act 1907

Section 82(1) of the Public Health Acts Amendment Act 1907 provides that a local authority, for the prevention of danger, obstruction, or annoyance to persons using the seashore, may make and enforce byelaws to [inter alia] 'generally regulate the user of the seashore for such purposes as shall be prescribed by such byelaws'.

Section 82(4) originally required that any byelaws made under section 82 that affect the foreshore below high water mark, must be approved by the Secretary of State before coming into operation. However, this was amended by the Local Government Byelaws (Wales) Act 2012 to apply only to byelaws made by Councils in England. Therefore, any byelaws proposed by Pembrokeshire County Council under section 82 would not need confirmation by the Secretary of State or any other party.

Several councils (in England and Wales) have made byelaws under section 82 to regulate bait collection,⁸³ indeed, the 'Model Byelaw', provided by the Department for Communities and Local Government⁸⁴ to give guidance to local authorities considering exercising their byelaw making powers under this section, includes provisions regulating bait digging.

9 The Town Council

Town Councils in Wales do not have any byelaw making powers that could be used to regulate bait or seaweed collection.

⁸² In Wales this replaces the general byelaw-making power given to local governments in section 235 of the Local Government Act 1972.

⁸³ Fowler (n80) notes that there is inconsistency in the approach to the use of section 82 and some authorities have been unable to obtain clearance for byelaws that have been approved in other districts.

⁸⁴ <https://www.gov.uk/government/publications/the-seashore-model-byelaw-6>, accessed 25 April 2014.

SECTION D: EXAMPLES OF REGULATION

Summary

This section looks at various examples of the regulation of bait collection and fisheries from both Wales and England.

1. Alnwick District Council – Boulmer Haven, Northumberland

1.1. Facts

Bait digging in Boulmer Haven caused concern for local fishermen launching their cobbles across the beach, as the holes and rocks left by bait collectors were damaging their boats and tractors. Bait digging was then prohibited entirely on the beach by the owner of the foreshore (Northumberland Estates). However, prohibitions on bait digging in nearby beaches caused an increase in the activity at Boulmer Haven and so Alnwick District Council decided to act.

In 1985 they passed a byelaw under section 82 of the Public Health Acts Amendment Act 1907, which stated that “without lawful right or authority no person shall in any part of the restricted area dig for ragworms for any form of fishing bait”. The ‘restricted area’ was defined as “such parts of Boulmer Haven as lie above the low water line”. However, in considering the byelaw for his approval, the Secretary of State asked for a map of the restricted area to be provided. ADC provided a copy of the Ordnance Survey map for the area, showing the restricted area hatched. The hatched area extended down to the line printed on the map as the ‘low water mean meridian tide line’. The Secretary of State approved the byelaw and returned them to ADC with the map attached. ADC then published the byelaw with a copy of the map.

In February 1990, during a period of extreme low water, the beach was exposed below the mean low water mark as defined on the Ordnance Survey map. Bait digging took place on that section of beach and a bait digger (Anderson) was subsequently charged with, and convicted of, breaching the byelaw.

Mr Anderson appealed against his conviction on several grounds. The most relevant of these to the present example being (i) that the geographical scope of the byelaw should be interpreted by reference to the map attached to it (and so he was not collecting within the restricted area); (ii) that the byelaw was ultra vires because either or both of the following grounds applied: (a) the byelaw totally prohibited bait digging in Boulmer Haven, rather than just regulating it, and that is contrary to the powers in section 82 of the Public Health Acts Amendment Act 1907;⁸⁵ and/or (b) the byelaw was ultra vires because it totally prohibited bait digging in Boulmer Haven and bait collection for personal use is a common law right, which cannot be prohibited in that way.

2.2 Findings

At the final appeal, the Court made the following relevant judgments:

2.2.1 The map did form part of the byelaw and so Mr Anderson was not collecting within the ‘restricted area’. However, if there had been no map, the ‘restricted area’, as defined by the text of the byelaw, would have extended to (and therefore fluctuated with) the low water line as it was at any time. It is therefore important that any map attached to potential byelaws (whether made under

⁸⁵ Which permits a Council to make byelaws to “generally regulate the user of the seashore for such purposes as shall be prescribed by such byelaws”.

the Public Health Acts Amendment Act 1907 or not), includes any area that may possibly be uncovered by the tides, or a statement that the map is illustrative only and that the area in question includes any area uncovered by the tides at any time.

2.2.2 The byelaw was held not to be ultra vires the Council's power under section 82 of the Public Health Acts Amendment Act 1907. It may have banned bait collection entirely at Boulmer Haven, but this is only one specific activity and only covered a small part of the foreshore within the Council's area and an even smaller part of the Northumbrian foreshore. The byelaw was held to be valid on this ground as the area in which bait collection was prohibited was not such as to prohibit fishermen obtaining bait reasonably close by.

2.2.3 The Court agreed that bait collection for personal use was ancillary to the public right to fish, although stated that "it does not follow that the right is unrestricted or that it may be exercised by any member of the public at any time or place." However, the Court did not confirm whether the byelaw went too far in regulating the public right so as to be ultra vires as the appeal did not turn on this issue.

2.3 What happened next

Following the judgement the Council did not attempt to enforce the byelaw. Instead it sought the input of various stakeholders, including Northumberland Estates, local police, national and regional sea angling groups, the Environment Agency, and local fishermen. The result of those negotiations was a new byelaw⁸⁶ which divided the beach into two parts; the dividing line being shown both on a map attached to the byelaw and by a line of painted boulders on the shore. Bait collection for personal use is permitted to the south of the line. No bait collection is permitted to the north of the line, where launching of fishing boats takes place. Bait collection is not regulated on the southern half of the beach.

2. Burry Inlet Cockle Fishery

2.1. Facts

The Burry Inlet cockle fishery is a regulated fishery pursuant to the Burry Inlet Cockle Fishery Regulating Order 1965⁸⁷⁸⁸. As of 1 April 2013, the fishery is now managed by NRW. The Regulating Order will expire in 2025.

The Regulating Order provides that within the area to which it applies, no cockles are to be taken without a licence issued by NRW. It also provides for a yearly toll for the licence. Within a defined part of the area to which the Regulating Order applies, cockle picking without a licence is permitted, provided that it is for personal use.

The Regulating Order is supplemented by Byelaws 15 to 20 (originally made by the South Wales Sea Fisheries Committee⁸⁹). These include a prohibition on Sunday gathering and take-limits for both personal use collectors (8kg) and licensed collectors (100kg).

⁸⁶ Again, made (in December 1999) by Alnwick District Council under Public Health Acts Amendment Act 1907, section 82.

⁸⁷ See <http://naturalresourceswales.gov.uk/content/docs/pdfs/consultation-pdfs/burry-inlet-cockle-fishery-order-1965.pdf?lang=en> for a copy of the Order (accessed 23 May 2014).

⁸⁸ Made under Part III of the Sea Fisheries Act 1868.

Byelaw 20 prohibits any activity (apart from lawful cockle picking) which disturbs or damages the surface of the sea bed within specified areas. This was designed to prohibit bait digging.

