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13 May 2014

To IFCA Chief Executive Officers

Protection of freshwater and migratory species

Issue

Defra position on the legal vires for the setting of IFCA bylaws to manage sea resource fisheries, such as bass, where the related exploitation is impacting on migratory species such as salmon

Background

This issue was raised in November 2012 at an IFCA legacy byelaw workshop. After due consideration between Defra and the MMO, the MMO published a letter in February 2013 which stated that 'MMO and Defra agree that IFCAs can make byelaws to manage the exploitation of sea fisheries resources in order to protect freshwater and migratory species on the basis that those species form part of the marine environment. The Cornwall IFCA commissioned further legal advice which contradicts this position. The EA asked Defra to consider the vires again and present this information to the ICFA/EA Enforcement Group. A meeting took place on 28th February where representatives from Defra, the EA and a number of IFCAs Chief Executives discussed this issue. Defra agreed to write to all IFCAs presenting their position.

Consideration

Defra is confident that the Marine and Coastal Access Act provided IFCAs with the powers to introduce a byelaw to manage fishing for sea resources where this fishing is adversely impacting on salmonids as part of the that marine environment. Section 153(1) of the Marine and Coastal Access Act 2009 states: "The authority for an IFC district must manage the exploitation of sea fisheries resources in that district." Because of the definition of "sea fisheries resources" in subsection (10), and the exclusion in subsection (11), this duty specifically does not extend to protecting salmon. However, subsection (2) goes on to state that ; "(2) In performing its duty under subsection (1), the authority for



an IFC district must—(a) seek to ensure that the exploitation of sea fisheries resources is carried out in a sustainable way, (b) 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”. Salmon fall within the definition of “marine environment”. Section 186 defines the “marine environment” as “flora and fauna which are dependent on, or associated with, a marine or coastal environment”. And similarly it is on this basis that IFCAs can also put in place byelaws to protect sea birds from certain fishing practices.

The issue is whether the considerations listed in subsection (2) form part of the duty in subsection (1), or whether they are additional to it. One view is that they are “qualifications” of the duty, so that protecting the marine environment is not a duty in its own right, rather an appendage to the duty to manage the exploitation of sea fisheries resources. This conclusion reached by those who have this view is that the IFCAs must make byelaws aimed at the “sea fisheries” before they can include provision in those byelaws about salmon. It has been suggested that this view is supported by the fact that other legislation enables the EA to make byelaws about salmon, and therefore there is a clear distinction in the law.

In Defra’s view the legislation places a duty on the IFCAs to undertake a balancing exercise between the exploiting sea fisheries resources and the matters listed in subsection (2). This means that in managing the fishing of sea fisheries resources pursuant, the IFCA must balance the benefits of fishing (social and economic) with the need to protect the marine environment (including salmon) from the effects of such fishing. The Explanatory Notes say gives extra weight to this argument.

The fact that subsection (10) expressly excludes salmon from the definition of “sea fisheries resources” is because the EA make byelaws about salmon, but in the context of sea fisheries, IFCAs are empowered to do so by virtue of the fact that they “must” ensure that the whole marine environment is protected.

Defra is of the firm view that the legislation enables the IFCA to make a byelaw that relates to the management of sea fisheries fishing in respect of its effects on salmon. Defra recognised some IFCAs’ reservations on this matter. As always the final judgement would be in a court of law. If an IFCA was legally challenged on the vires for a byelaw in these cases Defra would be involved in the proceedings, either as an interested party or as a second defendant, and its position would be to support the IFCA. As part of the disclosure process Defra would supply all relevant information to the court, which we believe would constitute evidence in support of the IFCA/Defra position.

Defra and the EA also recognise the need for EA to take the lead in both providing the IFCAs with a comprehensive package of information of salmon biology, behaviour, lifecycle and conservation challenges and providing the evidence for any local measures

that need to be brought in. Defra will work with the EA to encourage delivery of this work in a practical and timely fashion.

I hope this provide the basis of a common understanding of this issue and a position from which we can move forward.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Delyth Dyne', with a long horizontal flourish extending to the right.

Delyth Dyne

Policy Adviser, Migratory and Freshwater Fisheries and Sea Angling