MARINE STEWARDSHIP COUNCIL

IN THE MATTER OF OBJECTIONS TO THE FINAL REPORT ON THE PROPOSED CERTIFICATION OF THE OMEGA PROTEIN CORP. U.S. ATLANTIC MENHADEN PURSE SEINE FISHERY UNDER THE MSC PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING

DECISION OF THE INDEPENDENT ADJUDICATOR

I. INTRODUCTION.

1. This matter comes before me as an Independent Adjudicator for the Marine Stewardship Council (the "MSC") in connection with two Notices of Objection (the "NOOs"), one filed by the Nature Conservancy and the Chesapeake Bay Foundation (collectively, the "TNC Group"), and the second filed by the Theodore Roosevelt Conservation Partnership, the Coastal Conservation Association and the American Sportfishing Association (collectively, the "TRCP Group"), against the proposed certification of the Omega Protein Corp. U.S. Atlantic menhaden purse seine fishery (the "subject fishery") pursuant to the terms of the MSC's Principles and Criteria for Sustainable Fishing (the "MSC Principles"). The TNC Group and the TRCP Group (sometimes referred to collectively herein as the "objectors") are all non-profit, non-governmental organizations that promote the conservation of marine resources. The Nature Conservancy's marine conservation work "prioritizes sustainable seafood, strong coastal communities and a healthy ocean." The Chesapeake Bay Foundation is "dedicated solely to saving the Chesapeake Bay watershed." For their part, all members of the TRCP Group have a particular interest in supporting recreational fishing in the United States.

2. In accordance with the MSC's fisheries certification regime, Omega Protein Corp. ("Omega" or the "fishery client") entered into the MSC full assessment process in May, 2017, seeking certification of the U.S. Atlantic menhaden purse seine fishery. The fishery takes place primarily in waters off the coasts of Virginia, Maryland, Delaware, New Jersey and North Carolina and in the Chesapeake Bay, both in State territorial waters and the U.S. Exclusive Economic Zone (FAO Statistical Areas 21 and 31). The fishery, which utilizes encircling purse seine nets generally 180 feet in length and 65-90 feet in depth to target menhaden (*Brevoortia tyrannus*), has a single "unit of assessment" ("UoA") under the MSC certification scheme. Menhaden, which comprise a single stock from Florida to Nova Scotia, is a "key lower trophic level" ("KLTL") species which occupies an important niche in the marine food chain, providing forage for seabirds, other fish, including such species as striped bass, bluefish and weakfish, and marine mammals along the U.S. Atlantic Coast. The subject fishery itself is a "reduction" fishery which produces fish meal, fish oil and condensed fish solubles. In 2017, total directed landings for menhaden, including both the reduction fishery and a smaller bait fishery, amounted to 171,512 metric tons ("mt") against a coastwise Total Allowable Catch ("TAC") level of

200,000 mt. Of these landings, 128,911 mt were for reduction purposes, while the bait fishery accounted for 43,826 mt. For 2019, the TAC is 216,000 mt, roughly 80% of which is allocated to Virginia.[1] The fishery is managed by an interjurisdictional fisheries management body established by interstate compact, the Atlantic States Marine Fisheries Commission (the "ASMFC" or the "Commission"), whose membership includes all fifteen Atlantic seaboard States. The Commission devises coastwise management measures which are then adopted and implemented on a State-by-State basis by the individual member States. Currently, the fishery is operating under Amendment Three to the menhaden fishery management plan, adopted by the ASMFC in November 2017 (the "FMP"). About 50%-60% of the products of the fishery are utilized for domestic consumption, while demand in Asia, and especially China, for aquaculture purposes is growing.

3. On June 16, 2017, the MSC confirmed that the assessment would be carried out by a team from an accredited conformity assessment body, SAI Global (the "CAB" or "SAI"). The assessment was thereafter conducted by the CAB. Consistent with the MSC's requirements, the process included site visits, utilization of peer reviewers and stakeholder involvement. On December 4, 2018, SAI issued the Public Comment Draft Report (the "PCDR"). The public comment period closed on January 4, 2019. Following receipt of public comment, the CAB issued a Final Report on March 6, 2019 (the "Final Report"). The Final Report was published by the MSC on the same date. The Final Report found that the subject fishery, measured against the MSC's Performance Indicators ("PIs"), "achieved a score of 80 or higher on each of the three MSC Principles independently and did not score less than 60 against any Performance Indicator," in accordance with the MSC's applicable Fisheries Certification Requirements (Version 2.0, adopted October 1, 2014) (the "FCR"). *See* Final Report, Section 6, p. 147. Accordingly, the Final Report recommended that, subject to certain conditions set out in Appendix 1.3 thereof, the subject fishery be certified as a sustainable fishery in accordance with the MSC Principles. Final Report, p. 150. The Final Report is the subject of the present objections.

4. Pursuant to the MSC's Objections Procedure set out in FCR Annex PD (the "Objections Procedure"), on March 27, 2019, both objectors timely filed NOOs to the Final Report. Following a Request for Clarification from my predecessor, the TNC Group submitted a clarifying letter on April 10, 2019, while the TRCP Group filed a revised NOO on such date. Thereafter, on April 15, 2019, my predecessor as Independent Adjudicator determined that both NOOs were admissible, and, on the same date, the MSC posted the NOOs on its website. April 15, 2019, thus became the "date of publication" for purposes of various timelines set out in the Objections Procedure. Following such publication, in accordance with Section 2.4.8 of the Objections Procedure, the fishery client submitted a memorandum on May 6, 2019, responding to the NOOs (the "Omega Response"). Three other stakeholders, the Safina Center, the National Audubon Society and the Town of Wellfleet, MA, also made submissions under PD 2.4.8, supporting the contentions of the objectors. In accordance with Section 2.5.1.1, the CAB provided its response to the NOOs on May 13, 2019 (the "CAB Response").