2.2. Bait digging

According to the research carried out for the UK Marine SAC Project,⁹⁰ increasing levels of bait digging in the Burry Inlet cockle beds in the late 1980s began to cause a conflict between cockle pickers and bait diggers. The fishermen complained that the bait digging both damaged the cockle stocks and impeded their access to the fishery.

The South Wales Sea Fisheries Committee sought to introduce a byelaw to restrict the areas open to bait digging in order to protect the fishery. The first attempt was through a permit and bag limit scheme, restricting bait digging to a limit of 100 lugworms per digger. This limit was impossible to enforce, partly because excess worms could very easily be concealed while a Fisheries Officer was approaching. It was concluded that a quota system did not work, even on the Burry Inlet that benefited from the presence of a part time Fisheries Officer and the virtually continual presence of licensed cockle collectors during low tides.

Byelaw 20 was therefore passed, which establishes an open area and a closed area for bait digging, making enforcement much easier. The question of whether bait collection within the permitted area is for commercial or for personal use does not have to be addressed, because there is no longer a bag limit for lugworm.

The UK Marine Project SAC research also noted that several prosecutions were made for infringement of Byelaw 20 when it was first introduced. This may have helped spread the awareness of Byelaw 20 and also spread the message to bait diggers (and cockle pickers) that the Byelaw was being actively enforced.

3. Morecambe Bay

The North West Inshore Fisheries and Conservation Authority has recently passed Byelaw 6 under sections 155 and 156 of the Marine and Coastal Access Act 2009. This prohibits the use of bottom-towed gear in certain areas and also bait digging activities within certain areas of Morecambe Bay. The relevant text states:

“No person shall collect bait or work fisheries by hand in the Morecambe Bay EMS seagrass beds closed areas except with the written authorisation of and using methods approved by the Authority.”

This byelaw was passed in December 2013 and published in January 2014. However, it is likely to be of limited interest for the purposes of this report as it was brought in as a direct requirement of DEFRA and not as part of the NWIFCA's strategy to manage bait digging. NWIFCA have stated that bait digging activities generally do not take place within the restricted areas in any event as it is not a preferred habitat for the bait and digging conditions are difficult.

4. The Exe Estuary

⁸⁹ Following the Marine and Coastal Access Act 2009 (Commencement No.1, Consequential, Transitional & Savings Provisions) (England and Wales) Order 2010 (2010/630) the byelaws take effect as if made by the Welsh Ministers by statutory instrument.

⁹⁰ See <http://www.ukmarinesac.org.uk/activities/bait-collection/bc14.htm> (Last updated in 2001 when the project completed).

The Devon and Severn Inshore Fisheries and Conservation Authority has collated all of the byelaws made by its predecessors into one document.⁹¹ This includes, as byelaw 24, a prohibition on collection of peeler crabs:

“24. Harvesting of Shore Crab (18 July 2008)

For the purpose of conservation of marine resources the taking of shorecrab (*Carcinusmaenas*) is prohibited in the following areas:-

- a. In the Exe estuary north of a line joining Starcross Yacht Club Lat 50 °38.8N Long 003 °27.00W and Parsonage Stile Lat 50 °38.99N Long 003 °25.90W.
- b. In the vicinity of Dawlish Warren, south of a line joining Lat50 °36.65N Long 003 °26.62W and Lat 50 °36.62N Long 003 °25.74W.”

In addition to the byelaw, the Exe Estuary Management Partnership has worked with crab tillers to create a voluntary code of conduct to help ensure that their activities are sustainable. The voluntary code applies to the area of the Exe estuary not covered by Byelaw 24 and does not allow any further crab tiles to be placed on the beach, but broken or damaged existing tiles can be replaced. This effectively limits crab collection to those already collecting prior to the byelaw and the voluntary code, as the name suggests, the code has no legal force.

In the process of preparing for the Marine Bill (leading to the Marine & Coastal Access Act 2009), Defra commissioned a report into unlicensed activities in the marine environment.⁹² This looked at, inter alia, voluntary codes of conduct as a management tool and summarised that these work best where the users in question are recreational users that are members of clubs or organisations that promote codes of conduct; where the activity has a specific commercial interest (such as bait collection), a code of conduct is less effective because of the economic interest.⁹³

In particular, with reference to the Exe estuary crab tiling code of conduct, the report stated that:

“There is sometimes unwillingness by recreational groups to change their activity, especially when areas highlighted for voluntary management schemes are likely to significantly affect or exclude a particular activity. The crab tiling code of conduct in the Exe estuary and other Devon estuaries, although making fishermen aware of the issues, is not believed to have been a success due to the expense of enforcement.”

The report also added that:

“The Countryside Council for Wales’ code of conduct for angling was very successful in raising awareness in local recreational anglers who may have an interest [in] ensuring the sustainability of their local environment. However, there have been incidences where commercial bait diggers from elsewhere in the country have used Welsh intertidal areas to take large amounts of bait from sensitive habitats, not only negatively impacting these habitats, but reducing support for the code of conduct if it can be so easily undermined.”

⁹¹ See <http://www.devonandsevernifca.gov.uk/> (accessed 2 May 2014).

⁹² Unlicensed Activities: Boyes, S., Burdon, D. and Elliot, M. (November 2006) *A review to consider the threats to marine biodiversity*, available from: <http://webarchive.nationalarchives.gov.uk/20120123162956/http://www.defra.gov.uk/wildlife-countryside/resprog/findings/mb-threats/cr0354.pdf>).

⁹³ Voluntary measures were even more roundly criticized in Prior, S. (2011) *Investigating the use of voluntary marine management in the protection of UK marine biodiversity*. Report to Wales Environment Link.

The report concluded that:

“although codes of conduct have been established for bait digging/collection around the UK, these have had limited success due to the ‘unaffiliated’ nature of anglers to a governing body and the commercial nature of the activity”.

However, the latest crab tile survey of the Exe Estuary (carried out in 2012) showed an overall decrease in crab tile on the estuary, both since the last survey in 2008 and since the baseline levels were established in 2001. This suggests that the voluntary code is presently working.⁹⁴

5. The Solent

The recent report by Watson et al into bait collection management strategies in the Solent area⁹⁵ looked at three areas in the Solent (Dell Quay, Pagham Harbour and Fareham Creek) in which bait collection activities are managed in different ways, with the aim of identifying the extent to which each management method works.

5.1. The management methods used at the time of the report

5.1.1. Fareham Creek

Fareham Creek is located at the north-west channel of Portsmouth Harbour. It is covered by a Special Nature Conservation Order (SNCO)⁹⁶ instituted by Natural England to protect inter-tidal sediment habitats and wading birds. The SNCO bans commercial bait collection activities within the area protected by the order. Signage explaining this has been put up in the area, but Watson states that ‘no sustained official or unofficial on-site enforcement has occurred’.

5.1.2. Dell Quay

Dell Quay is in the north east Fishbourne Channel of Chichester Harbour. It was the most popular site for bait diggers of the three sites looked at by Watson *et al.* and is also an area with numerous moorings and jetties. Chichester Harbour Conservancy Council has implemented a byelaw to protect vessels and moorings from damage and to minimise the risk of injury. The byelaw prohibits bait collection of any kind within 15 m of any mooring or 6 m of any structure. Signage at the entrance to the quay details these rules. In addition, the offices of the Chichester Harbour Conservancy Council happen to overlook the channel and Watson *et al.* report that “over many years officers have observed digging occurring close to moorings and jetties... this has led to officers challenging individual diggers about the infractions and explaining the rules”. The byelaw is therefore regularly, if unofficially, enforced.

