



MARINE STEWARDSHIP COUNCIL

DECISION TO ALLOW OR DISMISS A FURTHER OBJECTION ON THE BERING SEA/ALEUTIAN ISLANDS POLLOCK FISHERY DETERMINATION

INTRODUCTION

This document presents the MSC's decision about whether to allow or dismiss a further objection to the MSC about the Determination made by independent certification body SCS to certify the Eastern Bering Sea / Aleutian Islands Pollock Fishery (BSAI) against the MSC Principles and Criteria for Sustainable Fishing.

The members of the MSC Board of Trustees entrusted with the responsibility for making this decision acknowledged the high quality of submissions made by the objectors and the certification body and the professionalism and seriousness displayed to date by each of the parties in the conduct of this important process.

OVERVIEW OF MSC POLICY AND PROCESS

The MSC Objections Procedure, adopted by the Board of Trustees in July 2002, allows dissatisfied parties to object to a certification body's Determination about a fishery. The objection may be in two stages: first to the certification body (initial objection); and second to the MSC if the objecting party is dissatisfied with the certification body's response (further objection).

Upon receipt of a further objection, the MSC has five working days to formally respond to the objecting party with its decision about whether to allow the further objection to be heard or dismiss it. If a further objection is allowed to be heard, the MSC then establishes an independent Objections Panel to hear the objection. If a further objection is dismissed, the Determination about a fishery becomes the certification decision by the independent certification body.

The MSC Board of Trustees decided at its meeting on 6-7 September 2004 to delegate to a sub-set of the Board the authority to make the decision whether to allow or dismiss a further objection on the BSAI pollock fishery. This group of members would exclude any members who might have a conflict of interest. The independent Board members delegated with this authority were the Rt. Hon. John Gummer MP (Chairman), Dr Keith Sainsbury, Mr Kees Lankester and Mr Henrique Cavalcanti.

In making their decision, the authorised Trustees of the Board considered the Final Report by SCS on the BSAI pollock fishery, the initial objection by Trustees for Alaska on behalf of a coalition of objectors¹, the response by SCS to the initial objection and the further objection to the MSC lodged by the same objectors.

¹ Alaska Oceans Program, Greenpeace International, National Environmental Trust and Oceana

The proper test for the MSC Board of Trustees in determining whether the further objection is patently frivolous or otherwise spurious is whether the further objection is obviously or easily recognisable as being: not seriously intended, implausible, deceitful or invalid. Other considerations are: 1) whether there are points raised within an objection that are outside the scope of an assessment against the MSC's Principles and Criteria for Sustainable Fishing; and 2) whether there are new issues introduced in the further objection that were not raised in the initial objection.

ASSESSMENT PROCESS

- Full assessment process by SCS began in early 2001. SCS conducted extensive consultation with stakeholders which exceeded MSC requirements at the time.
- Draft Report with draft Determination published September 2003.
- Final Report with a Determination that the fishery should be certified published June 2004. (see MSC website: www.msc.org)
- Initial objection lodged with SCS by objectors (listed in Footnote 1). