

MARINE STEWARDSHIP COUNCIL

INDEPENDENT ADJUDICATION

IN THE MATTER OF

NORTH SEA BROWN SHIP

DECISION OF THE INDEPENDENT ADJUDICATOR PURSUANT TO FCR PD 2.4

1. By letter dated 15 August 2017 the NGO Consortium (“the Consortium”) has submitted a Notice of Objection to the report and recommendation of Acoura Marine Ltd, the Conformity Assessment Body (CAB) to certify North Sea Brown Shrimp (hereafter shortened to “Shrimp” for convenience). The Consortium objects to the proposed certification.
2. The Consortium is made up of a number of different bodies: World Wildlife Fund (WWF), Netherlands; Natuurmonumenten; Waddenvereniging; North Sea Foundation; NABU; Schutzstation Wattenmeer; WWF Germany and WWF Denmark. The Notice of Objection is dated 15 August 2017 and is signed by Dr Aafke Brader.
3. The Notice of Objection is set out on the Marine Stewardship Council (MSC) Notice of Objection Form, but appears to be based on the Fisheries Certification Requirements (FCR), Version 1.3 (see the references to “CD” as opposed to “PD”).
4. The Notice of Objection contains several objections. First, it is alleged by the Consortium that the CAB, in compiling the Shrimp report, made a serious procedural irregularity by changing the scoring between the Public Comment Draft of the report and the final version

of the report in contravention of the FCR requirements. Secondly it is said the CAB relied upon unpublished material. The Consortium say the changes in scoring have significantly affected the CAB's determination on certification. This is said to ground the basis for adjudication pursuant to PD 2.7.2.1 (although the Notice incorrectly references CD).

5. Further the Consortium make two averments that the conditions set cannot be justified and it is said that in respect of the conditions attached to Performance Indicators (PI) 2.3.3 (species information) and 2.4.2 (habitat) no reasonable CAB would have applied such conditions. It is said this provides a basis for adjudication pursuant to PD 2.7.2.2.
6. Lastly, the Consortium set out five separate challenges in respect of the CAB's scoring. These challenges are a mix of alleged factual errors and claims of arbitrary and/or unreasonable approaches to scoring being adopted by the CAB. It is said this provides a basis for adjudication pursuant to PD 2.7.2.3.
7. FCR PD 2.3 sets out the requirements to determine the essential validity of a Notice of Objection. FCR PD 2.4.1 requires me, in my discretion, to satisfy myself that the Notice of Objection submitted is in the form required. I am satisfied the essential requirements are met.
8. First, pursuant to PD 2.3.1.2 this Notice was filed by the NGO Consortium who made written submissions to the CAB during the Shrimp assessment process (see pages 284 to 328 of the CAB report).
9. Secondly, pursuant to PD 2.3.2 the Notice of Objection was submitted on Tuesday 15 August 2017. The CAB report was published on the MSC website on 18 July 2017. More than fifteen working days elapsed between these two dates. I am told by the MSC that the period for receiving objections was extended by the CAB to 15 August 2017 because of various EU public holidays. It is not clear that the CAB has any power to extend the period for filing on Notices of Objection. However, PD 2.10.1.4 and PD 2.10.1.5 permit me to extend time either because of public holidays in countries where stakeholders reside (German, Netherlands and Denmark) or in exceptional circumstances. There is no clear evidence of where the stakeholders reside or the public holidays which took place in the

relevant countries between 18 July 2017 and 15 August 2017. However, on the basis I have been told the CAB informed would-be objectors of the extension of time, I am prepared to make a provisional decision to accept time should be extended either under PD 2.10.1.4 or 2.10.1.5 and should any party wish to argue this decision is wrong, they can raise it at a further stage in these proceedings. My reasons for so doing are to avoid unnecessary delay in this process and to adopt a proportionate approach to reduce the expenses required by all involved. Further it would be contrary to the interests of fairness and justice not to extend time given the CAB informed would be objectors of such an extension.

10. Thirdly, pursuant to PD 2.3.3 the Notice of Objection must be submitted on the prescribed form. The Consortium have filed their Notice on a prescribed form, albeit technically the FCR version 2.0 form should be used not the form based on FCR version 1.3, however both forms are in a “format prescribed by the MSC” and that is sufficient to comply with PD 2.3.3.
11. Fourthly, the requirements of PD 2.3.4 are amply met given the structured and reasoned submissions made by the Consortium.
12. FCR PD 2.4.1 requires me, in my discretion, to satisfy myself that the Notice of Objection submitted has reasonable prospects of success. This is defined at PD 2.4.2. As I read this section of the FCR both PD 2.4.2.1 and 2.4.2.2 are required to be satisfied.
13. I have carefully considered the Notice of Objection. It plainly cannot be said any of the objections raised are spurious or vexatious. At each stage of the Notice the Consortium raises, what seems to me at this early stage, appropriate challenges with intelligible reasoning. For this reason, and given the careful way the Consortium have set out their objection, I am persuaded the objection is neither spurious nor vexatious.
14. Secondly, I am satisfied there is a basis upon which an adjudicator “could reasonably expect to determine that one or more of the conditions set forth in PD 2.7.2 are satisfied”. My reason for so concluding is that at this early stage, the Consortium has set out a *prima facie* case under PD 2.7.2.1, 2.7.2.2 and 2.7.2.3. Whether at the end of the process of adjudication,

any of these individual grounds are sufficient to lead to a remand to the CAB is unclear, but sufficient grounds have been shown in the Notice.

15. I should add that further to the terms of PD 2.4.2.2, technically the Consortium has submitted no “evidence” but they have made submissions. I am prepared to accept their submissions as ‘evidence’ which demonstrates their case, although the Notice is submitted as grounds of objection and not as evidence.
16. Therefore pursuant to PD 2.4.7, the Notice of Objection is accepted and the CAB, the fishery clients and the Consortium are to be notified forthwith.
17. Pursuant to PD 2.4.8 the fishery clients and any stakeholder who participated in the assessment may submit written representations in respect of matters arising out of the accepted Notice of Objection within 15 days of the date of publication of the Notice on the MSC website, namely by 15:00 BST, 13 September 2017.
18. Pursuant to PD 2.5.1 the CAB is required to reconsider its final report and determination in the light of the accepted Notice of Objection. It shall submit a written report within 20 days of publication on the Notice on the MSC website, namely by 17:00 BST, 20 September 2017.
19. In the last week of September and first week of October 2017 I shall strive to consult the parties in respect of the Objection and ascertain whether some form of settlement is possible. Given the nature of the objections, my preliminary view is that reaching an acceptable solution to all parties may be challenging.
20. If I am required to proceed with adjudication pursuant to PD 2.6, I wish to give parties early notice that given the number and complexity of the arguments raised in the Notice of Objection, an oral hearing is likely to be required. I will of course conduct a written hearing pursuant to PD 2.6.1.1 if the parties agree and oral hearing is not wanted. Oral submissions and questioning would be helpful to explain the objections.

21. I therefore wish to give early notice that if a solution cannot be found and adjudication is required, an oral hearing would be helpful and I would propose to convene it with a time estimate of one day on 18 October 2017 in London.
22. In accordance with established practice the MSC has established an email address for this objection which is nsbshrimpobjection@msc.org.

John McKendrick QC
Independent Adjudicator