5.1.3. Pagham Harbour

Pagham Harbour is to the east of the Solent. It is within a Local Nature Reserve that was previously managed by West Sussex County Council, but that is now managed by the RSPB. It is subject to byelaws enacted by the County Council under the National Parks and Access to the Countryside Act

⁹⁴ A view shared by the Devon & Severn IFCA; pers. Comm. 12 June 2014 Katherine Gray, Devon & Severn IFCA.

⁹⁵ Watson, G., Murray J.M., Schaefer, M., Bonner, A. and Gillingham, M. (2013) *Does local marine conservation work? Evaluating management strategies for bait collection in the Solent*, A report to Natural England with funding from the Crown Estate’s Marine Stewardship Fund.

⁹⁶ Under the Conservation (Natural Habitats) Regulations 1994, regulation 22.

1949⁹⁷ to protect soft-sediment habitats and wading birds. The byelaws restrict bait collection activities in a number of ways:

- It is prohibited to carry out bait digging without a permit. These are limited in number and issued annually for a fee of £25. Permits are checked on site by the site wardens.
- There is a bag limit of 1lb per collector and a prohibition on collecting after sunset.
- Collection is limited to two areas, with access to zone A for 6 months of the year and then to zone B for the other 6 months of the year.

5.2. Findings

Watson *et al.* undertook detailed analysis of the sites, looking at CCTV footage and examining soil samples to establish the extent of bait digging activities at each site. The report also looked at how bait could be stored and for how long, with the intention of trying to establish how much bait a genuine personal collector could take in one visit and thus, whether it is possible to distinguish between personal and commercial collectors.

5.2.1. Personal vs commercial collection

Some management methods for bait collection activities are premised on the idea that a recreational collector must, in all instances, be collecting less than a commercial collector; both in terms of the amount collected and in terms of the length of time spent collecting in any one visit. This is the premise behind, in particular, bag limits.

However, Watson *et al.* disprove this in two ways. First, the CCTV footage examined showed that the time spent digging for bait varied with the site, the season, the time of day and the tidal height. It also presumably varies with the skill of the digger. Second, having undertaken detailed testing of the various methods of storing bait to establish how long bait can be stored before use, Watson *et al.* establishes that it is possible to store bait successfully for some weeks. As there is an obvious variance in the number of times that recreational fishermen go fishing (some may go only once a month, others may go multiple times in a week), Watson *et al.* concludes that it is therefore impossible to look at either the length of time spent digging or the amount of bait collected to conclusively separate commercial and recreational digging.

5.2.2. How each management strategy is working

5.2.2.1. Fareham Creek

Watson *et al.* did not have the data to be able to compare activity prior to the implementation of the SNCO to establish whether the SNCO has worked to reduce bait digging. However, the soil samples taken and the CCTV footage observed that bait digging activities are taking place regularly at the site. As only commercial digging is prohibited, the activities could all be legal, but this is unlikely. There has been no enforcement of the ban on commercial digging and Watson *et al.* reports that when residents have called the police to report activities they suspected to be commercial digging '*...the officers were unable (or unwilling) to act because of the difficulties in apprehending individuals and bringing any subsequent prosecution*'.

5.2.2.2. Dell Quay

⁹⁷ See above for further details of the byelaws, including that the County Council has currently suspended the byelaws as it believes they wrongfully infringe the public right to fish and ancillary right of bait collection.

Watson *et al.* conclude that the byelaw concerning bait digging at Dell Quay has been very successful. The soil samples taken and the CCTV footage examined showed that the majority of bait digging activity at Dell Quay was outside of the prohibited areas. Watson *et al.* attribute this to the unofficial enforcement activities of the Chichester Harbour Conservancy Council officers and also to the fact that jetties and moorings are real structures and not just lines on a map, so all parties are likely to be clearer about what is restricted and what is not. Watson *et al.* also suggest that *'protection for the sake of the safety of other shore users and the possibility of litigation from any damage to boats may have a much stronger deterrent effect than protection for conservation purposes'*.

5.2.2.3. Pagham Harbour

Interestingly, the data collected by Watson *et al.* showed that there is minimal digging taking place at Pagham Harbour, even though there are 15 permitted diggers and, as reported by the site wardens, a number of non-permitted diggers on the site too. Watson *et al.* concluded that the lack of activity may be down to the fact that the site has two full time wardens, but felt that *'it is more likely that it is the difficulty of accessing Pagham Harbour (in terms of both distance to travel to the harbour and distance from a car park to the digging areas) that deters the majority of diggers except for locals'*.

5.2.3. The bait collectors' code

Watson *et al.* also looked at 'The Bait Collectors' Code'; a voluntary code for bait collectors in the Solent area recommended by the public enquiry established for the SNCO at Fareham Creek. It was based on the National Federation of Sea Anglers' own code and published in 2003/2004. Watson spoke to a number of angling shops in the Solent area about the code. The majority of shops recognised it and stated that the diggers that supply them followed the code. This seems positive, but it should be noted that, for example, one of the rules of the code is that holes should always be backfilled. However the CCTV footage examined by Watson *et al.* showed that 95% of diggers recorded did not backfill their holes. This shows a clear disparity between the actions of bait diggers and what they and those that they supply state is happening.

Watson *et al.* also noted that a code needs to change behaviour before it can be considered successful. The Bait Collectors' Code contains ten 'rules' and only five of these relate to bait collection. Watson *et al.* go on to state that *'nearly all of the bait-specific points would be standard practice for most experienced diggers, for example, diggers routinely collect only what is needed and select larger worms, but avoid spawning ragworms as they do not remain intact on a hook'*. If a code merely restates what is standard practice already, then the majority of collectors are likely to comply with it, but this does not mean that the code is successful in managing behaviour.

As well as needing to change behaviour, rather than fall in line with current behaviour, any voluntary code will need to address the nature of bait collection. Bait collectors do not tend to belong to any recognised organisation⁹⁸ and can easily use sites that are geographically distant (particularly commercial collectors) from each other and from the collector's base. It is therefore hard to ensure that all collectors are aware of a code that affects a particular area, let alone comply with it.

5.3. Summary

⁹⁸ It was estimated in Fowler's (1999) report (n80) that around 75% of anglers are not affiliated to a regional or national association.

Watson *et al.*'s main finding was that enforcement is the key to whether a management strategy works to control bait collection activities. Without enforcement, any management strategy is likely to have limited, if any, effect.

Spatial zonation can work to eliminate digging in one area and concentrate it in less sensitive areas, but the zonation must be more than just a line on a map. If it is not based on physical structures (such as at Dell Quay), then some indication on the ground of the boundaries of the zonation is likely to have a better chance of changing behaviour than a line on a map at the entrance to the site.

Differentiating between commercial and recreational digging is almost impossible and so any management strategy must address both equally. This would make sense from a conservation point of view as, if the extent of digging can be the same whether commercial or recreational, then the impact on the site is the same too.

