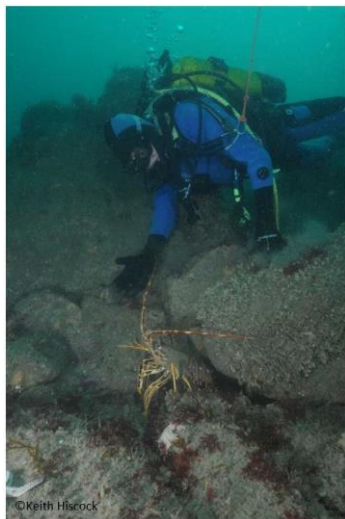




Diving Permit Byelaw

A Three-Year Review of the Permit Conditions



Supplementary report – A Summary of Response from the Phase 1 Consultation

(1st December 2017 to January 12th 2018)

March 2018

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1. Aim of this Supplementary Report

This supplementary report has been prepared for members of the Devon and Severn Inshore Fisheries and Conservation Authority (D&S IFCA) Byelaw and Permitting Sub-Committee. This supplementary report details the findings from the phase one consultation on the permit conditions for the D&S IFCA Diving Permit Byelaw which was conducted between 1st December 2017 and 12th January 2018.

In addition to summarising the responses from the phase one consultation, this supplementary report identifies several aspects of the Diving Permit Byelaw permit conditions that can be considered and discussed by members of the Byelaw and Permitting Sub-Committee with a view to potential amendment via additional consultation.

It should be noted that this first phase consultation had no focussed or specific items. It did give all stakeholders the opportunity to examine the present diving permit conditions, see how diving for the capture of scallops, crab and lobster is being managed by D&S IFCA and respond accordingly.

During the consultation period officers have also documented several other “identified” items for members to consider and these have been set out within this supplement.

Process and making use of this supplement report:

1. Members to examine summarised responses from stakeholders
2. Members to determine if any suitable items or themes identified by stakeholders should be subjected to further consultation?
3. Members to examine other identified items
4. Members to determine if these other identified items should be subjected to further consultation?
5. Members to highlight and discuss any other items not already documented

This supplementary report provides members with information relating to topics highlighted by stakeholders and the other identified items. Officer comments inserted as ***bold blue italic text*** are intended to assist members decision making but should not be considered as recommendations.

This supplementary report can be read in conjunction with “Diving Permit Byelaw - A three-year review of the permit conditions” – Phase One Consultation 1st Edition December 2017.

Following the meeting of the Byelaw and Permitting Sub Committee (12th April 2018), the detail documented in this supplementary report and the outcome of the meeting will be used to develop a 2nd edition progress and process report suitable for wider circulation. As well as highlighting potential consultation items, the developed 2nd edition of this report will help to explain why decisions have been taken by the Sub-Committee and act as a response document to the themes identified by stakeholders.

Response themes and identified topics included in this supplement:

- Closed season for scallops (Commercial diving)
- Catch restrictions (Recreational diving)
- The creation of the Diving Permit Byelaw
- The use of permit conditions to replace a reliance on the deeming clause
- The protection of spiny lobster (soft shell and removal from a fishery)
- Lundy Island – No Take Zone

Alterations to Permit Conditions

Managing diving for the capture of crab, lobster and scallop is achieved via the permit conditions. These permit conditions can be amended (or new conditions introduced) to accommodate required changes or potentially introduce new elements such as those set out in this supplement. In any additional consultation period relating to this three-year review of the diving permit conditions, not only will suggested changes (themes & topics) be highlighted, but the proposed amended permit conditions will also be clearly set out for all stakeholders.

