

Review of Byelaw Making Principles

Officers' Recommendations

1. That the B&PSC reviews and considers any amendments to the Byelaw Review Strategy and Principles (1 to 24).
2. That the Principle (25), relating to not separating commercial users, dependent on the issue of a fishing licence, is deferred and examined in more depth when considering the re-making of the Netting Permit Byelaw.
3. That the B&PSC reviews D&S IFCA's explanation of "Decision Making and the Pre-Cautionary Principle" and that any required amendments are identified and agreed by Members.

1. Background

Notwithstanding the requirement to consider options for management (the use of voluntary measures), byelaw review strategy and principles will underpin the development (re-making) of the Potting, Diving, and Netting Permit Byelaws. The B&PSC developed principles for D&S IFCA's byelaw review work circa 2014 - 2015. On 11th October 2018, Members of the B&PSC discussed the principles that had been adopted, developed, and applied during D&S IFCA's byelaw review work. On 20th November 2018, Members once again discussed the principles and agreed to them.

2. Strategy & Principles

Since 2011, the Authority has taken a view that a traditional model of byelaw making (in most circumstances) does not provide a suitable management structure. Inherited byelaws were identified as being too rigid to fit an ever-changing situation. The B&PSC has utilised Section 156 of the Marine and Coastal Access Act 2009 (MaCAA) and formulated a strategy for byelaw work as follows:

- *To adopt an activity-based byelaw model;*
- *To use permit-based byelaws.*

Officer Advice - Strategy:

It is the view of officers that this approach should continue.

Principles:

The principles as agreed by the B&PSC in 2018 are set out in **purple font**.

Officers are broadly supportive of the following agreed principles. In addition to being reviewed by the B&PSC, there is potential for amendments for accuracy and clarity of wording used. Members with legal skills are well placed to advise on alternative wording.

Generic Principles (transcribed in purple font):

1. To fully document the process – (Byelaw making and Permit Condition Review);
2. To gather evidence regarding potential impacts on stakeholders by the implementation of management;
3. To conduct a well communicated review with wide ranging consultation;
4. To be open and transparent with information;

5. To consider alternative management approaches to legislation;
6. To remove laws which have become irrelevant from the **statute book** (Hampton Review);
7. A **precautionary stance** must be taken where required to secure compliance with the UK's international Treaty obligations;
8. To use emergency byelaws as a last resort;
9. To recognise that sustainable development is where the management of a fishing activity seeks to maximise the social, economic and environmental benefits in the medium and long term;
10. To balance the needs of various users and meet conservation duties;
11. To encourage legitimate activity and remove illegal, un-licenced and un-regulated fishing activity;
12. To drive behavioural change and high compliance;
13. To seek to achieve consistency in management across IFCA boundaries.

And if byelaws are developed:

14. To use the wider byelaw making powers provided by MaCAA;
15. To adopt whenever possible an activity-based byelaw model;
16. To use permit-based byelaws;
17. Not to limit permit numbers;
18. Full cost recovery for administration is adopted for the fees charged for permits;
19. When possible, make legislation easier to understand;
20. To correct inaccuracies and remove identified loop holes;
21. Draft legislation so it assists with enforcement;
22. Standardising the terminology used;
23. To differentiate between commercial and recreational activities by applying appropriate management measures;
24. To make best use of technology;
25. Not to separate commercial users, dependent on the issue of a fishing licence (*specific to the Netting Permit Byelaw – see further comments on page 4*).

Officer Comments - Principles:

Officers are broadly supportive of the following principles; however, in addition to being reviewed by the B&PSC, there is potential for amendments for accuracy and clarity of wording used.

Members with legal skills are well placed to advise on alternative wording. For example: Principle (6) - "**Statute Book**" – Officers have been informed that a byelaw is not a statute in law – statute is primary legislation.

Regarding potential additions to principles - the flexibility offered by the use of permit conditions and the use of Control and Monitoring Plans, supported by Natural England, are examples of **the use of adaptive precaution**.

3. Explanation of some Principles

Some of the principles become more relevant if a byelaw is created. An explanation for some of the principles set out below in blue font:

Consider alternative management approaches (Options for Management).

In recognising the Hampton Review, alternatives to legislation are considered. Options for management are discussed at the early stages of byelaw development by the B&PSC. These considerations are documented. Voluntary measures are obviously a weaker form of management than legislation. The risk of non-compliance and the effects of non-compliance are key considerations.

Officer Comment – Options for Management:

The use of voluntary codes (options for management) will form part of officers' papers to be discussed by the B&PSC in considering the potential re-making of the Potting, Diving, and Netting Permit Byelaws.

A precautionary stance can be taken.

D&S IFCA aims to collect and use the best available evidence during the process of reviewing the management of fishing activities, creating new byelaws, and also reviewing management measures already established in existing permit-based byelaws. Best available evidence assists decision making.

Where evidence is lacking D&S IFCA will be able to apply precautionary measures in order to fulfil their main duty. Precautionary measures in this context means that the absence of adequate scientific information should not be used as a reason for postponing or failing to take management measures to conserve target species, associated or dependant species and non-target species and their environment.

