



Ref: 70/14

Mr J McMath
Chief Executive Officer
Western Rock Lobster Council
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Dear John

CONSULTATION WITH THE WESTERN ROCK LOBSTER COUNCIL ON PROPOSED MEASURES TO ADDRESS QUOTA OVER-RUNS IN THE WEST COAST ROCK LOBSTER MANAGED FISHERY.

The Department of Fisheries (Department) is seeking the views of the Western Rock Lobster Council (WRLC), pursuant to s.65(2) of the *Fish Resources Management Act 1994* (FRMA), and clause 4 of the *West Coast Rock Lobster Managed Fishery Management Plan 2012* (the Plan), on a proposal to amend the Plan, to provide an additional tool for responding to situations where fishers exceed their quota.

Details of the proposed amendment are enclosed with this letter for your comment. The proposed amendment would not remove the current mechanisms available for responding to over-quota incidents. It would slightly modify the existing defence and would add a provision within the Plan, that would result in all fishers who exceed their entitlement making a payment relating to the value of the lobster taken over quota.

Under the proposed amendments, the defence under clause 20 of the Plan will still be available for up to 30 kg over-runs. However, it is proposed that it could only be claimed once every 18 months and in circumstances where the over-run was not deemed to be reckless or intentional. Where an over-run does not fall under the defence, it is proposed that provisions be included in the Plan to enable the Chief Executive Officer of the Department, to issue a notice requiring payment of the market value (rather than the prescribed value in the *Fish Resources Management Regulations 1995* (FRMR) which applies to the defence) of the over-run. This will ensure that a financial advantage is not obtained from exceeding quota, thus addressing equity issues and community expectations regarding quota management.

In addition, to these changes, it is proposed to amend the prescribed values (i.e. whole, tails, per animal and per kg) of rock lobster in schedule 9 of the FRMR to account for the recent beach price increases. Changes to the prescribed values for rock lobster would have an impact on both commercial and recreational rock lobster

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fishers, as these values are not only used to determine the amount paid under the defence, but are also used when determining penalties prescribed under s.222 of the FRMA. Importantly, as is currently the case, the new values would apply to all rock lobster species and therefore would have an impact on other commercial rock lobster fisheries, not just the West Coast Rock Lobster Managed Fishery.

Could you please provide your comments to the Department by **14 August 2015**. Note that specific recommendations have been included in the enclosed paper to assist you with developing a response. Please also feel free to contact me on ph 9482 7338 if you require any further clarification of the information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jo Kennedy', written in a cursive style.

Jo Kennedy
MANAGER WEST COAST ROCK LOBSTER

2 June 2015

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DEPARTMENT OF FISHERIES

PROPOSED POLICY FRAMEWORK TO ADDRESS QUOTA OVER-RUNS IN THE WEST COAST ROCK LOBSTER MANAGED FISHERY

Purpose

The purpose of this paper is to present a proposed additional tool to address quota over-runs in the West Coast Rock Lobster Managed Fishery (the Fishery).

Background

The Fishery is managed under an Individual Transferable Quota (ITQ) system, whereby the annual Total Allowable Commercial Catch (TACC) is allocated amongst licence holders according to the number of units held in each of the three zones. It is a requirement under the *West Coast Rock Lobster Managed Fishery Management Plan 2012* (Management Plan) that fishers not operate in excess of their quota entitlement and the Department must act to maintain the integrity of this provision.

The importance of maintaining an effective quota management system is also recognised by industry, with over 85% of fishers operating within their quota allocation during the 2013 season. This demonstrates that the vast majority of operators have a strong sense of stewardship and are able to operate within the Management Plan. It is important that Government and industry work together to further strengthen this culture.

Currently, where a fisher goes over quota, Clause 20 of the Management Plan provides the following defence to prosecution:

It is a defence in proceedings for an offence against section 74 of the Act in respect of contravening clause 19 for the person charged to prove that –

- (a) the amount of rock lobster by which the restriction was exceeded is not more than 30 kilograms; and*
- (b) the licence holder, not more than 21 days after the landing of the rock lobster paid to the Fisheries Research and Development Fund an amount of money equal to the product of the number of kilograms by which the restriction was exceeded and the prescribed value (per unit of weight) for the rock lobster, as specified in Schedule 9 to the regulations.*

By and large, this defence is working well, but some issues have arisen.

For example, there are instances where the over-run is relatively small, but exceeds 30 kg. In these circumstances the Department's options are usually to either:

- prosecute the fisher at significant cost to both Government and industry and with the risk that the fisher/licence holder will receive a large penalty for a relatively minor transgression (including a possible "black mark"); or
- do nothing, thereby allowing the fisher to obtain a financial gain from going over quota.

The Department also has the option to issue an infringement notice (i.e. penalty of \$3,000). However, as they must be issued within 45 days of the offence and many over-runs are not detected until the Department undertakes reconciliations at the end of the quota period, this option is not always available. Depending on the level of over-run, it also does not necessarily address the issue of financial gain for fishing in excess of entitlement.