The re-drafting of the mobile fishing and potting permits for consultation has already highlighted a need to make some very minor alterations to all permits that are issued by D&S IFCA. Some alterations are relatively simple and add clarity rather than adding a new restriction. Examples include re-numbering or amendments such as relocating some permit restrictions from one section of the permit to another. Minor alterations (and adding clarity) may include revised wording within the interpretations, for example:

- **using the Latin words *Maja Spp.* to define spider crab as a collective.**
- **adding the words “berried” into existing paragraphs within catch restrictions.**

It is not expected that all of these types of changes are subjected to a six -week consultation period, rather they would be introduced as part of the work already needed to introduce more significant changes to the permit conditions. Minor implications for fishers introduced as part of the re-drafting process can be explained in consultation documents.

Care is needed in the re-drafting of permit conditions process, as some changes can produce unintended consequences to fishers. Officers receive legal advice during the re-drafting process. Changes cannot be made to permit conditions where revised wording change the meaning of the restrictions unless consultation is undertaken.

2. Communication – How the Consultation was Conducted?

D&S IFCA has developed a new communication strategy¹. A wide-ranging consultation was conducted and the newly developed consultee list utilised. This consultee list has been subjected to regular review and updated on a regular basis. Different communication methods were used including face book, twitter and on-line survey forms. The D&S IFCA website provided the main platform for the consultation presentation and a designated email was provided for responses.

All permit holders² were directly notified by email or letter that the consultation was about to begin. This amounted to over 850 permit holders, with over 200 of these having a valid diving permit. The notification letter informed all interested parties that D&S IFCA has a duty to consult with permit holders and such other stakeholders, organisations and persons as appear to the Authority to be representative of the interests likely to be substantially affected by the proposed future management options. Information relating to the D&S IFCA Privacy Policy was included within the notification and an option highlighted for stakeholders to be removed from the mailing list if they wished.

The phase one consultation was not a questionnaire and had no focussed or specific items. It did give all stakeholders the opportunity to examine the present diving permit conditions, see how diving for the capture of scallops, crab and lobster is being managed by D&S IFCA and respond accordingly. All stakeholders, regardless of their interest or fishing sector had the opportunity to respond to this consultation.

3. Who Responded

Although open to all stakeholders, very few responses were received in this “open” phase. A total of 15 responses were received as follows:

Response group and format	Total number
Email (individuals)	5
Email (organisations)	3
On-line surveys (individuals)	7
On-Line surveys (organisations)	0
All other response formats	0

The content of the responses was mixed. The National Coast Watch Institution (NCI) requested that they be removed from the mailing list. The Exe Estuary Management Partnership contacted D&S IFCA with a desire to publicise the consultation on their own website. The response from the Devon Wildlife Trust contained more detail and has been summarised. The responses received from individuals were also mixed in terms of their content, detail and objective. Six responses from individual stakeholders had no comment to make at this time but did wish to be contacted once again in any addition consultation periods. The majority of responses received via the on-line survey forms were not current commercial or recreational diving permit holders. Responses that contained at least some form of usable information have been summarised.

¹ Available upon request from D&S IFCA

² Who had valid permit on 29th November 2017

4. The Phase 1 Consultation Response

Responses from Organisations

Devon Wildlife Trust (DWT)

The response offered by this organisation focussed on several topics, with some (such as their support to see the application of otter guards fitted to pots, containers or other devices) more relevant to potting rather than the management of diving activity. Errors within the diving permit condition numbering (Catch restrictions) was highlighted for amendment. The response also suggested that elements of the wording within present catch restrictions be amended, and the word “berried” added within paragraph 1.1 (any berried lobster or “berried” edible crab).

In regard to the protection of spiny lobster, the DWT has recommended that ideally no spiny lobster should be taken from any area within the District by any permit holder. A suggested compromise was that Category One catch restrictions are amended to mirror those of Category Two permit holders and therefore restrict catches of spiny lobster to two per day. Their expectation is that, as a minimum, the Bideford to Foreland Point MCZ area should be added to the diving permits and the removal of this species be prohibited from this site.

The response from DWT also suggested permit condition amendments to add clarity to the existing restrictions, in particular the catch restrictions and the restrictions for the removal of berried species (edible crab).

Officer Comments

The amendments suggested by DWT to the numbering and wording used within the permits would be addressed if any diving permit conditions are subjected to further consultation. A permit re-drafting process provides the opportunity for the format of the diving permit conditions to be adjusted (minor changes to wording and numbering and placement of restrictions) to harmonise with other D&S IFCA permits as well as the opportunity to add proposed permit condition changes for consultation.

The addition of the wording “berried edible crab” is an example where amended diving permit conditions would both harmonise and add clarity to the catch restrictions.

- Providing additional protection for spiny lobster and the inclusion of the Bideford to Foreland Point MCZ within the diving permit conditions has been identified as a discussion item later in this supplement.*

The recommendation from DWT to prohibit the removal of spiny lobster in all areas of the District has not been applied to other D&S IFCA permits used to manage other fishing methods. Neither has a two-spiny lobster per day catch restriction been applied to commercial fishers in other sectors.

Individual Responses

Six individual responses provided some information and this information has been summarised into themes. Some themes are more suited to a review of the whole Diving Permit Byelaw, rather than focus on the current permit conditions.

Closed Season for Scallop Fishing (Category One – Commercial Dive Permits)

Response was mixed and the simplest response stated “***open up the closed season to encourage diving***”. Other responses in relation to this theme were slightly more detailed. One stakeholder raised concern that the current closed season period is not adequately enforced.

The application of the closed season to the entire District (and applied to different methods) was another issue raised and in particular the inclusion of North Devon. One fisher explained that although he conducts commercial potting, the three-month summer scallop close season (a restriction for commercial divers) presents him with difficulty diversifying his fishing activity. In his view, although there is demand for hand collected scallops, it is not a viable option for him to diversify his commercial fishing activity to include diving with this seasonal restriction in place. The local demand is often in the summer and weather conditions are often unsuitable for him to operate at other times of the year. This diver has a recreational diving permit but has recognised that his personal bag limit (all year access) is for personal consumption only. This stakeholder has suggested a regional approach to the application of the closed season for commercial fishing.

Officer Comments

The protection of the stock needs to be balanced against different factors which can include the needs of the different user groups. It is possible for the permit conditions to apply the closed season to different groups of fishers, different methods and in addition apply the closed season to different spatial areas.

The closed season was a legacy measure (Devon Sea Fisheries Committee) that was initially incorporated into the Mobile Fishing Byelaw. During the making of the Mobile Fishing Byelaw this restriction was applied to the whole of the D&S IFCA District, rather than the original areas that were only in the South of the District.

During the creation of the Diving Permit Byelaw, the summer closure in July, August and September of the scallop fisheries in the entire District was included into the diving permit conditions so the commercial sector as a whole (includes commercial divers) are able to support the protection of the scallop stocks during the spawning period.

The numbers of divers (commercial and recreational) who would operate within the District was initially an unknown quantity. At present there are 20 permits that have been issued to commercial divers. This compares to 200 recreational divers and 134 mobile fishing permits, the majority operating scallop gear.

During the making of the Diving Permit Byelaw it was considered more likely that most leisure divers would dive (or want to dive) during the summer months and also may wish to take scallops at this time. The year-round access for recreational divers to

remove scallops was balanced against the year-round daily bag limit of 15 scallops per day.

During the making of the Diving Permit Byelaw, reservations about allowing recreational divers to remove scallops during this period (July, August and September) were expressed by the UK diving organisations, who were concerned as to the effect on the conservation of scallop stocks. The Authority took the view that the daily catch limit (set at a low enough level) would not significantly impact stocks. On that basis the Authority was content to extend this concession to recreational divers, notwithstanding the concerns raised by the UK diving organisations.

