

Objection to the certification of Northeastern Tropical Pacific Purse Seine Yellowfin and Skipjack Tuna fishery

Decision on scope etc

Date and location of hearing

1. Further to the Notice of Intention to Adjudicate, dated 18 April 2017, I issued directions setting out potential dates for an oral hearing and asking for the views of the parties as to the appropriate date. The dates set for the oral hearing are **22 & 23 May 2017** and it will take place in London at my offices. I have suggested a second day given the number of issues that are contested between the parties (see below), thereby allowing any further procedural requests or applications to be dealt with at the beginning of the first day. I will set the timetable still to finish within one day if there are no further initial matters to be dealt with. I will send out detailed directions as to location and the running order of the hearing shortly.

Application for ruling on scope of objection

2. I received an email from the conformity assessment body (“CAB”), dated 25 April 2017, requesting that I make a ruling on the scope of objection and whether specific issues fall outside of that scope. I received a response to this application from the objectors, World Wildlife Fund (WWF) dated 27 April 2017.
3. The CAB has requested that the following matters be ruled out of scope:
 - a) An insurance policy associated with dolphin abundance surveys
 - b) Terms related to survey design
 - c) Requests for access to a historical data series

WWF has also requested that Part 4 of the objection be removed from consideration at the oral hearing.

Insurance policy and terms related to survey design

4. The CAB argues that the inclusion of a mandatory \$6.65million insurance policy to be paid to WWF if the industry does not carry out specified dolphin surveys and the inclusion of terms defining who controls scientific decision-making processes for dolphin abundance surveys in the EPO are beyond the scope of this objection. My attention is drawn to CD 2.6.6 and I am further reminded that it is the CAB that is the

party to approve the Client Action Plan subject to CD 27.11.3.2 (being satisfied that the conditions are achievable and realistic in the time period).

5. WWF has responded acknowledging that these issues related to matters “surfacing in the compromise discussions that have occurred – namely, discussions regarding mechanisms to assure scientifically appropriate dolphin population surveys are performed and scientific standards and measures followed.” WWF further acknowledged that it “intends to adjudicate the objections it listed in Part Five, not ideas or mechanisms that may have surfaced in the compromise discussions.”
6. As parties will be well aware, further to CD 2.6.6 "The Independent Adjudicator may not consider issues not raised in the Notice of Objection, even if the Independent Adjudicator is of the view that a particular issue should have been raised". On this basis and given also the acknowledgements given by WWF, I can make it clear now that the hearing will not consider any issues not raised in the Notice of Objection, including those set out in paragraphs 3 a) and b) above. The two issues at 3 a) and b) arose in the course of the parties' attempts to resolve this objection. This ruling does not stop the parties continuing to negotiate on these points both before and during the hearing outside of session.
7. Paragraph 3 c) is not included in this ruling for the reasons given below and also because the historical data was specifically raised in the Notice of Objection.

Historical data

8. With regard to the historical data, the CAB has argued that a consideration of the mechanisms whereby the bycatch were reduced in the 1990s is not relevant to the adjudication and the consideration of PI 2.3.1. It states that:

“the fishery in question announced full assessment in November 2014. While timelines associated with data inputs are not articulated explicitly in V1.3, there is clear and well-exercised precedent on this point. V2.0 has clearly articulated this consideration and GSA 3.4.2 states:

"When considering species for designation as 'main'(sic, by definition this also means ETP as these are defined prior to main species), in addition to the listed requirements in the CR, teams should also give consideration to the temporal trend in catches and use a precautionary approach to determine whether species shall count as 'main'. This should include taking into account the variability of the catch composition over the last five years or fishing seasons...."

SCS took a conservative approach in this assessment and requested that this V1.3 fishery meet the more stringent requirements of V2.0 by providing 5 years of data on which to assess main Principle 2 species.”

9. In this regard, WWF responded that its concern is that the CAB only provided summary data regarding dolphin mortality, not the raw observer data underlying the summaries, and in essence that relying on summary reports is relying on the evidence summarised. It argues further that there is no means to evaluate the core issue – change in dolphin mortality and, most importantly, dolphin population - by limiting data to that relating to the last 3-5 years and that the impact to dolphins can only be measured by comparison over longer time periods.
10. I agree with the objectors that any preliminary ruling that the earlier data is not relevant would essentially be my making a decision on the merits without having considered what is argued to be relevant evidence or heard from the parties at the hearing. It would therefore be wholly premature.

Part 4

11. With regard to the request that Part 4 not be considered at the oral hearing, whilst I can see, logically, that the same matters are being raised under Part 4 as under Part 5, not having dismissed this head of objection in the Acceptance of Notice stage of these proceedings and there not being any new matters to consider, I do not think it appropriate to knock this out without considering evidence and hearing in person from the objectors.

Jurisdiction

12. Counsel for WWF have also written at the same time as responding on the scope application, raising concerns as to the MSC's jurisdiction to assess a fishery in which, it is asserted, dolphins are targeted. I am asked to rule on this jurisdiction issue and to set aside the first hearing to consider whether this assessment is outside of the jurisdiction of the MSC.
13. My attention is drawn to CR version 2.0 which it is said makes the principle clear that mammals are not to be targeted, "inherent in the living versions of the prior CRs" and states that:

“7.4.1.1 The following taxa shall not be target species of the fishery under Principle 1:
a. Amphibians;
b. Reptiles;
c. Birds;
d. Mammals.”

14. The CAB has responded, in an email dated 28 April 2017, that this was not a matter raised in the Notice of Objection, and in any event is incorrect given the definitions of

“target species” in the Scheme. Counsel for WWF provided further comments on the same date, arguing that a jurisdictional point can be raised at anytime and that “subject matter jurisdiction addresses the authority and power of a tribunal to adjudicate the assessment”.

15. Whilst making no comment on the merits of the argument that this fishery has a target species of dolphins and therefore should not be eligible for assessment under the MSC Scheme, it is clear to me that this was not a matter raised in the Notice of Objection and for this reason is beyond my jurisdiction to give any kind of ruling. In my view, this is either a matter upon which I could have adjudicated, in which case it needed to be included in the Notice of Objection, or it is a matter that needs to be raised or indeed challenged in some other way with the MSC. The parameters of my jurisdiction are clearly set by the Objection Procedure and I am unable to rule upon any matter that goes beyond this.

Representation at the hearing

16. The CAB has raised a further concern in an email of 28 April 2017, as to the composition of the objector team attending the hearing. It is said that it is procedurally unfair (see CD 2.6.11 for the basis for raising this concern now) that members of World Wildlife Inc. (WWF US) and thereby counsel from Sheppard Mullin, Richter & Hampton LLP attend the hearing. It is said that as the individuals from WWF US come from an entity which is different to the objectors (said to be WWF Smart Fishing Initiative and WWF Mexico), they should not be permitted to attend.
17. WWF’s response, by email dated 1 May 2017, sets out the involvement of the particular individuals from the US national office of WWF in the assessment and points out that the objection was in fact signed by Dr Cross of WWF US.
18. In my view, it would not be fair to prohibit the WWF Smart Fishing Initiative and WWF Mexico from being accompanied by individuals from WWF US, regardless of whether the latter is a different entity from the former two or the roles played by the individuals in the assessment (and I note that Dr Cross and Dr Fox were involved in making representations). All entities and individuals are part of the WWF network. Mr Cohen of Sheppard Mullin, Richter & Hampton LLP is, as I understand it, representing the objectors and therefore it is appropriate that he attend.

Melanie Carter - Independent Adjudicator

2 May 2017