5. The submission of the CAB Response triggered the ten (10) day consultation period under Section 2.5.3 of the Objections Procedure. In accordance with my predecessor's

[1] In turn, Omega is responsible for the harvest of almost 75% of the Virginia allocation.

directions of May 15 and May 28, 2019, consultations then proceeded to take place in late May and early June, 2019. Eventually, however, on June 18, 2019, my predecessor formally concluded that there was not a "'real and imminent' prospect of settlement." In accordance with Section 2.5.5 of the Objections Procedure, she issued a Notice of Intention to Adjudicate, in which she formally notified the parties that she intended to proceed to adjudication under Section 2.6 of the Objections Procedure. In a Notice of Change of Independent Adjudicator, dated June 20, 2019, my predecessor advised the parties that the hearing would proceed on July 8 and 9, 2019, and that I would henceforth be substituted for her and assume the duties of the Independent Adjudicator in these matters.

6. On July 1, 2019, in accordance with the timeline set out in the Notice of Intention to Adjudicate, the CAB duly filed an agreed bundle of documents consisting of the record upon which this adjudication is based. This record included, *inter alia*, in accordance with Section 2.6.5.1.a. of the Objections Procedure, the written record of oral, written or documentary evidence submitted in the assessment process related to the matters under challenge, including any scientific literature referenced in the Final Report. Although permitted to do so, none of the parties submitted "additional or supplementary written representations" under PD 2.6.4.

7. The hearing was held at the MSC Office in Washington, D.C., on July 8, 2019. It was convened at 10:00 a.m. and concluded at approximately 3:25 p.m. All parties fully availed themselves of the opportunity to present their case, utilizing detailed PowerPoint presentations. I greatly appreciate the effort of the parties in preparing for the hearing under an extremely compressed time schedule, and I wish to commend the parties for the thoughtful, well-articulated and thorough presentations of their cases. The resolution of these objections has been greatly facilitated by the hearing presentations.

II. STANDARD OF REVIEW.

8. Before turning to the substance of the objections, it is necessary to consider the standard of review to be applied. The standard is narrow, and deference to the determinations of the CAB is appropriate. *See, e.g., In re: Russian Sea of Okhotsk Midwater Trawl Walleye Pollock Fishery*, ¶¶ 8-11 (MSC, June 19, 2013); *In re: Germany Lower Saxony Mussel Culture and Mussel Dredge Fishery*, ¶¶ 9-12 (MSC, September 23, 2013); I*n re: Echebastar Indian Ocean Purse Seine Skipjack, Yellowfin and Bigeye Tuna Fishery*, 9-12 (MSC, August 21, 2015); *In re: New Zealand Orange Roughy Fisheries*, ¶¶ 8-11 (MSC, December 2, 2016); *In re: SSMO Shetland Inshore Brown Crab and Scallop Fishery*, ¶¶ 8-10 (MSC, June 20, 2018). Review is not *de novo* and is akin to judicial review of administrative action under basic principles of English and American administrative law. Review is based upon the record, *see* PD 2.6.5, and it is defined by the scope of the NOOs: under PD 2.6.6, an Independent Adjudicator "may not consider issues not raised in the notice of objection." As provided in PD 2.6.6.1, "In no case shall the independent adjudicator substitute his or her own views or findings of fact for those of the CAB."

9. The purpose of the Objections Procedure is "to provide an orderly, structured, transparent and independent process" by which objections can be resolved. The function of the Independent Adjudicator is to examine the claims made in a notice of objection and to make written findings as to whether the CAB made an error of the sort described in Section 2.7.2 of the

Objections Procedure. Only if such an error can be identified, may the determination be remanded back to the CAB for reconsideration. More specifically, the Independent Adjudicator is required to issue a decision in writing either confirming the determination by the CAB or remanding the determination.

10. In this case, the objectors have mounted challenges to the scoring of several PIs and to two of the conditions raised in the Final Report. The standard for the former, as relevant to this case, is set out in PD 2.7.2.3, which provides that a remand can only be ordered where the Independent Adjudicator determines that a score cannot be justified because either: "[t]he CAB made a mistake as to a material fact;" "[t]he CAB failed to consider material information put forward in the assessment process by the fishery or a stakeholder;" [t]he CAB failed to consider material information put forward by stakeholders;" or "'t]he scoring decision was arbitrary or unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it." The standard for the latter is set out PD 2.7.2.2, which provides that the Independent Adjudicator may only set aside a determination where "'t]he setting of conditions by the CAB in relation to one or more performance indicators cannot be justified because the conditions fundamentally cannot be fulfilled, or the condition setting decision was arbitrary or unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it."

11. In the record review process in this case, as long as the CAB has not made a mistake as to a material fact, ignored material information or acted arbitrarily or unreasonably in awarding scores or devising conditions, the Independent Adjudicator may not set the conclusions of the CAB aside and instead must uphold the CAB's determination and conditions. *Per contra*, where such violations have occurred, the matter must be remanded to the CAB under PD 2.8, and, under PD 2.8.2, the CAB must "respond in writing to the matters specified in the remand," indicating either "no change" in relation to the scoring of PIs (PD 2.8.2.1), proposed changes to the justification for a score or "a change in the score in relation to any of the performance indicators" (PD 2.8.2.2).