Catch Restrictions (Category Two – Recreational Dive Permits)

Four responses contain information relevant to the daily bag limits. Issues were raised in relation to the amount of shellfish that can be taken per day, the levels that are appropriate per species and comparisons were also made to the commercial take of species. A view was expressed that the removal of 15 scallops per day was a low level when compared to a commercial diver taking 500 to 1000 scallops per day, with five or six days fishing conducted per week. The same response suggested a compromise may be that one lobster per day be permitted rather than two per day in return for a higher quantity of scallops. Another stakeholder suggested that the introduction of a 15-scallop per day bag limit has actually encouraged recreational divers to remove more scallops than they would have in the past; the rationale being that they have “paid” for them (via the £20 permit fee) in advance and should try to get maximum value for the cost imposed. Another response stated that recreational bass restrictions were unfair and suggested 2 per permit holder, per day.

Officer Comments

The Byelaw restricts the daily catch of recreational divers to two lobsters, three crabs and 15 scallops per person (permit holder) per calendar day.

The present permit conditions (catch restrictions) do not include bass. Bass can't be included in the diving permit conditions as the Byelaw is only for divers who may take scallops, lobsters and crab. In addition, any Byelaw (or permit condition) cannot be less restrictive than EU or Domestic legislation. A local (Byelaw) recreational bag limit of two bass could not be introduced when a zero limit has been more widely imposed.

The setting of a daily recreational bag limit is not solely for conservation objectives. D&S IFCA has a duty³ to balance the different needs of persons engaged in this fishing activity.

It is possible for the Sub-Committee to consider an amendment to the present daily bag limits for recreational divers via the permit conditions; however, the needs of Category One (commercial) permit holders will always be different to those in the recreational sector. None of the small number of responses have suggested what would be a suitable number of scallops to have in a daily bag limit for recreational fishers.

³ MaCAA 2009 – 153 (d) – seek to balance the different needs of persons engaged in the exploitation of sea fisheries resources in the district.

When specifying the original catch restrictions, the Authority believed it had achieved a fair balance between the divergent interests of commercial and recreational fishers. For non-commercial divers, the Authority believed that it had set limits which were entirely appropriate and proportionate to personal consumption. Although detailed landing data is not collected at this time, the permit system helps to improve estimations of total recreational take when full compliance with the restrictions is assumed.

Concerns Related to Effective Enforcement

Two responses raised concern that the current measures are being abused and not being enforced effectively by D&S IFCA. The current closed season and the landing of shellfish were the key focus points and this stakeholder referred to a lack of port inspections by D&S IFCA in Westbay (Dorset) and Lyme Regis (on the border between Devon and Dorset). Responses also implied that the permit system is not well understood and therefore the restrictions are unknown to many recreational divers, many of which are only visitors to the District. The response suggested that those who do comply with the restrictions are disadvantaged and nothing is being done to deter those that do not comply with the restrictions.

Officer Comments

- *This is not a topic that can be addressed by a review of the permit conditions.*

Informing all stakeholders about their obligations associated with fishing activity forms part of the communication work undertaken by D&S IFCA. A new communication strategy has been developed which will be reviewed on a regular basis. Members and stakeholders will be encouraged to input into any such review in due course. 200 recreational diving permits are currently in use, with some of these issued to stakeholders who are only occasional visitors to different areas of the District.

D&S IFCA has implemented an intelligence led enforcement strategy and is part of a National Intelligence sharing system. D&S IFCA works closely with other enforcement organisations including the Marine Management Organisation and Southern IFCA.

Suspicious activity can be reported to D&S IFCA who also have an out of hours phone number – 07740 175479. Good quality intelligence helps officers plan enforcement activity and allocate resources.

Concerns Related to the Introduction and Structure of the Diving Permit Byelaw

The content of two responses questioned the rational and merits of introducing the Diving Permit Byelaw. Comments included:

- Why should I have to have a permit to pick a lobster off the seabed?
- The permit system is a failure on many levels and I have yet to see anyone with a recreational permit.
- The cost of the permits and the hassle getting a permit puts off recreational divers getting a permit and visiting the District (taking trips on charter vessels)
- What level of information has been obtained by the issue of a small number of recreational diving permits?