5.3.1. Site specific

The three sites studied were in the same area and covered by the same IFCA, yet they showed large differences in the extent of bait digging carried on there and the level of compliance with any management strategy in force there. Watson *et al.* therefore conclude that:

“...any management must be site specific and tailored to local needs. Regional (or UK) level management is important for displacement issues, giving parity between the regional IFCA's and simplifying the management process, but one size will not fit all.”

5.3.2. Enforcement window

Watson *et al.* studied CCTV footage from each site. The recording was continuous, but the footage was only examined for the period starting 1 hour before low tide and ending two hours after low tide. While it is entirely possible that some bait digging activity occurred outside of this three-hour period, Watson found that the vast majority of diggers recorded arrived and left within this period. This three-hour period is therefore the key window for any enforcement measures.

5.3.3. Recommendation for enforcement

As stated above, enforcement is vital if any management strategy is to work. However, traditional enforcement measures can be very expensive. Watson *et al.* recommends the use of mobile CCTV systems. The report notes that advances in technology to allow for motion tracking, facial recognition, and remote control mean that CCTV could be the best way to monitor bait collection, with the added bonus that it provides evidence should it be needed.⁹⁹

6. Poole Harbour

The Southern Inshore Fisheries and Conservation Authority has set up a working group to look at bait collection management within Poole Harbour. The members of the working group are drawn from local bait diggers (both commercial and recreational), the relevant authorities in the area, and the scientific community.

The seagrass beds within Poole Harbour and elsewhere within the Southern IFCA's remit have been evaluated as being at the highest risk and so the IFCA has passed a byelaw under sections 155 and 156 of the Marine and Coastal Access Act 2009 prohibiting bait collection within certain defined

⁹⁹ As stated in the Watson report, it should be noted that any proposal to install CCTV will need to consider data protection issues and the Regulatory Investigative Powers Act 2000.

areas (being the areas of seagrass). This has been in place for around 5 months¹⁰⁰ and is so far deemed successful by the Southern IFCA.¹⁰¹ There have been no recorded offences against the byelaw. By way of enforcement measures, SIFCA offices patrol Poole Harbour both on land and by patrol boat at least 1 to 2 times each week as a minimum.

In addition to the byelaw, the working group has developed a Memorandum of Understanding which asks bait collectors in Poole Harbour to avoid certain defined areas¹⁰² between 1 November and 30 March. This will be implemented with a public launch of the MoU in late summer/early autumn 2014, ready for the next bird sensitive season (which starts in November 2014). Although the MoU has yet to be launched, the Southern IFCA has confirmed¹⁰³ that it has been well received by local angling groups and commercial collectors, and they hope that the close involvement of these groups will lead to a sense of ownership by the community and an element of self-policing.

¹⁰⁰ As at June 2014.

¹⁰¹ Pers. Comm. 16 June 2014, Sarah Birchenough, Southern IFCA.

¹⁰² Chosen as bird sensitive areas and agreed by the working group.

¹⁰³ Pers. Comm. 16 June 2014 Sarah Birchenough, Southern IFCA.

SECTION E: A CASE STUDY – THE GANN AT MILFORD HAVEN

1. The Factual Context

The area of concern is the Gann estuary at Milford Haven (“**the Gann**”), particularly around the village of Dale. The Gann is subject to several designations under national and European law. These are:

- a. The Pembrokeshire Marine/Sir Benfro Forol Special Area of Conservation (SAC), designated under the Habitats Directive .
- b. The Milford Haven Waterway Site of Special Scientific Interest (SSSI) designated under the Wildlife and Countryside Act 1981.
- c. A Marine Protected Area (MPA) under the OSPAR Convention.

It is also one of the best examples of a sheltered muddy gravel sediment habitat in Wales, which is a priority habitat of principal importance listed under section 42 of the Natural Environment and Rural Communities Act 2006.

The Gann is foreshore owned by The Crown Estate. Along with other areas of foreshore in Pembrokeshire, it is leased to the Pembrokeshire Coast National Park Authority (PCNPA) by a Lease dated 16 August 2002. We are informed that the terms of this lease oblige PCNPA to facilitate use of and access to the foreshore by third parties, although a review of the lease and the 2003 Deed of Variation does not show such an obligation.

Several types of bait collection activities are currently being carried out in the Gann, but those of most concern are (in order of importance):

- a. Digging for ragworm by hand in the muddy intertidal sediments. King rag is the most sought after and this is found in the muddy gravel (a sensitive habitat) of the Gann near Dale.
- b. Collection of common shore crabs (peeler crabs) by turning boulders and in some places by placing artificial habitats on the shore to act as a refuge for the crabs. This takes place at certain times throughout the year.

Those carrying out bait collection activities at the Gann can be split into three groups: (i) individuals for their own use; (ii) individuals for their own use and to pass on to friends (again for their own use) for free; and (iii) individuals for commercial gain. Groups (i) and (ii) are permitted by the public right to collect bait. Group (iii) is not.

2. The Wildlife and Countryside Act 1981

2.1. Is there a notifiable operation?

The Gann is within the Milford Haven Waterway SSSI. The list of notifiable operations relating to this SSSI includes:

- the destruction, displacement, removal or cutting of any plant or plant remains, including, inter alia, seaweed; and
- seafood or marine life collection, including the use of traps or fish cages and bait digging likely to damage the flora, fauna, or features for which the site is of special interest.

Furthermore, the management scheme for the Milford Haven Waterway SSSI states that “bait collection can have an impact on the site by disturbing finer sediments which may then become transported elsewhere, whilst also bringing previously buried contaminants to the surface. Bait collection, along with winkle and mussel picking can also result in the selective extraction of species from the intertidal area. The intertidal communities at several sites, in particular muddy gravel sites within the Haven, have changed over time, as indicated by surveillance and observation undertaken over the last 10 or more years. This may be as a result of the bait collection that occurred at those sites regularly. Further surveillance and monitoring is required, and consideration should be given to attempting to limit the impact on the intertidal features, and birds, which is a result of bait collection.”

The list of notifiable operations does not make any distinction between commercial bait digging activities and recreational bait digging activities. Therefore, on a strict interpretation of the list, both activities are notifiable operations. However, we are informed that two individuals have been identified as being responsible for the majority of bait collection activities that took place during the spring of 2013, and that both of these individuals were collecting commercially. For the purposes of this section on the WCA, we will therefore focus on commercial activities only.

Following a letter from the police to the two individuals in question warning them that their activities were not permitted under common law, the WCA, or the Habitats Directive, one of the individuals then applied to PCNPA for permission to carry out commercial bait collection activities at the Gann.

2.2. The relevant section of WCA to apply

As stated above, bait collection is a notifiable operation for the Milford Haven Waterway SSSI under the WCA. NRW therefore need to be notified of any proposal to grant consent for the activity under either section 28E (general duty on occupiers) or section 28I (duty on public authorities exercising their functions) of the WCA. The relevant section to apply will depend upon whether PCNPA (as a public authority within the definition of section 28G WCA) would be acting in exercise of its functions in considering whether to authorise a notifiable operation on its land.

2.2.1. Is PCNPA acting in exercise of its functions?

The application for consent to carry out commercial bait digging activities at the Gann has been made to PCNPA as occupier of the land in question. Therefore, if PCNPA leases the land in exercise of its functions then, arguably, any decision to authorise an activity on the land would also be in exercise of its functions and so section 28I would apply.