III. GROUNDS FOR THE OBJECTIONS.

12. As set out in the NOOs, the objectors mount several challenges to the Final Report. First, the objectors challenge the scoring with regard to six PIs -- PI 1.1.1, PI 2.1.3, PI 2.5.2, PI 3.1.1, PI 3.1.3 and PI 3.2.3[2] -- thereby establishing a claim under PD 2.7.2.3.[3] Second, the objectors contend that Conditions 1 and 2, raised under PIs 1.2.1 and 1.2.2, respectively, are

---

[2] In its PowerPoint presentation for the hearing, the TNC Group suggests lack of justification for scores under PIs 3.2.1, 3.2.2 and 3.24 as well. These PIs were not cited in the TNC Group's April 10 letter of clarification and so are outside the scope of the objections. *See* PD 2.6.6. In any case, the arguments the TNC Group puts forth are essentially the same as those undergirding the other P3 claims and are, for all intents and purposes, subsumed under those claims.

[3] In its PowerPoint presentation for the hearing, the TRCP Group also suggested that it was challenging the scoring for PI 1.2.2. However, in the course of its oral presentation, the TRCP Group acknowledged that such a challenge was not included in its NOO and, therefore, under PD 2.6.6, could not be asserted subsequently.

insufficient, thereby establishing a claim under PD 2.7.2.2.[4] I will deal with each of these contentions in turn. Before I do so, however, a word needs to be said about the overall thrust of the objectors' case and the defense arrayed against it by the CAB and the fishery client.[5]

13. The TNC Group and the TRCP Group share much the same viewpoint about the certification of the subject fishery, as reflected in the substantial overlap of their objections. The objectors basically take the position that the fishery as currently managed is not yet at the point it should be with respect to the integration of ecological concerns into management measures. In some sense, as the TRCP Group stated at the hearing, they regard certification as premature and would prefer that it await the adoption of Ecological Reference Points ("ERPs") that will presumably undergird much of the ecologically-based management strategy and harvest control rule ("HCR") currently under development by the Commission. Short of that, they at least wish that conditions developed by the CAB be an impetus to swifter adoption of such measures, and they would prefer conditions which spell out in greater detail just what such measures should provide. Finally, they question whether the existing management system is truly effective in light of what they regard as Virginia's non-compliance with Commission management measures, in particular the current cap on the level of harvest in the Chesapeake Bay.

14. Not surprisingly, the CAB and the fishery client have a rather different perspective. They regard the management regime as precautionary and conservative, accounting for ecosystem concerns even in its current form. While they recognize the need for further integration of ecological considerations, they believe a timeframe coincident with the certification period is most appropriate under the MSC scheme, and they balk at prejudging precisely what the new management measures should say. They view menhaden management as a work in progress, and they see MSC certification as focused appropriately at promoting improvement over time. Last of all, given that no non-compliance determination has been made by the Commission, they strongly take issue with the claim that Virginia is not in compliance with Commission's rules and that the management system is therefore ineffective.

15. In the context of this proceeding, it is not my job to sort out who is right or wrong on substance. Whatever the merits of the arguments of the parties, or their policy predilections, my decision in this particular case must be limited under the terms of the Objections Procedure to more narrow questions relating to the "rationality" of or support for the CAB's determinations.

---

[4] In its PowerPoint presentation for the hearing, the TNC Group indicated that it favored adding a third condition to "rectify scoring issues relating to Principle 3." Such a claim was not made in the TNC Group's NOO, and, even if it were, it would be premature at this time. If the CAB's determinations with respect to Principle 3 PIs were found wanting, the matter would be remanded to the CAB, and, if the CAB then rendered a score less than Scoring Guidepost ("SG") 80, in the first instance it would be up to the CAB, in its discretion, to devise what it determined to be an appropriate condition. It is not within my jurisdiction now to pass on its appropriateness.

[5] It should be noted that, in considering the objectors' challenges, I have not taken into account any documents that post-date the PCDR. *See* PD 2.3.4.4, PD 2.6.5.2. These include several documents that were provisionally included in the CAB's record bundle submitted on July 1, 2019. *E.g.*, Doc. Ref. Nos. 152 (Virginia Business 2019), 154 (Chesapeake Bay Magazine 2019), 156 (Commonwealth of Virginia letter, dated January 14, 2019), 160 (ASMFC News Release, dated February 7, 2019).

A. The Objectors' Challenges to the Scoring of Performance Indicators.

16. As noted above, the objectors challenge the scoring of six PIs under the MSC Principles pursuant to PD 2.7.2.3 of the Objections Procedure. The objectors contend that the scores were unjustified and, in many cases, even awarding a score at the SG 60 level was not warranted.[6] If the objectors are correct, then the scores would need to be substantially reduced, and, if any did not meet the SG 60 level, the UoA as a whole would not merit a passing grade under the FCR.

i. The PI 1.1.1A Claims.

17. Principle 1 of the MSC regime provides, "A fishery must be conducted in a manner that does not lead to over-fishing or depletion of the exploited populations and, for those populations that are depleted, the fishery must be conducted in a manner that demonstrably leads to their recovery." The Principle basically relates to the health of the target stocks. In turn, PI 1.1.1A, which, because menhaden is a KLTL species, all parties agree is applicable to the subject fishery, provides, "The stock is at a level which has a low probability of serious ecosystem impacts." For a score of 80 under this PI, which is the score awarded to the fishery, it must be "highly likely that the stock is above the point where serious ecosystem effects could occur."