- A small bag limit should be allowed without the need for a permit (threshold concept)
- Night fishing (diving) for fish at night is not sporting and should be restricted

Officer Comments

- *This review process, is focussed on the permit conditions rather than a review of the Diving Permit Byelaw or its structure.*

The rationale and decision-making process for the introduction of the Byelaw is documented in the Diving Permit Byelaw Impact Assessment and other documents such as minutes from Sub-Committee meetings. Items such as the cost of permits, why should stakeholders have a permit and could a small amount of shellfish be taken without the need for a permit (threshold concept) are not discussion points at this time.

- *The Diving Permit Byelaw (as a whole) is due for a review in 2020.*

The Diving Permit Byelaw manages diving for the capture of scallops, lobster and crab and 220 permits are valid at this time, 200 of these being Category Two (recreational) permits.

- *Fin fish are not included in this Byelaw (interpretations) and permit conditions cannot be introduced to regulate night fishing for fin fish. D&S IFCA will be reviewing management of a range of “Hand Working Activities” in due course.*

5. Other Identified Items

Items highlighted for discussion and potential additional consultation include the following:

To Use Permit Conditions to Replace a Reliance on the Deeming Clause

As with the Mobile Fishing and the Potting Permit Byelaws, the implementation of the Diving Permit Byelaw was a significant change from the more traditional byelaw model. The format used to make the other permit-based byelaws was largely replicated when the Diving Permit Byelaw was constructed and therefore a deeming clause was introduced.

Why was a deeming clause introduced?

A deeming clause was introduced to support the effective enforcement of some of the management measures that were introduced in the Byelaw and permit conditions. Byelaws only apply within the District, normally six nautical miles from the coast or, in places on the north coast of the D&S IFCA District, the median line with Wales. Proving where vessels or individuals have been fishing and what was caught where is an inherent and significant challenge and a potential enforcement weakness for any byelaw. Measures that apply within the byelaws such as minimum conservation reference sizes can be different (more restrictive) than domestic or EU legislation. The absence of a deeming clause can reduce the ability to enforce the legislation and consequently the effectiveness of the management measures.

What are the alternatives to deeming clauses and how can this be achieved?

In 2016, the Department for Environment & Rural Affairs (Defra) issued advice to D&S IFCA. It was explained that deeming clauses are rarely used in the UK justice system. D&S IFCA's prosecuting solicitor was in agreement with the issued advice, and as an alternative, recommended that permit conditions should be fully utilized instead.

The Diving Permit Byelaw is due for a complete review in 2019. However, in the shorter term, the permit conditions can be amended to produce equivalent effectiveness as a deeming clause in a more legally acceptable manner. This has already been demonstrated in the development of the Netting Permit Byelaw where permit conditions (catch restrictions) have been created as follows:

“A Permit holder or named representative is not authorised to fish under this Permit if he has retained on board or has in his possession any catch that does not comply with any of the catch restrictions set out in paragraphs X to X inclusive.”

The fisher has the option to apply for a permit and be bound by the restrictions or not apply for a permit and not fish within the D&S IFCA's District. Although a similar result is achieved, this presents a different legal solution that is more acceptable.

Officer Comments

The replacement on the reliance on the deeming clause has already been subjected to consultation for both the Mobile Fishing and Potting Permit Byelaws (permit conditions). Consistency of management is one of the guiding principles of the review

of byelaws being undertaken by D&S IFCA. Adding this as a consultation item harmonizes with the approach already taken to date.

Management of the Removal of Spiny Lobster from Tranche 2 Marine Conservation Zones (MCZ)

Devon & Severn IFCA officers have undertaken assessments in order to document and determine whether management measures are required to achieve the conservation objectives of all the Marine Conservation Zones (MCZs) in its District. The IFCA's responsibilities in relation to management of MCZs are laid out in Sections 124 to 126, & 154 to 157 Marine and Coastal Access Act 2009.