PCNPA was created under the Environment Act 1995. This Act gives national park authorities the power to do anything which, in the opinion of the authority, is calculated to facilitate, or is conducive or incidental to, (a) the accomplishment of the statutory purposes of the national park authorities and/or (b) the carrying out of any functions conferred on the authority by virtue of any other enactment.

In addition, Schedule 8 of the Environment Act 1995 applies section 120 of the Local Government Act 1972 to national park authorities; giving them power to acquire land for the purposes of any of their functions or for the benefit, improvement, or development of their national park.

There are no other powers to acquire land given to National Park Authorities in the legislation, and so the decision of PCNPA to take a lease of much of the foreshore within the Pembrokeshire Coast

National Park is likely to have been made under the specific power to acquire land in section 120 Local Government Act 1972.

Whether PCNPA hold the land in question in exercise of their functions will depend upon the reason for acquiring the land. However, we have assumed, for the purposes of this report, that PCNPA acquired the land for the purposes of their functions, and so that they are a public authority to which section 28I WCA applies.

2.2.2. Applying Section 28I

Under section 28I WCA, PCNPA cannot give consent to carry out a notifiable operation until it has given notice of the proposed operation to NRW. PCNPA must then wait 28 days before it may give its consent. If it receives any advice from NRW within that period, it must take this into account in deciding whether to give consent and/or what (if any) conditions to attach to the consent. However, PCNPA is not obliged to follow the advice of NRW; save that if it chooses not to follow their advice, PCNPA must give notice of the permission and its terms to NRW, along with a statement of how it has taken NRW's advice into account, and may not allow the operation to start until 21 days after the date of the notice to NRW.

2.2.2.1. Offence by bait collectors

Following the receipt of a request for permission to carry out commercial bait digging activities at the Gann, PCNPA have not formally notified NRW as required by section 28I. At present therefore, an activity is being carried out within a SSSI that requires the consent of PCNPA and notification to NRW, but that has not been consented to by PCNPA or notified to NRW. An occupier or owner who has received notification and permits collecting bait commercially at the Gann is therefore in breach of section 28E(1) of the WCA and liable on summary conviction to a fine of up to £20,000 or on indictment to an unlimited fine. A third party collecting bait may be in breach of section 28P(6) of the WCA if they intentionally or recklessly destroy or disturb of the features of the SSSI without reasonable excuse and, if they knew what they destroyed was on summary conviction, they are liable to a fine of £20,000.¹⁰⁴ There is a lesser offence, which has a maximum fine on level 4 on the standard scale,¹⁰⁵ if the bait digger is unaware of the SSSI.¹⁰⁶

2.2.2.2. Possible offence by PCNPA

Section 28P(5A) WCA makes it an offence for a public authority exercising its functions to permit a notifiable operation to be carried out without first notifying NRW using the procedure set out in section 28I WCA. This offence carries a fine of up to £20,000 on summary conviction or a fine on indictment.

The question is whether PCNPA is 'permitting' the operation of commercial bait digging at the Gann. In other words, is 'permitting' a positive action or can a body be said to be permitting an operation if it merely has knowledge of the carrying out of the operation and potential powers and/or rights to stop the operation, but has failed to make any attempt to do so?

¹⁰⁴ Wildlife and Countryside Act 1981, section 28P(6).

¹⁰⁵ Currently £2,500.

¹⁰⁶ Wildlife and Countryside Act 1981, section 28P(6)(a).

The only guidance the WCA gives as to the meaning of ‘permission’ is that in relation to section 28I, “permission includes authorisation, consent, and any other type of permission”¹⁰⁷. There doesn’t appear to be any case law that gives any further guidance on this meaning.

The Oxford English Dictionary definition of ‘permission’ is ‘the action of permitting, allowing, or giving consent’. The definition of ‘allow’, in this context, is to permit or enable, although it is stated that the breach “covers a range of meaning from actively giving permission to passively not preventing something”.¹⁰⁸

Case law relating to other environmental legislation may be able to aid in the interpretation. For example, *Walker & Son (Hauliers) Ltd v Environment Agency*¹⁰⁹ involved an appeal against a prosecution for a breach by the appellant of the Environmental Permitting Regulations 2007.¹¹⁰ Those regulations make it an offence to ‘knowingly permit’ the contravention of the regulations by someone else. The case turned on a slightly different point, but the Court did hold that permitting something includes having knowledge of it and allowing it by failing to prevent it.

The *Walker* case provides some guidance, but the regulations in question in that case did state that the offences created by them were to be strict liability, which may have led to a stricter interpretation of the word ‘permit’ than may be applied to other legislation which creates non-strict liability offences, such as the WCA.

While the exact interpretation of ‘permission’ in this case may not be clear without further in depth research, the possibility of the commission of an offence by PCNPA in failing to take steps to stop commercial bait digging operations at the Gann cannot be discounted. Furthermore section 28G(2) of the WCA requires the PCNPA to “take reasonable steps, consistent with the proper exercise of the authority's functions, to further the conservation and enhancement of the flora, fauna or geological or physiographical features by reason of which the site is of special scientific interest.” Read together there is a strong case for the PCNPA taking preventative measures to restrict bait collection (both commercial and recreational) which harms the SSSI.

3. The Habitats Directive

3.1. Article 6(2)

3.1.1. Does it apply?

Although technically it is the member state rather than the competent authority who is responsible for any breach of the Habitats Directive where public bodies have the requisite authority, Article 6(2) requires them, as competent authorities, to take appropriate steps with regard to an SAC, to avoid the deterioration of natural habitats and the habitats of species, as well as the disturbance of the species for which the site has been designated.

The conservation features for which the Pembrokeshire Marine SAC was designated run to eight habitat types and seven species. The Gann includes at least two of the protected habitat types; large shallow inlets and bays, and intertidal mud and sandflats. In fact, the flats of the Gann near Dale are the most biologically diverse intertidal sediment site within the SAC, despite being used heavily for bait digging. For the purposes of this report, it is assumed that the bait digging activity that is

¹⁰⁷ Section 28I(7) Wildlife and Countryside Act 1981.

¹⁰⁸ See <http://www.oed.com/view/Entry/5460?redirectedFrom=allow#eid> (accessed 5 June 2014).

¹⁰⁹ [2014] EWCA Crim 100 (6 February 2014).

¹¹⁰ Now repealed.

currently taking place at the Gann is either causing the deterioration of the protected habitat types or at least risking such deterioration.

Article 6(2) therefore applies to the Gann and each competent authority must take appropriate steps to restrict or control bait digging in order to prevent deterioration of the habitat types.

3.1.2. What does it require?

The duties under Articles 6 (1) and 6(2) require the member state (and therefore at least one public body with appropriate powers) to restrict bait digging activity to levels that do not risk any deterioration of the habitats and species found on the site. In calculating the level (if any) of bait digging activities that can be undertaken at the Gann without risking the deterioration of the protected habitat types, it would be advisable to base such management measures on appropriate scientific advice.

3.2. Article 6(3)

Article 6(3) requires a competent authority to carry out an appropriate assessment before deciding whether to undertake or give consent to a plan or a project which is likely to have a significant effect on an SAC and which is not connected with or necessary to the management of the site.

