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

Notice of Acceptance

1. Two Notices of Objection have been lodged with the Marine Stewardship Council (“MSC”) on 14 July 2020 to the proposed certification of the Australia Orange Roughy – Eastern Zone fishery. The objectors are WWF-Australia (“WWF”) and Australian Marine Conservation Society (“AMCS”). I am appointed as the Independent Adjudicator for these objections.

Preliminary issue

2. A preliminary issue has arisen as to whether these objections are 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 which 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.
3. It should be noted that the objectors have submitted in their Notices of Objection (NOOs) that they are eligible to lodge objections both on the basis of clause 2.3.1b (written submissions during assessment) and 2.3.1c (a failure by the CAB which prevented or substantially impaired participation).
4. I have decided that the NOOs should be accepted for the reasons set out below.

Background to preliminary issue

5. The objectors, having been identified as stakeholders, had received a notification on 22 May 2020 from the Conformity Assessment Body (“CAB”) MRAG Americas, Inc. This invited the objectors to comment on the PCDR stating:

“Dear Stakeholder, We are contacting you as you have been identified as a stakeholder in the Australia orange roughy – eastern zone trawl fishery. The Public Comment Draft Report is now available for comment. Any stakeholder wishing to comment on the report is invited to contact MRAG Americas no later than 5 pm UTC, 20 June 2020. Attached is the notification with information on how to view the report.”

6. AMCS had then emailed the MSC which responded on 19 June 2020 stating the following:

“I would urge you to capture the AMCS position via a stakeholder submission (template attached) to MRAG who are the CAB undertaking the assessment.”

7. Both objectors submitted their comments on 20 June 2020.
8. In Appendix 12.1 Stakeholder Input on page 204 of the Final report MRAG, issued three days later, it is stated: *“No written or verbal stakeholder input was received as of the publication of the PCDR, other than that which is reported in the site visits record. There were two stakeholder submissions received during the PCDR comment period, however neither were admissible according to MSC requirements (clause 7.20.8.1) thus the assessment team will address those outside of this assessment process.”*

The relevant provisions of the Standard and related Interpretation:

9. Clause 4.2.2 provides that the CAB shall send a copy of a consultation announcement to all “identified stakeholders” including a hyperlink to the ‘MSC Template for Stakeholder Input into Fishery Assessments’ no longer than 4 days after the start of each consultation period.
10. The MSC recently issued an entry to the MSC Interpretations Log dated 05 June 2020 entitled: *Contacting stakeholders, stakeholder consultation and registered stakeholders (FCP v2.1 - 4.2)*. The MSC response to a query states:

“It is the MSC’s intent that all identified stakeholders have the opportunity to input into fishery assessments and to be kept informed of key stages in the assessment and any changes to these. The MSC expects CABs to contact all stakeholders to offer them these opportunities.

The only exceptions to this are at PCDR and Objections, when the CAB should only invite stakeholders to participate who have already previously participated in the assessment, for example through submitting written or verbal input, attending the site visit or participating in the RBF consultation.”

11. Clause 7.20.8.1 of FCP v2.1 states: *The CAB shall consider stakeholder input on the Public Comment Draft Report from stakeholders who provided written input on the Announcement Comment Draft Report or attended the site visit, in person or remotely.*
12. Clause 7.22.3 states: *The CAB shall include the following in a separate section or appendix to the Final Draft Report:*
 - a. *Written submissions from stakeholders (if any) received during the consultation opportunity on the Public Comment Draft Report.*
13. PD2.1.2 provides that *“Subject to PD2.3.1.c, the Objection Procedure is open only to parties that made written submissions to the CAB during the assessment process, or to parties that attended stakeholder meetings or the site visit, either in-person or remotely.”*
14. PD2.3.1 of the objections process provides:

“The following parties may file a ‘Notice of Objection’ to the Final Draft Report and Determination:

 - a. *The fishery client(s).*
 - b. *Any party to the assessment process that made written submissions to the CAB during the assessment process or attended stakeholder meetings, either in person or remotely.*
 - c. *Any other party that can establish that the failure of the CAB to follow procedures prevented or substantially impaired the party’s participation in the assessment process.”*

WWF and AMCS submissions

15. AMCS supported all submissions made by WWF in their NOO on this issue. Whilst WWF acknowledged the inclusion of clause 7.20.8.1 in FCP v2.1 and the intent of the MSC to ‘frontload’ stakeholder involvement in the MSC assessment process, it argued that the MSC requirements and supporting materials were contradictory and unclear. In these circumstances, a strict interpretation of PD2.3.1b should be applied and the objections accepted on the basis that written submissions had been made during the assessment process. In the alternative, they relied upon PD2.3.1c.
16. Whilst not arising from the Standard itself, WWF also points to the stakeholder engagement webpage: <https://www.msc.org/what-you-can-do/engage-with-a-fishery-assessment> the only statement on the webpage that references this requirement is under “How to comment”: *“You need to comment as a stakeholder at the beginning of a fishery assessment to be able to*

comment again at the very end of the assessment.” They argue this is unclear as to consequences also noting under “Objections and how they work” it states: *“Stakeholders previously involved with the specific fishery assessment”*. Again, they argue this could mean that a stakeholder had sent in a written submission during any part of the assessment ie: as they did during the PCDR consultation period.

17. WWF argues that the entry to the Interpretation Log with regard to clause 4.2.2 supports the argument that there is an ambiguity around these issues. They state that the fact that an invitation to comment was indeed sent to WWF and that the log entry post-dates the invitation indicates that at the time of the PCDR announcement this provision of the MSC requirements was not clear as to MSC intent. Furthermore, they point to the fact that MRAG sent a notification to WWF of the Final Report and Determination and the opportunity to lodge an objection to the certification of the fishery after the posting of the Interpretations log entry indicates that MRAG remained unclear.
18. It is submitted further that although clause 7.20.8.1 does not oblige the CAB to take into account the submissions they could choose to. They further argue, albeit under the Procedural Error entry in their NOO that while a CAB may not be obliged to respond to stakeholder comments received under clause 7.20.8.1, clause 7.22.3 provides that a CAB shall include, in effect, all written submissions received from stakeholders in the Final Draft Report. This did not happen. WWF argues that even if MRAG sees itself as not bound to consider or respond to their submissions, the comments received from the two stakeholders should be included in the Final Draft Report.
19. Finally, AMCS point to the fact that the MSC, in their email of 19 June, showed that it also was unaware, at the time of their engagement, that the FCP made provision to restrict the CAB’s consideration and response to stakeholders.

CAB and fishery submissions

20. I am asked by the CAB and the client fishery to interpret PD2.3.1b FCP in light of what is said to be the clear MSC intent – that is that the process is front loaded and stakeholders which seek to partake later on in the process only, are essentially not able to – both in relation to responses to the PCDR and the ability to object. It is said that PD 2.3.1 is to be read in the context of the wider Standard and that from this and in particular clause 7.20.8.1 it is clear that the right to object should be limited in the way suggested. The express wording used in PD2.3.1 was said to be further to a “simple oversight” and that the “eligibility criteria in the objections process were not updated to align with the new FCP process”.
21. With regard to the wider context, the CAB wrote:

“ The CAB is now required to produce an “Announcement Comment Draft Report” at the time the fishery assessment is announced. This report provides initial indicative scoring and rationales based on the information available to the team prior to the site visit. The report is published online when the fishery assessment is announced, and stakeholders are given a 60-day period during which to review the reports and submit any comments or additional information they would like considered in the assessment. Alternatively or additionally, they may indicate an interest in speaking with the assessment team during the site visit, either in person or remotely; and b. Stakeholders are now required to at least signal their interest in participating in the assessment during this first 60-day period. If they have particular views or additional information to provide to the team for consideration, they are required to use the stakeholder input template to submit these, and their submissions are also made publicly available before the site visit. “
22. It was pointed out that the Interpretation above came after MRAG has sent out the emails to stakeholders with regard to PCDR consultation as they simply worked from their original list and understood this still to be required under clause 4.2. They say that had they understood

the MSC intent they would not have sent out any such notifications as no stakeholder had participated earlier (beyond those participating in the site visit).

23. The fishery specifically argued that clause 7.20.8.1 was such that the CAB is actually prevented from taking account the relevant submissions. Further the wording in PD 2.3.1 that in order to file a NOO, the party must have “made written submissions to the CAB during the assessment process” should be construed in such a way that submissions that may not be considered are not to be seen as having been made to the CAB “during the assessment process”.
24. With regard to PD 2.3.1c and whether there was a failure of the CAB to follow procedures which prevented or substantially impaired the objectors’ participation in the assessment process, the alternative basis on which objections could be eligible, it was argued that there was no relevant failure. First, the CAB had contacted all identified stakeholders as required and indeed, when doing so there was a link to the guide to stakeholder input developed by the MSC which expressly stated that you needed to comment at the outset in order to do so again “at the very end of the assessment”. Thus, they argue the objectors were not misled.
25. Similarly, it was argued that the invitation to comment on PCDR by email could not be said in or of itself limit or impair their engagement in the process. Further it was argued that even if MRAG had failed to publish the submissions in the Final Draft Report, this could not be said to impair their participation in the assessment process. The objectors had been appraised early on of the position and chose not to comment at the early stage. Nothing that happened subsequently that could operate to satisfy PD 2.3.1.c.
26. Finally, the CAB pointed out that it will be considering the submissions as part of the next stage of the certification process, that is annual surveillance audits (leaving open the possibility of an expedited audit if necessary). Finally, the fishery client indicated there would be financial detriment for the industry and also negative consequences for the “value of the MSC’s social licence” if the objections were allowed to go ahead.

