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## **Objections to the proposed certification of the Australia Orange Roughy – Eastern Zone Fishery**

### **Final Decision**

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1. This is the final decision in relation to two objections to the proposed certification of the Australia Orange Roughy – Eastern Zone fishery conducted under the Marine Stewardship Council Principles and Criteria for Sustainable Fishing as set out the Fisheries Certification Process v2.1. I am the Independent Adjudicator appointed to decide these objections.
2. My decision is that one head of the objections is upheld. The CAB must now make its proposal as to certification by reference to this decision.

### **Background**

3. Two Notices of Objection were lodged with the MSC on 14 July 2020. The objectors are the WWF-Australia (“WWF”) and Australian Marine Conservation Society (“AMCS”). The fishery client is Atlantis Consulting Group on behalf of Orange Roughy quota holding companies and vessels listed in the Final Report and Determination (“FRD”). The Conformity Assessment Body (“CAB”) is MRAG Americas, Inc.
4. A preliminary issue arose as to whether these objections were valid given the restrictions on who may lodge an objection and in particular under Fishery Certification Process v2.1, the provision that is said to limit this to those stakeholders who have participated by way of comments early on in the assessment process. The background to this is that the objectors had submitted stakeholder comments but only at the Public Comment Draft Report (“PCDR”) stage. My decision was that the objections should be accepted for the reasons set out in the Appendix to the remand decision.
5. A hearing was held from 17 to 19 and on 23 November 2020 and after receipt of further written submissions post-hearing I came to the decision to remand the proposed certification to the CAB. This was on the basis that there was a serious irregularity that is material to the fairness of the assessment - that the CAB did not treat orange roughy as an endangered, threatened and protected (“ETP”) species and scored the fishery

under Principle 1 (“P1”) in relation to targeted orange roughy stocks. As explained in my earlier decisions, available on the MSC website, in my view orange roughy should have been treated as an ETP species and targeting and scoring an ETP under P1 is inconsistent with the MSC Standard.

6. In brief, the Standard provides for species to be ETP where “*recognised*” as such in national ETP legislation. Orange roughy is listed under species that are “*threatened*” in Australia’s ETP legislation, albeit in the category of “*conservation dependent*”. This latter category in turn links to fisheries management legislation which anticipates a total allowable catch and permitted commercial fishing of limited stocks to certain precautionary levels. The CAB did not originally classify orange roughy as an ETP species – in my earlier decisions, I explained why I agreed with the objectors that being listed as “*threatened*”, amounted to recognition as an ETP species in national legislation – regardless that commercial fishing of certain stocks is permitted. I also explained that in my view the Standard did not anticipate ETP being targeted and scored under P1, there being inconsistencies (for instance with regard to an ETP being commercially fished whilst subject to a requirement that mortality be minimised) which in my view were difficult, if not impossible, to reconcile.
7. All other heads of objection were not upheld (including with regard to an alleged failure to include the objectors’ PCDR submissions in the original FRD and challenges to Performance Indicators scores for PIs 1.1.1, 1.2.3, 2.4.1 and 2.4.2 – see the remand decision for reasons for these findings).
8. The next step in the procedure would have been for the CAB to give a response to the remand decision. The CAB however wrote to me to raise concerns under PD 2.7.10. I issued a decision in relation to these concerns on 24 February 2021 providing my reasons for not finding any error of fact, procedural error, or unfairness with respect to the way in which the objections procedure had been conducted and also as to my remand decision. Whilst noting that many of the points raised were in essence an attempt to appeal the outcome, that decision does provide clarification in relation to a number of points and should therefore be read alongside the remand decision.
9. On 10 March 2021, the CAB provided its response to the remand decision which proposed a change to the FRD such that orange roughy is now recognised and scored as ETP under Principle 2 (“P2”). The CAB did not change its approach in continuing to score the fishery under P1. The CAB provided an amended FRD in line

with this, and maintained the proposed certification of the fishery.

10. I received further submissions from the objectors on 19 March 2021. Both WWF and AMCS argued that the continued scoring of the orange roughy stocks under P1 was not in accordance with my decision, that the objections should be upheld on that basis and the fishery fail certification.

## Decision

11. My task at this stage is to determine, under PD2.9.4 whether the CAB response adequately addresses the points made in the remand decision.
12. Whilst the CAB has provided amendments to the FRD with regard to reclassification of orange roughy as an ETP species, I have not commented on these given its position with regard to P1 and the implications for certification. It should be noted however that scoring of orange roughy as ETP under P2, given the difficulties around interpretation of what the minimisation of mortality might mean in this context, likely gives rise to more difficulties, some of which have been noted by the objectors in their submissions.
13. The CAB's justification for continuing to score the fishery under P1 is:

*"We determined that the remand decision does not change or dispute the fact that the Eastern Zone stock of orange roughy is within scope for MSC Principle 1 assessment according to the Fisheries Certification Process section 7.4 and accompanying guidance in section G7.4. Thus, we have made no changes to the Principle 1 section of the report, except in the narrative description related to the Target and ETP status of the species."*

I read this as a restatement of the CAB's disagreement with my earlier findings with regard to scope and that section 7.4 is not determinative of the question whether ETP species can be targeted and scored under P1.

14. The difficulty as will be apparent is that whilst the CAB can and has proposed to now treat orange roughy as an ETP, it cannot, in light of my finding that scoring an ETP under P1 is not intended by the Standard, cure that difficulty and in such a way as to maintain the proposed certification. As such, I have no option but to uphold the objections on the basis of the serious irregularity identified in the remand decision, that is that orange roughy stocks, part of an ETP species, should not be scored under P1

of the Standard. I do not go over my reasons again, as these were fully set out in the remand decision and then the PD 2.7.10 decision, both available on the MSC website.

15. The objection procedure provides:

*“PD2.9.7 A decision by the independent adjudicator under PD2.9.4 is final. No additional objections may be lodged under these procedures in respect of such a decision.*

*PD2.9.8 The certification decision of the CAB shall be made with reference to the decision of the independent adjudicator.”*

The CAB must now make its certification decision with reference to this final decision. I interpret this as meaning that the fishery’s application for certification should fail.

16. As I have previously noted, the ramifications of this issue fall to the MSC and/or the Australian legislature to sort out and are beyond my jurisdiction. In some respects that is unsurprising given that the implications of an ETP species or stocks of an ETP species being a target fishery is likely to be both controversial and require careful consideration, consultation, and likely changes to the Standard or legislation.
17. At this final point in the objections procedure, I would like to thank again all parties for their commitment to the process and careful detailed submissions at all stages.

**Melanie Carter**

**Independent Adjudicator**

**7 April 2021**