The adoption of a management measures pursuant to Article 6(2) could be said to be a plan, but it is unlikely to trigger an Article 6(3) assessment on the basis that such management measures are by definition connected with the management of the site.

Furthermore, provided the management measures are based on sound scientific evidence that confirms an acceptable level of bait digging activity, that will not place the protected habitats at risk of deterioration, any proposal to permit or consent to bait digging activities should not trigger an Article 6(3) assessment as there should be no risk that such permit or consent would have an adverse effect on the integrity of the site.

4. Potential Regulators for the Gann

4.1. The Welsh Government

As noted above, “the environment” is one of the areas in which the Welsh Ministers can exercise executive functions and the Assembly has legislative competence. It is therefore possible for the Ministers to propose a new Act to control bait digging activities at the Gann.

This would have the advantage that the Ministers and the Assembly have more than adequate experience of bringing in new legislation. However, it is unlikely to be the best option in the present case as the presumed time demands on the Ministers and the Assembly make it unlikely that this issue would be allocated sufficient Assembly time within an acceptable time frame for action to be taken under Article 6(2).

Alternatively, the Welsh Ministers have byelaw making powers under section 5 of the Sea Fish (Conservation) Act and section 155 of the Marine and Coastal Access Act 2009. Again, this requires time that the Ministers may struggle to find, but presumably less time than a new Act. The powers given to the Welsh Government are extensive and include the ability to issue permits over given areas.¹¹¹

¹¹¹ These permitting powers have been used by the Devon and Severn Inshore Fisheries and Conservation Authority.

4.2. Natural Resources Wales

NRW has various byelaw-making powers that could be used to control bait digging activities at the Gann:

- Section 20 of the National Parks and Access to the Countryside Act 1949 and Regulation 30 of the Habitats Regulations.
- Section 28R of the Wildlife and Countryside Act 1981.

4.3. The Crown Estate

The Crown Estate owns the Gann. Section 6(1) of the Crown Estate Act 1961 permits the Crown Estate Commissioners to make such regulations, to be observed by persons using land of the Crown Estate to which the public are for the time being allowed access, as they consider necessary for securing the proper management of that land and the preservation of order and prevention of abuses on that land.

Arguably the Gann is land to which the public are for the time being allowed access. While there is no general public right to access beaches, public access at many beaches, including the Gann, is tolerated. This means that the Commissioners could possibly use their byelaw-making power if they are satisfied that the control of bait digging activities at the Gann is necessary for securing the proper management of the land.

However, it is unlikely that the Commissioners would want to be the body that regulates bait digging activities, given that they appear to have had little or no involvement in the issue to date, moreover the authorisation of some bait digging under the public right to fish may make this a difficult byelaw to enact.

4.4. Pembrokeshire Coast National Park Authority (PCNPA)

4.4.1. PCNPA as National Park Authority

PCNPA already has a set of byelaws in place, made under the National Parks and Access to the Countryside Act 1949 and the Local Government Act 1933. These include a byelaw stating that:

“No person shall, without lawful authority, kill, take, molest or wilfully disturb any animal or bird, or take or injure any egg or nest, or engage in any hunting, shooting or the setting of traps or nets or the laying of snares.”

This could possibly be interpreted to include worms and crabs. However, the byelaw has not at present been used to control bait collection and we understand that the current byelaws are viewed as outdated and not fit for purpose by those involved.

It is open to PCNPA to repeal the current byelaws and make a new, updated, set of byelaws, to include restrictions on bait digging. The advantage of this approach is that the byelaws could be made to apply to all the foreshore owned or occupied by PCNPA within the national park. Care would need to be taken in resourcing this approach and it may be that for practical reasons a case by case basis of the adoption of byelaws is more achievable. Articles 6(1) and 6(2) of the Directive do not set a firm timetable, but it is clear the measures would need to be proceeded within a reasonable timescale.

4.4.2. PCNPA as occupier of the land

Separate from (and additional to) any issue of regulation under environmental or other legislation, bait and seaweed collection not covered by the public right should have the consent of PCNPA as the occupier of the Gann (either explicitly or impliedly through public ownership of the land in question).

Clause 3.9 of the Lease under which PCNPA occupies the Gann states that PCNPA must use reasonable endeavours to prevent all encroachments and unlawful acts on the demised premises which may prejudice the Crown's title to them. This arguably covers the use of the premises by commercial bait collectors, who have no public or private right to be on the premises or take anything from the premises. There remains a real question though as to whether the PCNPA can consent to such an activity in a SSSI because of s28(P) of the WCA.

In addition, any byelaws made by PCNPA in respect of the use of the premises will need the consent of the Crown Estate Commissioners (such consent not to be unreasonably withheld).

4.5. Pembrokeshire County Council

Pembrokeshire County Council has powers to regulate bait digging activities at the Gann under section 82 of the Public Health Acts Amendment Act 1907. This has been used by a number of councils to regulate bait digging, with varying degrees of success. Pembrokeshire County Council need to be informed of their potential to assist in this matter in the light of the European designation affecting the site which puts pressure on authorities with appropriate powers to protect the site.

4.6. Milford Haven Port Authority

The Gann is within the boundary of the Port of Milford Haven. Milford Haven is a trust port created by The Milford Haven Conservancy Act 1958. This was amended by the following Acts:

- Milford Haven Conservancy Act 1983
- Milford Haven Port Authority Act 1986
- Milford Haven Port Authority Harbour Revision Order 2000
- Milford Haven Port Authority Act 2002

The 1958 Act imposes a duty on the Board of the Port Authority to take such steps as it may from time to time consider necessary or expedient to "maintain, improve, protect and regulate the navigation, and in particular the deep-water facilities", in the area within the boundary of the Port of Milford Haven. The 1958 Act also gives the Board a power, in satisfying that duty, to make byelaws regulating any matter, but in particular "for preventing and removing obstructions or impediments within the haven not authorised by or under any enactment".

The question of whether such regulation falls within the duties of the Port of Milford Haven is difficult to answer without sight of their governing instrument; the 1983 and 1986 Acts have not been examined as they are not found on the usual legal databases. Even if there are no moorings, jetties or other navigation structures at the Gann, if there are questions of requisite statutory authority, there may be a case for the Port Authority regulating the activity through its obligations under section 40 of the Natural Environment Rural Communities Act 2006 and as a competent authority under the Habitats Directive.

SECTION F: GUIDELINES FOR THE FUTURE EFFECTIVE MANAGEMENT OF BAIT & SEAWEED COLLECTION

Summary

This section provides some guidelines for the management of areas in which bait digging activity (or other intertidal activity) has reached problem levels. We have assumed that any such area is most likely to be within a European Site¹¹² and so that Article 6 of the Habitats Directive will apply.

There can be no 'one size fits all' approach to bait digging management as the key is to ensure that any management strategy is backed up by reliable scientific evidence specific to the area in question. The level of bait digging activity that may be acceptable for one area of foreshore cannot be extrapolated to apply to all areas of the Welsh coast.

As well as a tailored approach suiting the specific area in question, any management strategy must include (as an integral part of that strategy) a package of enforcement measures which seek to ensure that the strategy is adhered to by all users of the foreshore. A strategy which is not backed up with adequate enforcement measures is likely to fail and may expose the implementing authority to the risk of infraction proceedings under the Habitats Directive.