Officer Comment – Precautionary Stance:

Section 3 of this officers' paper sets out D&S IFCA's explanation of Decision Making and the Pre-Cautionary Principle that Members can review and amend as required.

Consideration of Duties (Health and Safety).

The duties of D&S IFCA are set out in the Marine and Coastal Access Act 2009. These duties do not extend to consideration regarding health and safety. Fishers must make their own judgement regarding their own safety when undertaking fishing activities.

Not to limit permit numbers and to issue different types of permits.

The D&S IFCA has taken the view that permits issued for fishing methods should not be limited, thereby creating a private fishery as fish is a public resource available to everyone. Control of different fishing activities will be achieved via the conditions in the permits rather than limiting the overall number. Limiting permit numbers provides difficulties in deciding who initially has access to the fishery; it can create an economic advantage for those issued with the permits, it blocks the path for new entrants wanting to enter the fishery and provides complications regarding managing waiting lists for permits.

Officers' View – Not Limiting Permits:

It is the officers' view that the approach of not limiting permits should continue.

The principle of full cost recovery for administration be adopted for the fees charged for permits.

The permits that are currently issued via D&S IFCA Permit Byelaws (at time of writing) are £20 for a two-year period. This fee was intended to cover administration costs only. During the 5-year review of the Mobile Fishing Permit Byelaw, members of the B&PSC re-examined the original principle for the charging of fees. Members recognised that the £20 fee as set out on the face of existing Permit Byelaws was insufficient to cover the administration burden placed on the Authority. Members agreed that a fixed fee should not appear on the face of Permit Byelaws when they are reviewed and remade. Members reviewed the administration costs and agreed that a £40 fee would become the bench mark for future permit fees when Permit Byelaws are replaced, or new ones created. Regarding fees, the Mobile Fishing Permit Byelaw 2022, now with the Marine Management Organisation (MMO) for quality assurance has the following inserted:

“The Authority may charge an administration fee for a permit in accordance with the Act with any changes to administration fees subject to the review process in the Byelaw”.

The Impact Assessment, that accompanies the Mobile Fishing Permit Byelaw 2022, sets out that the fee is £40 for a two-year period and explains that the amended review process now includes the process to amend permit fees if required.

Officers’ View – Permit Fees:

It is the officers’ view that a £40 fee for a two-year period, that can be amended as required, remains as an appropriate amount to cover administration costs for the issuing of a permit.

Not to separate commercial users, dependent on the issue of a fishing licence (Netting Permit Byelaw).

This principle relates to non-powered vessels, and although there was a reason for its development as written, it is at odds with one of the other principles – “To encourage legitimate activity and remove illegal, un-licensed and un-regulated fishing activity”.

Not separating commercial users, dependent on the issue of a fishing licence, differs to the approach taken with the current Potting Permit Byelaw and Diving Permit Byelaw, both implemented in 2015. To qualify for a Category One (commercial) potting or diving permit, the applicant must have a vessel that is both registered and has a valid fishing licence. A vessel that is both registered and has a valid fishing licence is defined as a “**relevant fishing vessel**”. If a vessel is not a “**relevant fishing vessel**” it is not possible to be issued with a Category One Potting Permit or a Category One Diving Permit.

When developing the Netting Permit Byelaw, the B&PSC recognised a historic stake net fishery at Bridgewater Bay (Severn area) which included the use of a “vessel” called a mud horse. The mud horse was used by two commercial fishermen to carry the catch, with the fishermen wading through the mud to access the fishing grounds. The mud horse is a non-powered vessel. In addition, the B&PSC had the expectation that the MMO, rather than D&S IFCA, would be best placed to address the issue of non-powered vessels. The B&PSC determined at that time (specifically for netting) that the Byelaw would set out different criteria required to gain a Category One (commercial) permit. This difference in approach was incorporated into the Netting Permit Byelaw and that a vessel with no mechanical propulsion of any kind on board would also be defined as a **relevant fishing vessel**.

Officers' View – Separation of Users/Fishing Licence:

It is the officers' view that non-powered vessels (NPV) represent a legal loop hole that can and is exploited by some individuals. D&S IFCA, along with Cornwall IFCA, have raised the issue of a growing number of NPV's with the Marine Management Organisation. The level of Unregulated and Unlicensed vessels is now significant and the fact that they are being used, or claimed to being used, to fish for and retain sea fish with impunity against national fisheries legislation is of great concern. In addition to this, recreational and commercial fishing vessels subject to fishing restrictions are disguising their catches through marketing of sea fish under NPV vessels registered with the MMO. Legitimate fishermen are also dismayed by the NPV situation which creates unfair competition and undermines the conservation measures they are obliged to follow.

If the B&PSC determine to push forward and develop a re-made Netting Permit Byelaw, the criteria to gain a commercial netting permit can be explored. The criteria to gain a commercial permit can potentially exclude fishers operating nets from a NPV or those operated with no named vessel (shore stake net fishery).

4. D&S IFCA's Explanation of Decision Making & the Precautionary Principle

In May 2017, the B&PSC requested that a clear explanation of the precautionary principle be developed and then placed on the D&S IFCA website. In August 2017, Members offered to assist officers to develop an explanation of the precautionary principle and Members took the lead role to develop the written explanation. In November 2017 Members of the B&PSC were presented with the completed document, and approved its publication on D&S IFCA's website.

- The document can be accessed using this [link](#).

The document has been transcribed in full below in **purple font**:

Devon & Severn IFCA: Decision Making & the Precautionary Principle

The UN Convention on Biological Diversity, in its Preamble, states that:

“Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat”¹.

This principle that a lack of evidence or gaps in the evidence should not preclude precautionary regulation has become known as the 'Precautionary Principle'. A Preamble forms part of an International Convention and as the UK is a signatory to the Convention the application of the Precautionary Principle in decision making by public bodies is thus a legal obligation. To this end the United Kingdom Interdepartmental Liaison Group on Risk

¹ <https://www.cbd.int/convention/articles/default.shtml?a=cbd-00>

Assessment (UK-ILGRA) has defined the purpose of the Precautionary principle as the creation of:

“... an impetus to take a decision notwithstanding scientific uncertainty about the nature and extent of the risk, i.e. to avoid ‘paralysis by analysis’ by removing excuses for inaction on the grounds of scientific uncertainty.”

This means that the Precautionary Principle should be applied when, on the basis of the best scientific advice available in the timeframe for decision-making:

- there is good reason to believe that harmful effects may occur to human, animal or plant health, or to the environment; and
- the level of scientific uncertainty about the consequences or likelihoods is such that risk cannot be assessed with sufficient confidence to inform decision-making.²

This requirement on public bodies to apply the Precautionary Principle in their decision-making is thus both a legal and a policy obligation which IFCA's have to comply with.

IFCA's & the Precautionary Principle

For IFCA's, when deciding how to discharge their statutory duties to manage fisheries in a sustainable way and balance socio-economic benefits with protecting the marine environment³, it means that where there is no evidence, or more likely, gaps in the available evidence then the IFCA cannot use this to avoid making a decision, but must apply the

Precautionary Principle and make a decision accordingly. This requirement is confirmed in the Explanatory Notes to the Marine & Coastal Access Act 2009⁴ where it states:

“IFCA authorities will be able to apply precautionary measures ... in order to fulfil their main duty. Precautionary measures in this context means that the absence of adequate scientific information should not be used as a reason for postponing or failing to take management measures to conserve target species, associated or dependant species and non-target species and their environment.”⁵

Although an IFCA cannot avoid making decisions where evidence is lacking or incomplete there is nevertheless a good degree of flexibility allowed in the decision-making. As has been pointed out:

“Precaution is not an all-or-nothing commodity: different approaches can be precautionary to different degrees. ... In principle, a 'precautionary approach' to a fishery is any approach which reduces the likelihood of stock collapse or significant impact on natural heritage or the supporting environment. Selecting the appropriate mechanism, and choosing the 'degree' of precaution to be used, is a matter for ... judgement by decision-makers. Precautionary approaches can reflect the full panoply of mechanisms (e.g. regulations, incentives, spatial planning of fishing activity, etc), up to and including prohibition ('strict precaution'). Often, however, precaution can be exercised through the proper application of a feedback loop

² 'The Precautionary Principle: Policy and Application' United Kingdom Interdepartmental Liaison Group on Risk Assessment (UK-ILGRA). <http://www.hse.gov.uk/aboutus/meetings/committees/ilgra/pppa.htm>

³ S.153 Marine & Coastal Access Act 2009

⁴ The Stationary Office 2009

⁵ Para.435 p.57.

between activity and impact which modifies the intensity of a process over time ('adaptive precaution'). Adaptive precaution is the preferred option where:

- *the activity is one which can be undertaken at different levels of intensity;*
- *it is technically feasible to establish a feedback monitoring regime; and*
- *institutional frameworks are sufficiently robust to guarantee that monitoring and feedback controls future mortality.”⁶*

By utilising current systems such as catch reporting and monitoring, together with evidentiary reviews and a Permitting By-Law system, Devon & Severn IFCA can apply an adaptive precautionary approach which is flexible, responds to increased evidence gathering and ensures a proportionate balance between risk and public benefit is maintained. The participation of sea users in this exercise is essential and should be seen as a collaborative exercise between the public and the IFCA in order to improve decision making.

Officer Comments – The Published Explanation:

There is potential for the explanation above to be amended and potentially made more concise.

The use of Control and Monitoring Plans, an approach supported by Natural England, could be clearly set out in the explanation.

Members with legal skills are well placed to advise on alternative wording.

If there is a need to use footnotes with hyperlinks to external websites, D&S IFCA has no control over their longevity, resulting in “page not found”. This is evident in this published explanation. This can be overcome by loading documents or relevant extracts into D&S IFCA’s own website Resource Library and linking to those documents or extracts.

Background Papers

B&PSC - Officers’ papers and minutes of meetings – Section B of D&S IFCA website Resource Library.

Published explanation - Devon & Severn IFCA: Decision Making & the Precautionary Principle.

⁶ <http://jncc.defra.gov.uk/page-2520>