18. The heart of the objectors' challenge to the CAB's approach to assessing the status of the menhaden stock under PI 1.1.1A is straightforward. They consider that the starting point for assessment under SA 2.2.8-2.2.17 of the FCR is the spawning stock biomass level. Instead of using spawning stock biomass, however, the CAB relied upon total biomass estimates in its analysis. This, the objectors argue, was error and contrary to the MSC's express requirements. Further, as the TRCP Group argues at some length, it was bad science, "obliterat[ing] the effect of rounding down the reproductive component of the stock and its impact on sustainability," "prevent[ing] the assessment team from understanding the relationship between the number of juvenile menhaden and adult menhaden and how this reflects current stock status and future population recruitment," and "artificially inflat[ing] the spawning potential ratio . . . , thus fail[ing] to adequately assess the risks to the health and sustainability of the fishery." TRCP Group NOO, pp. 13-14.

19. The problem with the objectors' contention is that the MSC expressly allowed the CAB to use the total biomass approach. In the fall of 2018, the CAB queried the MSC on this very issue. On November 29, 2018, the MSC responded, based upon an interpretation approved by the Technical Committee, "Either indicator can be used, total stock biomass (B) or spawning stock biomass (SSB) (in the absence of fishing), so long as the intent remains that the default target would be 75% of the respective indicator used (ie., B or SSB). In the event a higher or lower target biomass level is to be used (ie. less than or greater than the default 75%), SA 2.2.13b shall be adhered to." *See* Final Report, pp. 50, 159.[7]

---

[6] Under Section 7.10.5.1a of the FCR, if any scoring element fails to achieve an SG 60, the fishery fails and is ineligible for certification.

[7] The interpretation apparently reaffirmed an interpretation given "much earlier in the assessment process." *Id.*

20. With this interpretation in hand, the CAB proceeded to undertake an analysis. It deemed total biomass "the most appropriate measure of the ecosystem role of the menhaden stock." Final Report, p. 50. It did so, after considering at length, the pros and cons of such an approach, which are elaborated in the Final Report. In particular, it relied upon studies such as Smith, *et al.*, *Impacts of Fishing Low Trophic Level Species on Marine Ecosystems*, Science, 333:1147 (2011) (Doc. Ref. No. 130) and Pikitch, *et al.*, *Managing a Crucial Link in Ocean Food Webs* (Report to the Lenfest Forage Fish Task Force) (2012) (Doc. Ref. No. 113). Because the best available science indicated that 2017 biomass would only be 46.7% of the total biomass expected in the absence of fishing, *i.e.,* below the 75% default target biomass level, it undertook the evaluation called for by SA 2.2.13b., which allows for use of lower levels, down to 40%, in appropriate circumstances. And, in conducting its analysis, here again the CAB relied upon recent science, Buchheister, *et al.*, *Evaluating Ecosystem-Based Reference Points for Atlantic Menhaden*, Marine and Coastal Fisheries, 9:1, 457-478 (2017) (Doc. Ref. No. 24), which it concluded "represents a reasonable, comprehensive and ultimately credible ecosystem model." Final Report, p. 52. Finally, as the CAB affirms, it didn't limit its analysis to biomass considerations – it stated at hearing that this is not the "be-all-and-end-all" of the scientific inquiry – but followed an "ensemble approach," consistent with the requirements of the FCR, taking into account such factors as fishing mortality and the effects of the menhaden fishery on other species.

21. The objectors suggest that the MSC has improperly "shifted the goal posts" and "deviated from its own standard" and that it was "unreasonable" for the CAB even to query the MSC concerning the use of total biomass for its assessment. The CAB is correct, in my judgment, however, in considering the MSC interpretation "normative," and it is beyond my remit as an Independent Adjudicator to determine that the MSC's interpretation of its own requirements is in error. Nor is there any way I can consider the CAB's query unreasonable. If it had been unreasonable, the MSC presumably would not have responded by giving the CAB the option to choose between using total biomass or spawning stock biomass. That it did respond – and respond positively – of necessity precludes any finding by me that the query itself was unreasonable.

22. At the same time, little more can be asked of the CAB with respect to the elucidation of its reasoning. That reasoning is spelled out in detail in the Final Report (at pp. 49-55), and it is found as well in the Scoring Table for PI 1.1.1A (Final Report, pp. 163-165). The objectors are in essence asking me to substitute my judgment for that of the CAB on a matter of science. That is something I cannot and will not do. *See* PD 2.6.6.1. Nor can I say that SAI made a mistake of material fact, failed to consider material information or was arbitrary or unreasonable in reaching the conclusions it did. Ultimately, fisheries science judgments are within the province of the CAB, and, on questions involving the sifting and weighing of evidence, deference to the CAB is warranted. *See, e.g., In re: New Zealand Orange Roughy Fisheries, supra,* ¶¶ 69, 86, 92; *In re: SSMO Shetland Inshore Brown Crab and Scallop Fishery, supra,* ¶¶ 18, 26. Accordingly, I decline to accept the objectors' contentions under PI 1.1.1A.

ii. The PI 2.1.3 Claim.

23. Principle 2 provides, "Fishing operations should allow for the maintenance of the structure, productivity, function and diversity of the ecosystem (including habitat and associated

dependent and ecologically related diverse species) on which the fishery depends." The TRCP Group (but not the TNC Group) challenges the scoring of PI 2.1.3. PI 2.1.3 provides, "Information on the nature and extent of primary species is adequate to determine the risk posed by the UoA and the effectiveness of the strategy to manage primary species." The fishery received a score of 80 on this PI.