There may also be situations where an over-run is large, but the fisher can demonstrate that it occurred as a result of an honest and mistaken belief. This makes a successful prosecution unlikely meaning such fishers would receive a financial advantage as a result of the over-run.

The Department's experience with fishers who have exceeded their quota indicates that most are being "up-front" about their over-run (i.e. it is recorded on Catch and Disposal Records and in Fish Eye notifications) and want to be able to expediently reconcile the situation. The proposal contained in this paper attempts to overcome current issues with respect to dealing with unintentional quota over-runs. It centres on the premise that those who exceed their entitlement should not gain as a result of this activity, thus removing any incentive for going over quota and preserving the integrity of the management system. Its introduction would require amendments to both the Management Plan and the *Fish Resources Management Regulations 1995* (Regulations).

Proposed Management Plan Amendments

Proposed Amendments to Current Defence

It is proposed that the defence provided under Clause 20 of the Management Plan be retained, but with two changes. Firstly, it is proposed that the defence only apply in circumstances where the over-run was not reckless or intentional. That is, the defence would only apply to offences committed under section 74(2) of the *Fish Resources Management Act 1994* (FRMA), rather than to all of section 74 as is currently the case. This is appropriate, as those who recklessly or intentionally exceed their quota pose a risk to the reputation of the industry and ultimately to sustainability. Such operators should not be able to avoid prosecution.

It is also proposed that a fisher may only claim the defence once every 18 months. This would recognise the efforts of the majority of industry members, who are remaining within their quota, and would emphasise that the ability to claim a defence is for 'exceptional circumstances', not a normal way of doing business.

Recommendation 1

That the existing defence in clause 20 of the Management Plan be narrowed such that it does not apply where the fishing in excess of entitlement is considered reckless or intentional (i.e. that it not be a defence to prosecution under section 74(1) of the FRMA).

Recommendation 2

That the existing defence in clause 20 of the Management Plan be amended so that it can only be claimed once in any 18 month period in line with the intent that the defence is for exceptional circumstances.

Issuing a Notice Requiring Payment of Proceeds

The Department is proposing to amend the Management Plan so that where the Chief Executive Officer (CEO) is satisfied that the entitlement of a Managed Fishery Licence (MFL) has been exceeded, the CEO may issue a notice to either the MFL holder or the Master of the relevant boat (as the CEO deems appropriate). The notice would require payment to the Fisheries Research and Development Account (FRDA), within 14 days, the value of the over-quota catch, as determined by the Department based on the market price on the day (or days) on which the over-run occurred. This notice could be issued regardless of the level of the over-run, effectively meaning that all financial benefits from fishing in excess of entitlement would be returned to the State, including in situations where the over-run is less than 30 kg, but the defence cannot be, or is not, claimed.

In developing this proposal, various options, including a schedule of set payments based on the level of the over-run, were considered, but it is important that the CEO acts to simply recover the value of the over-run on behalf of the community, rather than to impose a penalty (as the latter is the role of the prosecution system).

It is proposed that the Management Plan also be amended to provide that it is a condition of an MFL that no fishing is to be carried out under the licence at any time after a notice has been given by the CEO unless either:

- a) the notice is withdrawn; or
- b) the amount specified in the notice has been paid in full.

Similarly, it is proposed to include a ground to refuse the transfer of a licence or entitlement when a notice has been issued, but has not been resolved. These measures would provide an incentive for both the Department and the affected industry member to resolve the matter expediently.

Payment against a notice issued by the CEO would be different from claiming the defence in clause 20 of the Management Plan. Unlike with the defence, it would still be possible for the Department to take action, including prosecution, despite the payment being made.

The primary aim of the proposed notice system is to prevent those going over quota from gaining a financial advantage, thereby allowing compliance resources to be directed towards circumstances where the over-run is the result of intentional or reckless (e.g. not taking reasonable care to remain within quota) behaviour.

Recommendation 3

That provision be included in the Management Plan that where the CEO is satisfied that the entitlement of an MFL has been exceeded, the CEO may issue a notice to either the licence holder or the master of the relevant boat. The notice would require payment to the FRDA, within 14 days, the value of the over-quota catch, as determined by the Department based on the market price on the day(s) on which the over-run occurred.

Recommendation 4

That the Management Plan also be amended to provide that it is a condition of an MFL that no fishing is to be carried out under the licence at any time after a notice has been given by the CEO unless either:

- a) the notice is withdrawn; or*
- b) the amount specified in the notice has been paid in full.*

Recommendation 5

That the Management Plan includes a ground to refuse the transfer of an MFL or entitlement when a notice has been issued, but has not been resolved.

Review of CEO notice by the State Administrative Tribunal (SAT)

It is proposed that the Management Plan would include a provision whereby a person who has been issued a notice by the CEO would have the right to apply to the SAT for a review of the CEO's decision provided that not less than 90% of the sum specified in the CEO's notice has been paid. Note that if a matter is reviewed by the SAT and the decision in the CEO's notice is not upheld, the amount paid by the fisher would need to be reimbursed by the Department.

It is anticipated that very few instances where the CEO issues a notice would reach the SAT, as it is expected that prior to and after issuing the notice, the Department would be in communication with the licence holder or master with regard to the level of the over-run and the amount to be paid. Experience since the move to quota suggests that most fishers want to resolve over-quota matters as quickly as possible.