The spiny lobster, also known as crawfish and *Palinurus elephas*, is a feature of two Tranche 1 and one Tranche 2 MCZs designated in the D&S IFCA District and at each of these sites, this species has a recover to favourable condition conservation objective. Favourable condition with respect to spiny lobster means that the quality and quantity of its habitat and the composition of its population in terms of number, age and sex ratio are such as to ensure that the population is maintained in numbers, which enable it to thrive. Current permit conditions prohibit the removal of spiny lobster from within the Skerries Bank and Surrounds MCZ and also Lundy MCZ as set out in the catch restrictions of the diving permits.

For the Tranche 2 MCZ site, Bideford to Foreland Point MCZ, spiny lobster is a feature of conservation importance with a 'recover to favourable conservation' objective and therefore need protecting. The three-year review of permit conditions for the Diving Permit Byelaw provides the opportunity to bring in a prohibition on the removal of spiny lobsters in these sites by fishers using a range of fishing equipment or those that have a permit to dive for shellfish⁴. MCZ assessments for this site are currently being prepared and changes to the permit conditions to afford protection to the spiny lobster in the designated MCZ is being highlighted within the assessments, to show that the IFCA is able to introduce management to protect the feature, prevent deterioration of spiny lobster populations and ensure the conservation objective is furthered. It is the IFCA's statutory responsibility to seek to further the conservation objectives of the sites.

Officer Comments

The permit conditions of the Diving Permit Byelaw will need to be adapted to prohibit the removal of spiny lobster from this MCZ site. The format of the permit conditions would be amended and Annexes (Charts) can be created to clearly define the sites. The spatial permit conditions would link to these Annexes and therefore achieve the objective. This approach has already been taken in regard to consultation on the Mobile Fishing and Potting Permit Byelaw permit conditions.

The recommendation from Devon Wildlife Trust to prohibit the removal of spiny lobster in all areas of the District has not been applied to other D&S IFCA permit Byelaws and neither has a two-spiny lobster per day catch restriction been applied to commercial fishers in other sectors.

⁴ Crab, lobster or scallop

Protection of Spiny Lobsters that have Recently Cast their Shell

Each permit contains a list of catch restrictions. Due to the original wording used, the diving permits (catch restriction 1.1 iii) currently provides no protection for spiny lobsters that have recently cast their shell.

Officer Comments

It has already been concluded by members that this lack of protection to “soft shell” spiny lobster has arisen in error during the development of the original diving permit conditions.

This oversight has been addressed in the creation of the Netting Permit Byelaw, where the findings from the formal consultation period prompted members of the Byelaw and Permitting Sub-Committee to amend the original (consultation) netting permit conditions to include the wording “spiny lobster” to the list of protected species which also include edible crab and lobster.

Amended permit conditions for both Mobile Fishing and Potting have been subjected to consultation in an attempt to address this issue.

- *Adding this as a consultation item harmonises with the approach already taken to date for the other permitting byelaws.*

Lundy Island - No Take Zone

The restrictions in this legacy Byelaw can be partly incorporated into the diving permit conditions.

Officer Comments

It is important to recognise that the legacy measure applies to all persons. No person can remove any sea fish from within the defined area at Lundy Island. The diving permits are issued for divers who may then choose to take crab, lobsters and scallops but not divers who take fin fish.

- *The legacy Byelaw would not be revoked as part of a potential change to the diving permit conditions*

This addition to the Diving permit conditions would not add an additional restriction to fishers however; this addition would potentially simplify restrictions for divers who do have a permit as more of the regulation will be in one place (the permit). An Annex (chart) can be created and issued with the permit conditions.

Consultation on this amendment would harmonise with the approach taken in regard to the review of the potting permits.

6. Further Information/Recommended Reading

- D&S IFCA Communication Strategy (available upon request)

Imbedded Information (Hyperlinks)

- [Diving Permit Byelaw – A three-year review of the permit conditions – Phase One Consultation 1st edition December 2017](#)
- [The Diving Permit Byelaw](#)
- [The present technical permit requirements - diving](#)