24. To achieve a score of 80, the CAB must find, with respect to scoring issue c, that "[i]information is adequate to support a **partial strategy** to manage **main** Primary species."[8] It is somewhat difficult to discern the TRCP Group's concern about the scoring of this PI. By-catch in the fishery is very low: only 0.04%. There are no "main primary" species that make up by-catch in the fishery. Final Report, p. 67. Consequently, it is difficult to fault the CAB for concluding that, because there are no main primary species, the partial strategy called for to meet SG 80 "is not necessary" and "information adequate to support such a strategy is not required." Final Report, p. 185.

25. The TRCP Group, in its NOO, makes several points in support of its claim that the CAB made a mistake of material fact and reached conclusions unsupported by the record, with the result that the score for this PI "is more appropriately 60 or less." First, the TRCP Group complains that one cannot have a "partial strategy" if there is no "strategy" in place. To the contrary, by its very nature, a "partial strategy" is something less than a "strategy." This is clear from the definitions of "strategy" and "partial strategy" in Table SA 8 of the FCR, with a "strategy" comprising, for example, a "strategic" arrangement which is lacking in the mere "cohesive" arrangement found in a "partial strategy."

26. Second, the TRCP Group points to the CAB's own acknowledgment that there are problems with the adequacy of by-catch data for the fishery. Indeed, the CAB states, "The impacts on bycatch species are poorly known. Data on bycatch are only collected on an *ad hoc* basis at infrequent intervals." Final Report, p. 16. The CAB's candor, however, is scarcely sufficient to undercut its fundamental conclusion about the absence of main primary species. Even if by-catch were substantially greater – and there is little indication that it is – no such species would likely be found. *See* Final Report, Tables 12, 13.[9]

27. Third, the objector cites what it characterizes as "more recent data" gathered by the National Oceanic and Atmospheric Administration ("NOAA"), the Federal agency charged with management of United States ocean fisheries, purportedly showing higher by-catch rates. The assertion is incorrect. As the CAB points out in its response to the NOOs, the data cited by the TRCP Group are for the Gulf of Mexico menhaden fishery, while the NOAA data relied

---

[8] The CAB determined that scoring issue a, which relates to the adequacy of information to assess the impact on main primary species, was "[n]ot relevant" because there are no main primary species and, with respect to scoring issue b, which relates to the adequacy of information to assess the impact on minor primary species and which does not provide for scoring at the SG 60 or 80 level, there was "[s]ufficient qualitative information to estimate the impact of the Menhaden fishery on Minor Primary species," if not "quantitative information" to meet the SG 100 level. Final Report, p. 185.

[9] Under Section SA 3.4.2 of the FCR, a "main primary species" "comprises 5% or more by weight of the total catch of all species by the UoA" (SA 3.4.2.1) or the species is categorized as "less resilient" and the catch comprises "2% or more by weight of the total catch of all species by the UoA" (SA 3.4.2.2). *See generally* FCR Guidance, Table GSA 2, Section GSA 3.1.4

upon in the Final Report (*see* Final Report, Table 12) "are specific to the Atlantic fishery and are the result of NOAA observer program data collected between 2007 and 2012." *See* CAB Response, p. 12.

28. Fourth, the objector complains about the "low and sporadic" observer coverage in the fishery. The fact is that observer coverage is low because, under NOAA's Standardized Bycatch Reporting Methodology, in particular, it has been determined that by-catch in the fishery is not sufficient to warrant significant coverage. This is obviously not the fault of Omega, and, if anything, it tends to support the CAB's conclusions about low by-catch levels in the fishery.

29. In sum, I cannot find that the CAB made a mistake of material fact, reached a decision that was unsupported by the record or otherwise acted arbitrarily or unreasonably in scoring PI 2.1.3.

iii. The PI 2.5.2 Claims.

30. The second P2 scoring objection, raised by both objectors, relates to PI 2.5.2. PI 2.5.2 provides, "There are measures in place to ensure the UoA does not pose a risk of serious or irreversible harm to ecosystem structure and function." The CAB awarded a score of 80 to the fishery on this PI. To do so, it found that a score of 80 was justified for each of the three scoring issues which make up the PI, finding in particular that there was a "partial strategy" in place to avoid ecosystem risks, "some objective basis" for confidence that the partial strategy will work and "some evidence" that the strategy "is being implemented successfully."

31. The objectors' overarching theme with regard to this PI is that because the ASMFC has yet to adopt an integrated, ecosystem-based management plan for menhaden, and because, in any event, the State of Virginia has not adopted the 51,000 mt Chesapeake Bay cap, it cannot reasonably be said that any "strategy" exists. The primary problem, in short, in their view, is inherent in the continued system of single species management for menhaden. However, the CAB does not interpret PI 2.5.2 as requiring an explicit ecosystem approach to be integrated in the fishery management plan itself. Rather, it is enough in its judgment, consistent with the FCR, that there be a suite of measures in place that act together to avoid ecosystem risks.[10] I find no reason to take issue with the CAB's approach, which is in conformity with the FCR's definitions.