Recommendation 6

That the Management Plan includes a provision whereby a person who has been issued a notice by the CEO would have the right to apply to the SAT for the review of the CEO's decision provided that not less than 90% of the sum specified in the CEO's notice has been paid.

Withdrawal of a Notice

The Department is proposing that the CEO would have discretion to withdraw a notice requiring payment of proceeds of sale.

The CEO is unlikely to withdraw a notice unless there are special circumstances warranting such action.

One situation may be where the Department has acted on incorrect information. However this should be an exceptional circumstance, because as discussed above, there would be communication with the licence holder or master before a notice is issued.

Another situation where the CEO may consider withdrawing a notice is where a temporary transfer of entitlement has been applied for to cover the quota over-run, and the over-run was the result of a genuine mistake by the fisher. It is not acceptable for fishers to operate without sufficient entitlement to cover their catch.

Temporary transfers should be finalised before fishing takes place, and not as a means of 'balancing' after a quota over-run has occurred.

Recommendation 7

That the Management Plan provides power for the CEO to withdraw a notice with respect to payment for a quota over-run.

Amendment of the Regulations

Noting the recent increase in the rock lobster beach price, the Department is proposing to amend schedule 9 of the Regulations to include updated prescribed values for rock lobster. The prescribed values will be used for the purposes of determining mandatory penalties under section 222 of the FRMA (i.e. 10 times the value of fish) and the determination of the value of rock lobster for fishers who claim the defence under clause 20 of the Management Plan. Because of the implications for section 222 penalties, which apply to rock lobsters taken in all fisheries, including the recreational fishery, both the WA Fishing Industry Council and Recfishwest are being consulted regarding this proposal.

The new proposed prescribed values are set out in the following table.

	Current Values		Proposed Values	
	Value per unit of weight (\$/kg)	Value per fish (\$)	Value per unit of weight (\$/kg)	Value per fish (\$)
Rock Lobster	\$50.00	\$25.00	\$80.00	\$40.00
Rock Lobster tail	\$60.00	\$15.00	\$96.00	\$40.00

It is important to note that these values would not be relevant to payment against the proposed new CEO notice, as this would be based on the market value of lobsters on the day(s) of the over-run.

Recommendation 8

That the Regulations be amended to prescribe the following values for rock lobster:

	Current Values		Proposed Values	
	Value per unit of weight (\$/kg)	Value per fish (\$)	Value per unit of weight (\$/kg)	Value per fish (\$)
<i>Rock Lobster</i>	<i>\$50.00</i>	<i>\$25.00</i>	<i>\$80.00</i>	<i>\$40.00</i>
<i>Rock Lobster tail</i>	<i>\$60.00</i>	<i>\$15.00</i>	<i>\$96.00</i>	<i>\$40.00</i>

Some Scenarios to Demonstrate Application of the Proposed Changes

Scenario 1

Jack has been a commercial rock lobster fisher for 20 years. During this time he has meticulously stuck to the rules and since the introduction of quota he has maintained

records of his landed weights as well as weights supplied to him by his processor. He has also submitted E1 requests when he has been close to catching his quota. However, a recent miscalculation has resulted in Jack going over quota by 20 kg.

In this instance, Jack's fishing in excess of entitlement was considered to be an unfortunate error and he is able to claim the defence under clause 20 of the Management Plan.

Scenario 2

Michelle keeps a rough tally of her quota usage in her head. She is poor at keeping records and has never logged onto Fish Eye or made an E1 request. She doesn't see why it's necessary to stick to her quota because the TACC is well below the maximum that is sustainable. Michelle exceeds her quota by 25 kg. She boasts that she's done pretty well considering she never writes anything down.

However, her fishing in excess of entitlement is considered to be reckless. Therefore, she is unable to claim the defence under Clause 20 of the Management Plan and is issued with a notice requiring payment of the market value of the 25 kg of lobsters taken in excess of quota. Michelle's quota over-run is also being investigated further, with the possibility that compliance action will be taken.

Scenario 3

Ross holds a large number of units and owns a big boat. He often lands large catches and has discovered that he is 200 kg over quota. Ross is issued with a notice requiring payment of the market price of the 200 kg of lobster in excess of entitlement to the FRDA. The circumstances behind the fishing in excess of entitlement are also being investigated by the Department.

Scenario 4

Evan has 500 kg of quota remaining when he heads out to pull his pots. He expects that this will be more than sufficient to cover his catch. There are also applications with the Department to temporarily transfer units totalling three tonnes of quota onto Evan's MFL.

Evan starts pulling his pots and he can't believe how many lobsters he's getting. He is aware of his remaining quota and stops fishing because he thinks he's getting close. When he weighs his catch, he discovers that he is 50 kg over-quota. This is confirmed later in the day when he receives the receiver's net weight. Evan is issued with a notice requiring payment of the market price of the 50 kg in excess of quota to the FRDA, but this notice is later withdrawn noting the transfer applications lodged with the Department and the unintentional nature of the over-run.