Consideration and decision on preliminary issue

27. I have given very careful consideration to this given the implication for the parties on both sides. I have decided that the objections should be accepted. With regard to the key provision, PD 2.3.1, I do not think it appropriate to go against the plain English meaning of the words to give a purposive and more narrow interpretation. Whilst this may have been an oversight in amendments, it is notable that the same provision is, in effect, given in PD2.1.2 and PD 2.6.1. It is true that certain provision and supporting materials point in the direction of MSC’s intention to “frontload” the process and restrict engagement, but this has not been consistently implemented or indeed communicated.
28. Whilst there was an indication in the stakeholder guide that later participation would not be possible, this was contained in guidance only and I am concerned with interpreting a provision of the FCP. The only clear limitation is in clause 7.20.8.1 and actually does no more than say that the CAB is not obliged to consider submissions from stakeholders that have not participated previously (it appears they could still choose to do so). Inability to send in submissions or object, which is of course a major restriction on the ability of stakeholders to engage would have been, in my view, spelled out in other provisions of the Standard and in particular the ones providing for who may lodge an objection.
29. The Interpretation would be useful in circumstances in which there is a clear ambiguity and MSC’s intentions would help guide resolution of that ambiguity. I did consider whether submissions made “during the assessment process” as said in PD2.3.1b might give rise to an ambiguity. It seems to me however that there is no ambiguity as “during” imports a consideration of time and on any evaluation the relevant submissions were made within the timeline of the assessment. Whilst I accept that the substantive meaning of “assessment process” in this context is unclear, I do not consider that this is the material limitation in play – the words “during the assessment period” impose a time limit (ie: submissions that come in

before the process has started or after the PCDR consultation period, not being eligible). This issue does not require me to consider what is and is not “the assessment process”.

30. In short, whilst there are contradictions and inconsistencies in the FCP, there is insufficient ambiguity for me to go against the plain English meaning of PD2.3.1b and to apply a purposive interpretation. I would mention also, although I do not rely on this, that given the direct communications issued by the CAB and the MSC encouraging submissions at PCDR stage, this would seem an appropriate outcome.
31. Finally, as I have decided the objections are admissible under PD2.3.1b, I have not considered in detail PD2.3.1c, but note that I have not identified any failure by the CAB to follow procedures which could have prevented or substantially impaired the objectors ability to engage in the assessment process.

Notice of Acceptance

32. My next task as Independent Adjudicator is to consider under PD 2.4 of the MSC Objections Procedure whether the NOOs are in the prescribed form required by the procedure and whether the objections meet the threshold test of, on the face of the NOOs alone, their having a “reasonable prospect of success”.

33. The objection process provides:

“PD2.4.1 If the independent adjudicator, in his or her discretion, determines that the ‘Notice of Objection’ is not in the form required by these procedures or has no reasonable prospect of success, the independent adjudicator may either:

- a. Dismiss all or part of the ‘Notice of Objection’, giving written reasons, or*
- b. Request further clarification from the party that filed the ‘Notice of Objection’ on all or part of the ‘Notice of Objection’.*

PD2.4.2 For purposes of this section, a ‘Notice of Objection’ has a “reasonable prospect of success” if, in the view of the independent adjudicator:

- a. The ‘Notice of Objection’ is not spurious or vexatious.*
- b. Some evidence is presented on the basis of which the independent adjudicator could reasonably expect to determine that 1 or more of the grounds set out in PD2.8.2 are satisfied.*

PD2.4.3 If the independent adjudicator decides to dismiss the ‘Notice of Objection’, the party that filed the ‘Notice of Objection’ may nonetheless file an amended ‘Notice of Objection’ within 5 days of being so notified by the independent adjudicator.”

34. The AMCS NOO contains two alleged procedural errors which I do not consider meet the above threshold test under PD2.4.2a (spurious rather than vexatious) and b:
- a. The first procedural error in the NOO relating to referencing of evidence relied upon in the report does not in my view reach the threshold of a serious procedural or other irregularity in the process that is material to the fairness of the assessment. On the assumption that the links followed through (or a cut and paste via google/some other accessible search engine) to the relevant underlying evidence, or there was some other accessible way of locating the documents, the fact that allegedly references were not named correctly will not have had a material impact on fairness (whilst acknowledging that if the case, this may not have been best practice and created more work for stakeholder). I note moreover that the substance of this head of objection is reflected in a scoring challenge which will go ahead.
 - b. The second procedural error in the NOO relates to duplication of information from other UoA assessment reports. On the face of it there is nothing untoward in such duplication, provided what is cited is equally applicable to both UoAs. Again, I would expect this to be picked up in a scoring challenge, if it is the case that the evidence and rationale given by the CAB was on its own merits and in relation to this fishery alone, questionable in terms of rationality etc.

35. In relation to the above two matters, further to PD2.4.3, AMCS has until **5pm UTC 14 August 2020** from the date of this decision to file an amended NOO (in this regard only).

36. I have decided that, other than in relation to the above matters, the objections meet the threshold test for acceptance. The process which follows allows for submissions from all parties and stakeholders and detailed evidence to be considered.

Date of Publication of Objections

37. The date of publication for these objections is **6 August 2020**. I do not propose to change this date even if an amended NOO is provided by AMCS, as the heads of objection dismissed are of a relatively minor nature and are to a great degree reflected in scoring challenges which are going ahead. Any amended NOO will however be provided to the parties and published on the MSC website.

38. In the meantime and unless further directions are issued, the dates below apply and the consultation phase should begin. Please note that I have tried to ensure that the dates in this Notice take into account time differences and relevant public holidays.

Consultation Phase

39. Under the new procedures in v2.1 (all references to days are working days):

“PD2.5.1 The objector(s), the fishery client(s), and the CAB have a period of 15 days from the date of publication to consult with each other to reach agreement on 1 or more items raised in the ‘Notice of Objection’. MSC Fisheries Certification Process v2.1

PD2.5.1.1 If more time is needed, the parties may ask the independent adjudicator to extend the consultation period between parties.

PD2.5.1.2 The independent adjudicator may extend the period for consultation if satisfied there is a real and imminent prospect of agreement being reached on 1 or more items in the ‘Notice of Objection’.

PD2.5.2 At any time, if any party considers there is no real and imminent prospect of reaching an agreement on any items raised in the ‘Notice of Objection’, they shall notify the independent adjudicator.

PD2.5.3 Where the period for consultation has expired, or as notified under PD2.5.2, the independent adjudicator shall continue with the proceedings as per PD2.5.6.

PD2.5.4 If all items raised in the ‘Notice of Objection(s)’ can be resolved through consultation, the parties shall notify their agreement to the independent adjudicator.

PD2.5.4.1 The CAB shall make such changes and revisions to the Final Draft Report and determination as may be agreed and shall proceed to prepare a Public Certification Report as per FCP Section 7.24.

PD2.5.4.2 The independent adjudicator shall issue a notice of cessation.

PD2.5.4.3 No further appeal or objection shall be permitted.

PD2.5.5 If some but not all items in the ‘Notice of Objection’ are resolved, the parties shall notify the independent adjudicator of the items and the nature of their agreement.

PD2.5.6 The independent adjudicator shall notify all parties that the objection will proceed to written representations as set out in Section PD2.6.

PD2.5.6.1 The date on which the independent adjudicator notifies all parties that the objection will proceed to written representations shall be the "Written Representations Start Date".

PD2.5.6.2 The MSC shall ensure that the independent adjudicator's decision including the Written Representations Start Date and, if applicable, any agreement on items raised in the 'Notice of Objection' (as per PD2.5.5) is published on the MSC website."

40. The parties therefore have a period of 15 working days from the date of publication, that is, by **5pm UTC 28 August 2020**, to consult with each other in order to determine whether there is a possibility of a settlement on one or more heads of objection; i.e. whether the differences between the parties may be resolved or narrowed.
41. Depending on the outcome of the consultation phase, and if the objections are not wholly resolved, they will proceed to the next step which will be marked by a notice issued with the Written Representation Start Date and directions as to further dates.

Evidence

42. Please note that PD2.3.6d provides that the NOOs should (and only such evidence is admissible):

*"d. Include only information that was publicly available in final (not draft) form on or before the last day of the site visit or agreed in writing between the CAB and any participant to the site visit to be shared after the site visit as set out in FCP 7.20.3.b.
i. Information that came into existence after that date shall not be used as a basis for objection."*

Appointment of Expert

43. Finally, I have decided under PD2.7.7 to appoint an expert to advise me on technical matters (please see the objection process for more details on the appointment, role - ie: the expert advises only and takes no part in the decision making, all written advice being shared). I will notify the parties when I have identified a suitable person to carry out this role.

Melanie Carter
Independent Adjudicator
6 August 2020