32. The TRCP Group complains once again that one cannot have a "partial strategy" if there is no "strategy" in place. As discussed in paragraph 25 above with respect to the PI 2.1.3

[10] Table SA 8 of the FCR defines "measures" as "actions or tools in place that either explicitly manage impacts on the component or indirectly contribute to management of the component under assessment having been designed to manage impacts elsewhere." In turn, a "partial strategy" constitutes "a cohesive arrangement which may comprise one or more measures, an understanding of how it/they work to achieve an outcome and an awareness of the need to change the measures should they cease to be effective. It may not have been designed to manage the impact on that component specifically." *See also* Guidance to the FCR, Table GSA 3.

objection, this is not the way the FCR works, and finding that there is a "partial strategy" when there is no "strategy" is fully consistent with the scheme. *See* FCR Table SA 8.[11]

33. In fact, as Omega underscored at hearing, the management of menhaden is conservative and precautionary, taking into account expressed concerns about the stock's role in the ecosystem and effectively accommodating ecosystem needs. Thus, for example, as Omega argued, the current TAC of 216,000 mt essentially presents a 0% risk of exceeding overfishing thresholds, leaving a substantial cushion of roughly 100,000 mt available to satisfy such ecosystem needs. Omega points, among other matters, to a September 21, 2015 letter from NOAA to the Hon. Robert J. Wittman (Doc. Ref. No. 158), which enumerated the ways in which the single species assessment model recognizes predation/ecosystem effects. As NOAA stated, "The 2015 stock assessment takes into account mortality of menhaden due to factors other than fishing, which is termed natural mortality . . . . A scientific effort aside from the stock assessment has been undertaken to try to model predation mortality in particular . . . . Some of the major fish predators included in the modeling efforts were bluefish, striped bass and weakfish." The CAB could clearly take such considerations into account in reaching conclusions regarding PI 2.5.2.

34. Moreover, as SAI pointed out in scoring this PI, there is a "broad range of regulatory measures [that] are in place within U.S. coastal waters which aim to limit adverse effects of fishing on the marine ecosystem." Final Report, p. 219. Of particular note is NOAA's "Ecosystem-Based Fisheries Management" policy which "promote[s] consideration of not only cumulative effects, but also tradeoffs across various management regimes and human uses." It was not reasonable for the CAB to take these into account in determining that a "partial strategy" meets SG 80 scoring requirements.

35. Finally, while the objectors contend that the decision in *In re: Echebastar Indian Ocean Purse Seine Skipjack, Yellowfin and Bigeye Tuna Fishery, supra*, suggests a different result, I do not concur. At issue in that case was whether the management body had developed and implemented an HCR. This is an explicit management tool, designed directly and solely for the fishery at issue. It is a far cry from what may be a loosely connected suite of management measures and policies that may make up a partial ecosystem strategy and that, by very definition, "may not have been designed to manage the impact on that component specifically." *See* FCR, Table SA 8.

36. In conclusion, I cannot say that the CAB made a mistake of material fact or otherwise acted arbitrarily or unreasonably in scoring PI 2.5.2

iv. The PI 3.1.1, 3.1.3 and 3.2.3 Claims.

37. Principle 3 relates to "effective management." It reads, "The fishery is subject to an effective management system that respects local, national and international laws and standards and incorporates institutional and operational frameworks that require use of the resource to be responsible and sustainable." Overall the fishery received a score of 92.2 under

---

[11] The TRCP Group also objects to the views of one peer reviewer as premised on a "mistake of material fact." However, as the CAB states, peer reviewers "are not part of the team and are entirely external to SAI Global." *See* CAB Response, p.14.

this Principle. The TNC Group assert a claim under PI 3.1.3,[12] while the TRCP Group mounts challenges to the scoring of PI 3.1.1 and PI 3.2.3. PI 3.1.1 (scored at 95) provides, "The management system exists within an appropriate legal and/or customary framework which ensures that it: Is capable of delivering sustainability in the UoA(s); Observes the legal rights created explicitly or established by custom of people dependent on fishing for food and livelihood; and Incorporates an appropriate dispute resolution framework." PI 3.1.3 (scored at 100) provides, "The management policy has clear long term objectives to guide decision-making that are consistent with MSC fisheries standard, and incorporates the precautionary approach." PI 3.2.3 (scored at 80) provides, "Monitoring, control and surveillance mechanisms ensure the management measures in the fishery are enforced and complied with."

38. All the P3 claims, no matter the particular PI whose score is challenged, basically come down to a single argument: because the State of Virginia is assertedly not in compliance with the 51,000 mt Chesapeake Bay cap adopted by the Commission, the CAB could not find that the management regime for menhaden passes muster under the MSC standards. There is no dispute in this case that Virginia has not adopted the cap. Indeed, it unquestionably has an 87,216 mt cap in place instead. Further, there are differences in the operation of the cap. For example, the ASMFC does not allow rollover of unused quota in subsequent years, while the State of Virginia does. The question in this proceeding is what the significance of these differences between the ASMFC rule and the Virginia rule is for certification of the fishery.

39. The position of the objectors is straightforward. Virginia has in place a different regime for the Chesapeake Bay, with a higher TAC, and that, in and of itself, is enough to undercut the CAB's scoring of the P3 indicators. What they are saying, in effect, is that the CAB should have made an independent judgment of the facts on the ground in scoring the fishery. They also point to lobbying activities by Omega regarding the cap and from that conclude that Omega cannot be relied upon to support ecologically-based management in the fishery, undercutting the effectiveness of the management regime.

40. The CAB and the fishery client have an entirely different perspective on the matter. They view the ASMFC management system as robust and the mere fact that Virginia has not adopted the 51,000 mt cap in the Chesapeake Bay as not conclusive as to whether Virginia is in "compliance" or out of "compliance" with applicable management measures. In fact, as they point out, the ASMFC has a specific mechanism for determining whether a State is in compliance or not with the Commission's management measures. Further, once a non-compliance determination is made, the Secretary of Commerce (the head of the cabinet department in which NOAA resides) can then take coercive action against the non-complying State by imposing a moratorium on fishing. This constitutes, they argue, a very effective management regime. Omega has attached to its response to the NOOs a chart (Exhibit B to the Omega Response) showing that on twenty-five (25) separate occasions the ASMFC has actually made non-compliance determinations and, almost universally, these determinations succeeded in securing virtually immediate compliance with the applicable management measures. In the

[12] The basis for this objection is set out in the TNC Group's April 10, 2019 letter of clarification. Because no other PIs were cited in such letter, I consider that claims related to the scoring of other PIs are outside the scope of the objection. *See* PD 2.6.6. In any event, for the reasons discussed herein and as noted in footnote 2 above, they are basically subsumed under the PI 3.1.3 claim.

present case, it is undisputed that the Chesapeake Bay cap has in fact never been exceeded and that, in these circumstances, the Commission has not acted to find Virginia in non-compliance. Therefore, in the view of the CAB and the fishery client, it would be inappropriate for the CAB as a practical matter to make such a finding, affecting in turn the scoring of the P3 indicators.