1. Extent of Area

The first step should be to establish the extent of the area that needs to be managed with regard to bait collection activities. At this stage, thought should be given to whether any potential management strategy may cause displacement of bait collection activities to nearby sites and whether such sites should also be included in the area subject to management.

2. Scientific Evidence

Any action taken must be based on scientific evidence obtained in respect of the area in question confirming what level (if any) of bait collection activity is acceptable for that area. This is the level (if any) that can take place within the area without risking the deterioration of the habitats or significant disturbance of the species for which the area is designated under European legislation.¹¹³

At this stage evidence should also be collected establishing the current level of bait collecting activity for the area in question.

Together these two evidence bases will inform both the amount by which bait collection activity needs to be reduced and the possible practical methods for achieving such a reduction.¹¹⁴ They may also provide useful information when deciding the most suitable enforcement measures to adopt.¹¹⁵

In order to reduce the risk of a possible judicial review or infraction proceedings being launched in respect of any management scheme implemented, this is also the stage at which nature

¹¹² In other words, an SAC under the Habitats Directive or an SPA under the Birds Directive.

¹¹³ Competent authorities are under a duty (under Article 6(2) of the Habitats Directive) to avoid the deterioration of habitats and/or the significant disturbance of species for which a site is designated.

¹¹⁴ Such as zoning, temporal restrictions, or a blanket prohibition.

¹¹⁵ For example, evidence showing that an area has a high level of bait collecting activity at night is likely to warrant different enforcement measures than an area in which all activity takes place within traditional working hours.

conservation charities and organisations should be involved. If the scientific evidence obtained is unclear in any way, but the relevant nature conservation charities and organisations have been involved in the development of a management strategy and are happy with it, then the risk of a judicial review application or infraction proceedings is significantly reduced.

3. Management Options – Outright Ban

If the scientific evidence obtained for the area in question concludes that there is no level of bait collecting activity that is acceptable, then compliance with a public body’s duties under the Habitats Directive requires that the activity is prohibited completely.¹¹⁶

Any such proposal to prohibit bait collection activities would not trigger an Article 6(3) assessment, as it would be part of the management scheme for the site.

3.1. Is it possible?

An outright ban may be controversial as it would apply to recreational collectors as well as to commercial collectors. However, the view that the public right to collect bait for personal use cannot be prohibited in any way is erroneous.

The public right to fish is subject to various localised prohibitions, such as the no take zone at Lundy Island. Additionally, *Anderson v Alnwick* held that byelaws could prohibit bait collection at certain beaches provided that the geographical extent of such byelaws was not such as to prohibit fishermen obtaining worms reasonably close by.

3.2. Options for achieving an outright ban

An outright ban ultimately requires a byelaw or statutory instrument to back it up. This is not a quick option, and so a voluntary code could be used in the interim period while the byelaws are being passed.

The best legislation to be used and the most suitable body to use that legislation to make such byelaws will depend upon the designations affecting the area in question. Below we have listed some suggestions for the bodies and legislation that could be used in each instance. It will fall to the bodies in question to decide between themselves which of them is the most suitable in any particular case.

3.2.1. Area within an SAC and a SSSI

Public Body	Legislation
Welsh Ministers	Sea Fish (Conservation) Act and section 155 Marine & Coastal Access Act 2009
Natural Resources Wales	Regulation 30 Habitats Regulations 2010 and section 20 National Parks & Access to the Countryside Act 1949 <i>or</i> Section 28R Wildlife & Countryside Act 1981
Pembrokeshire County Council	Section 82 Public Health Acts Amendment Act 1907

¹¹⁶ See Article 6(2) Habitats Directive.

3.2.2. Area within an SAC but not a SSSI

Public Body	Legislation
Welsh Ministers	Sea Fish (Conservation) Act Section 155 Marine & Coastal Access Act 2009 <i>or</i> Special Nature Conservation Order, Regulations 25 & 26 Habitats Regulations 2010
Natural Resources Wales	Regulation 30 Habitats Regulations 2010 and section 20 National Parks & Access to the Countryside Act 1949
Pembrokeshire County Council	Section 82 Public Health Acts Amendment Act 1907

3.3. Voluntary code

As stated above, an outright ban supported by byelaw will take some time to be put in place. However, a delay in implementing a ban could lead to significant deterioration of habitats and disturbance of species in the area. Therefore, in order to comply with their duties under Article 6(2) of the Habitats Directive, the relevant authorities for the area in question could cooperate to produce a code of conduct for the area in question. The code would be voluntary, but would be expressed as pending legislation, which would hopefully bestow more authority on it than a typical voluntary code.

It is suggested that a working group is set up to draw up the voluntary code, comprising representatives from each of the relevant public authorities as well as members of the local angling/bait digging community and residents from the area in question. The involvement of local anglers, bait diggers, and residents would hopefully lead to a feeling of ownership of the code and a willingness to abide by it and to help enforce it.

3.4. Enforcement

As with any management strategy, the key to success will be enforcement. Without any enforcement measures being taken, any new management strategy is likely to fail; as was found by Watson *et al.* at Fareham Creek in the Solent (where an SNCO has remained simply a line on paper owing to a lack of any real enforcement). Given this, enforcement measures need to be thought of as part of the management strategy and not an optional extra. An authority's duty under Article 6(2) of the Habitats Directive to actively manage a site, is not satisfied merely by implementing an appropriate management strategy on paper. Enforcement measures need to be taken to ensure that the strategy is being adhered to and that the risk of deterioration of habitats or significant disturbance of species is being reduced/eliminated.

For a voluntary code followed by a byelaw enacting an outright ban, the following enforcement measures might be considered:

3.4.1. During the voluntary code stage

The first consideration with any management strategy, whether voluntary or otherwise, is to ensure that users of the foreshore are aware of it. Appropriate signage will therefore be needed to alert any bait collectors to the existence and content of the code.

The voluntary code will have no legal basis, but members of local angling community and local residents could be encouraged to approach those breaching it to remind them of the existence of the code and of the pending byelaw. If there is unwillingness to approach individuals in this way, then the local residents and angling community could be encouraged to report sightings of people breaching the code to either the local wildlife police officer or one of the relevant authorities.

Spot checks by the local wildlife police officer and/or representatives from one or more of the relevant authorities could also be carried out. Anyone found breaching the code during such spot checks could be informed/reminded of the existence of the code and that a byelaw is pending which will make their activity a criminal offence.

3.4.2. Following implementation of the byelaw

Once the byelaw is in place, enforcement will have legal bite. Again, signage will be important in order to ensure that bait collectors are aware of the existence of the rules and their content.

Spot checks by the local wildlife police officer and/or representatives from one or more of the relevant authorities are likely to be one of the most effective ways of enforcing the byelaw. This could be accompanied by the use of a CCTV system to monitor the beach.

A CCTV system has the benefit of being a deterrent in itself.¹¹⁷ In addition, if the resources are available to monitor the footage, a CCTV system will be able to indicate when illegal activity is occurring so that an appropriate person can visit the beach and attempt to stop the activity. The hope would be that an initial period of monitoring and visiting the beach will be sufficient to make it clear to bait collectors that they must comply with the byelaw or face criminal sanctions, and that after an initial period of intense enforcement activity, this can be scaled down to a much reduced level.

As with the voluntary code, involvement of the local anglers/bait diggers and the local community should be encouraged as it could help to share the burden of enforcement.

4. Management Options – Restricting Activity

If the scientific evidence obtained for the area in question identifies a level of activity that can occur without risk of deterioration of habitats or significant disturbance of species and this level is less than the level of activity currently occurring at the area, then action needs to be taken to reduce the current level to that identified by the scientific evidence.

Again, it is recommended that a working group is set up comprising representatives from the relevant authorities and members of the local angling/bait digging community and local residents. The working group would then establish the best way to reduce bait digging activity to an acceptable level in accordance with the scientific evidence available. The possible options include zoning the beach, bag limits, and temporal limits. It is important that the option(s) chosen is(are) backed up by the scientific evidence.

Any restrictions must apply to commercial and recreational collecting equally. The conclusions of Watson *et al.* were that there is no realistic and reliable way to distinguish between commercial and recreational collectors and so any restrictions based on this distinction are likely to fail.

¹¹⁷ Although it should be noted that the deterrent effect will diminish over time if no other enforcement measures are implemented and bait collectors realise that no action will be taken even if they are caught on camera.

4.1. Options for restricting the level of activity

The procedure for restricting the level of activity will be much the same as for an outright ban. A set of byelaws setting out the rules will be required and a voluntary code should be used while those byelaws are being made. As with an outright ban, enforcement measures must be considered at an early stage and included within the management scheme. The possible enforcement measures are discussed above.

4.2. The Wildlife and Countryside Act 1981

Any management strategy, other than an outright ban, will also need to consider the application of the WCA. If the area in question is within a SSSI and the list of notifiable operations for that SSSI includes bait digging, then the appropriate notification must be given to NRW and consent obtained (if needed).

Whether a notifiable operation is proposed may also depend on the scientific evidence for the area in question. For example, within the Milford Haven Waterway SSSI, the notifiable operation is 'bait digging likely to damage the flora, fauna, or features for which the site is of special interest'. This suggests that it is possible that there is a level of bait digging activity that would not be likely to damage the flora, fauna, or features for which the site is designated, which can only be determined by a scientific study of the area. Similar to the application of article 6(2) of the Habitats Directive, if the scientific evidence establishes a level of bait digging activity that is not likely to damage the flora, fauna, or features for which the site is designated, then any management scheme that proposes to restrict the activity to that level would not be proposing a notifiable operation and so would not need to follow the relevant notification procedure. However, if the management scheme proposes to restrict the activity to a level which is more intense than that established by the scientific evidence then it is proposing a notifiable operation, which would need to be notified to NRW and consent sought (if appropriate).

4.3. Landowner

Commercial bait digging is not permitted by a public right and so any commercial bait digging activity also needs the permission of the owner of the foreshore. Without such permission any entry onto the foreshore for the purpose of bait collecting will be a trespass. Furthermore, the fact that the landowner or person in possession of the foreshore may not have taken any action in the past, is not sufficient of itself to establish a defence (by way of estoppel or acquiescence) to a claim of trespass.¹¹⁸

Requiring commercial bait diggers to obtain the separate consent of the relevant landowner/occupier can be very difficult in practice. So this leaves a range of options.

4.3.1. Do nothing

The landowner and any occupiers may be involved in the decision to implement a management scheme in respect of an area of foreshore and should, at the very least, be informed of such a decision. They may then be happy to allow such activity as is permitted by the byelaws (or voluntary code), without any further consent from them. This will not prejudice a claim for trespass should a commercial bait collector breach the byelaws.

¹¹⁸ *Jones v Stones* [1999] 1 WLR 1739.

4.3.2. Blanket consent

A landowner/occupier may prefer to issue a blanket consent to commercial bait collectors provided that they are complying with the relevant byelaws (or voluntary code). This could be noted on the signage setting out the rules at the relevant area.

In the case of occupiers, it will be important to check whether any separate consent of the landlord is required under the terms of the lease.

4.3.3. Individual consents

A landowner can issue individual licences to commercial bait collectors on the basis that the licensed commercial bait collectors will police the area in question.

5. Pembrokeshire Case Study; the Gann at Milford Haven

5.1. The area

The area that will be subject to any potential management scheme must be identified, together with any other areas that may suffer displacement activity.

5.2. The scientific evidence

As explained above, any management scheme must be based on reliable scientific evidence obtained for the area in question. It would also be prudent at this stage to collect evidence to establish the current levels of bait collecting activity and the patterns of such activity (if any).

5.3. The possible solutions

Any solution must be based on the scientific evidence obtained and the practicality of a legislative course of action, so we cannot give concrete advice as to the best action to take. However, on the assumption that the scientific evidence obtained permits a certain level of bait digging, it is suggested that a solution along the following lines (allowing that it may need amending to reflect the scientific evidence obtained):

- A zoning of the beach so that there is an area in which no bait collecting of any kind is permitted and an area in which a certain level of activity is permitted, provided that certain rules are followed. The extent of each area will need to be determined looking at the scientific evidence.
- Within the permitted zone, anyone will be permitted to collect bait (whether commercially or recreationally) provided that it is collected in specific bags. We suggest these bags are of a bright colour – such as orange – which stand out on the beach. Commercial bait collection could be further limited by the requirement of a commercial collection licence.
- The bags will be available for a small fee (to cover their production). The purpose of the bags is (i) to monitor the intensity of bait collection so as to ensure that the management scheme is reducing it to the correct levels; (ii) to ensure that anyone collecting at the beach is aware of the rules of collection, which can be given to them with the bags; and (iii) to ensure visibility on the beach, which will help with enforcement of the rules.
- Anyone collecting within the permitted zone will also be required to follow certain rules, such as backfilling any holes dug.

- The zoning and rules should be enshrined in a set of byelaws, which can be made by any of the bodies detailed above. It is possible that NRW may be the best choice as they are likely to have more time available to commit to the project than the Welsh Ministers and a greater reach than Pembrokeshire County Council (thus making it easier to implement other management schemes in the same way as and where needed around the Welsh coast).
- Pending the implementation of byelaws, a voluntary code should be used setting out the same rules.

5.4. Enforcement

As stated above, enforcement needs to be considered as a vital part of the management scheme and not as an afterthought. The possibilities for enforcement are set out above.

5.5. Involvement of PCNPA and The Crown Estate

The area in question is owned by the Crown Estate and leased to PCNPA. Given their ownership of a large proportion of the foreshore in Wales, it is suggested that the Crown Estate Commissioners are informed of the proposal to prepare and implement a management scheme and offered the opportunity to be involved in the process.

Assuming the management scheme decided upon will permit a certain level of bait collection activity, the consent of the Commissioners as landowner and PCNPA as occupier will be needed for anyone collecting commercially. It is suggested that the Commissioners are consulted on whether they wish to give a blanket consent for anyone collecting within the terms of the byelaws/voluntary code, whether they wish to stay silent and effectively tolerate the trespass of anyone collecting with the terms of the byelaws/voluntary code, or would want to individually licence certain commercial collectors. PCNPA can then follow the lead of the Commissioners (making sure that the terms of their lease are complied with).