41. On the whole, I think the CAB and the fishery client have the better of the argument. The regime on its face is capable of making judgments with respect to non-compliance and enforcing those judgments against recalcitrant States. In the absence of any action by the Commission, the CAB would be treading on shaky ground indeed to find non-compliance on its own initiative, especially when the TAC has never actually been exceeded. Indeed, among other things, the objectors would have the CAB wade into a heated intramural dispute within the State of Virginia over whether the Governor (who opposes certification) or the Legislature (which favors certification) is best vested with management responsibilities for menhaden. This is a task for which any CAB would be ill-equipped, and where clear standards from the MSC are lacking.

42. The parties spar at length over a variety of other issues related to the cap: whether it matters that Virginia has not exceeded the overall TAC allocation to the State from the ASMFC; whether Virginia's 2017 appeal of the FMP Amendment 3 coastwise TAC, and the subsequent dropping of that appeal, demonstrate that the system is working or not; whether the cap, which is based only upon an average of past landings, is science-based; whether the cap is more about allocation/access than conservation; and, indeed, whether the cap is a meaningful precautionary measure or whether it has any conservation benefits at all. At the end of the day, all these arguments appear peripheral and ancillary to the fundamental question whether the compliance oversight and enforcement mechanisms are satisfactory and warrant the scores given.

43. Further, in my judgment, Omega's lobbying activities are of questionable relevance. Whatever positions Omega may have taken in the past on ASMFC management measures, including the Chesapeake Bay cap, are not necessarily predictive of positions Omega may take on future issues, and Omega is certainly free to follow its own lights in advocating for particular measures or not. In fact, as acknowledged by the objectors at hearing, there is no evidence Omega has lobbied against the adoption of ecosystem-based management measures by the Commission, and, to the contrary, the record shows that it has been generally supportive, with some qualification, of the Commission moving in this direction. *See* letter, dated October 24, 2017, from Omega to the ASMFC, Omega Response, Exhibit 5.

44. Last of all, I cannot accept the objectors' argument that the PI 3.1.1 decisions in the matter of *Faroese Mackerel*, where the Independent Adjudicator found a passing score not supportable, compel a similar result here. *See In re: Faroese Pelagic Organisation North-East Atlantic Mackerel Fishery* (MSC, December 21, 2010); *In re: Faroese Pelagic Organisation North-East Atlantic Mackerel Fishery* (MSC, January 28, 2011). In the *Faroese Mackerel* case, there was a lack of agreed allocation by the intergovernmental authorities responsible for management, no mechanism to remedy this deficiency and the likelihood that there was going to be overfishing of the TAC by 50%. The circumstances here are far different: the TAC has been set by the responsible management authority; there are robust mechanisms in place under the ASMFC management framework to ensure compliance with the TAC (and other management measures); and there no evidence that overfishing is likely, let alone imminent.

45. Given the considerations just outlined, the objections to the scoring of the P3 indicators are not upheld.

B. The Objectors' Challenges to the Adequacy of Conditions.

46. The objectors make two objections against two conditions raised by the CAB in the Final Report: Condition 1 under PI 1.2.1, which requires the development of an ecologically-based harvest strategy, and Condition 2 under PI 1.2.2, which requires the development of an ecologically-based HCR. The objections are on a variety of grounds. The TNC Group objects to the timeframe for meeting the conditions as too long, and it further challenges what it asserts is the failure of the CAB to require adoption and implementation of the management measures in question at the State level by the members of the Commission.[13] The TRCP Group mounts a number of other arguments, including that the conditions are based upon "mistakes of material fact," are not "auditable and verifiable" within the meaning of FCR 7.11.1, do not result in "improved performance," as required by FCR 7.11.1.3, and do not specify milestones that spell out "measurable improvements and outcomes (using quantitative metrics) expected each year," as required by FCR 7.11.1.4a. Objecting to conditions is one of the most difficult burdens to carry under the Objections Procedure. As noted above, to prevail, an objector must demonstrate under PD 2.7.2.2 that (a) a condition "fundamentally cannot be fulfilled," or (b) "the condition setting decision was arbitrary and unreasonable in the sense that no reasonable CAB could have reached such a decision on the evidence available to it." As articulated in the NOOs, with one exception where clarification of the scope of the conditions is required, the objections to conditions do not rise to the level required by PD 2.7.2.2.

47. The claim that the timeframe for fulfillment of the conditions is too long is readily dealt with. The TNC Group would like a two-year period for closing the conditions, which would mirror the schedule for Commission adoption of ERPs. However, the timeframe is appropriately linked to the certification period. If the conditions are closed earlier, that is all to the good. However, given the five-year certification period, there is no justifiable rationale for compressing the timeframe. If at the end of the five-year period the conditions remain unfulfilled, certification will be lifted.

48. Nor is there any "mistake of material fact." The "mistake of material fact" relied upon by the TRCP Group is SAI's alleged erroneous approach to stock assessment and, in particular, its determination, in the absence of adopted ERPs, that the stock was at a sustainable level and its reliance on total biomass instead of spawning stock biomass in assessing the status of the stock. As explained in Section III.A.i. above, this was not in error and therefore can't constitute a basis for objecting to the conditions.

49. Likewise, I am not persuaded that the conditions are "not written concisely or definitively enough to ensure compliance with MSC's standards." TRCP Group NOO, p. 9.

[13] In its NOO, the TNC Group only argued that adoption and implementation by the State of Virginia should be part of the conditions. At hearing, however, it stated that the logic of its position necessarily extended to all ASMFC member States. While extending the conditions to other States is outside the scope of the TNC Group NOO as such, I agree that it would seem to make little sense to limit such conditions to Virginia alone, and there is nothing that should preclude the CAB from applying the conditions to all States.

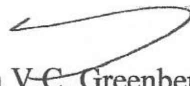
Conditions are to be written "to follow the narrative or metric form of the PISGs used in the final tree." FCR 7.11.1.2. Further, as stated in Section 7.11.2 of the FCR Guidance, "CABs should not be overly prescriptive about the means of meeting conditions." As the CAB explained at hearing, if conditions were overly prescriptive, CABs would put themselves in the position of eventually having to audit themselves. In fact, the conditions crafted by the CAB closely hew to the templates set out in the MSC Guidance. *See* FCR Guidance, Table G8 (Example of conditions for Principle 1). The conditions are sensible in calling for the adoption of an ecologically-based harvest strategy and HCR, and they do state milestones, leading ultimately to a determination that the SG 80 level is met. As a general matter, they are clearly capable of being fulfilled and not unreasonable.

50. While I generally find the conditions to be justifiable, I nonetheless believe that, on the key issue whether adoption and implementation of the management measures by the ASMFC's constituent States are required by the conditions, greater clarity is necessary. The conditions establish year four milestones for both the harvest strategy and HCR which call for evidence that each requisite measure "has been adopted by the ASMFC (or their designated bodies)," with the explanation that the term "adopted" "is analogous to 'in place.'" *See* Final Report, pp. 250, 251. Elsewhere the Final Report states, in response to comments, "[T]he current Assessment Team deem it highly unlikely that a future Assessment Team would find such measures to be in place were they not adopted by the relevant jurisdictions." Final Report, p. 392. At hearing, the CAB stated that the reference to "designated bodies" included the ASMFC member States and affirmed that, if at the end of the period the States had not adopted the measures, the conditions would not be met. The CAB's response to the NOOs also stated the CAB "understood from the outset that measures adopted by the ASMFC would require parallel legislative action at the State-level." CAB Response, p. 24. It is worth noting, moreover, that the ASMFC itself advised the CAB with respect to Conditions 1 and 2, "[T]he Commission's 'adoption' does not ensure the ERPs are fully implemented by all jurisdictions along the Atlantic coast. The final step in ensuring there is a robust and precautionary harvest strategy for lower trophic level species important to the ecosystem, such as Atlantic menhaden, requires the full implementation and enforcement of new management measures by all jurisdictions." *See* letter, dated September 12, 2018, from Robert Beal to Samuel Dignan, reproduced in the Final Report, p. 258. Despite such statements, I find the language of the Final Report, including the reference to "designated bodies" and the use of the qualifying phrase "highly unlikely," less than crystal clear, and obviously it was not clear enough for the objectors to conclude that State adoption and implementation were in fact elements of the conditions. In my judgment, State adoption and implementation of the harvest strategy and HCR are so integral to fulfillment of the conditions that, if Conditions 1 and 2 were interpreted not to require such State actions, the conditions would be arbitrary and unreasonable under PD 2.7.2.2.

51. In the current circumstances, therefore, a limited remand is in order. State adoption and implementation may well be implicit in the conditions as written. Still, this seems to me to be such a critical point that no ambiguity should be left remaining in the conditions. Accordingly, the matter will be remanded to the CAB for the purpose of clarifying how State adoption and implementation of the ecologically-based harvest strategy and ecologically-based HCR form part of Conditions 1 and 2.

IV. CONCLUSION.

52. Having considered the written submissions and supporting documentation of the parties, together with their presentations at the oral hearing, I find that, with one exception, the TNC Group's and the TRCP Group's grounds for objection, as set forth in the NOOs, have not been established under the terms of the Objections Procedure. Therefore, the objections will be dismissed in all respects, except with respect to the scope of Conditions 1 and 2 where I have found that further clarification of their application to the ASMFC member States is necessary. In accordance with Section PD 2.7.1.2 of the Objections Procedure, I now remand the determination of the CAB for action consistent with this decision. The CAB shall proceed to consider this ruling and, pursuant to PD 2.8.2, within 10 days, or by 5:00 p.m. British Summer Time on August 14, 2019, respond in writing to the matters specified herein.[14] Under PD 2.8.3, the other parties, within five (5) days after the CAB response, or by 5:00 p.m. British Summer Time on August 21, 2019, "may make written submissions on the matters specified in the remand or on the response thereto by the CAB."



Eldon V.C. Greenberg
MSC Independent Adjudicator

Dated: July 31, 2019

[14] PD 2.8.2.1 and PD 2.8.2.2, which deal with CAB responses to remands, were plainly not written with remands related to conditions in mind. They thus only refer to a CAB response related to scores and scoring. In this case, obviously what is at issue is whether the language of Conditions 1 and 2 should be altered, not any changes to justifications for scoring or to a score itself.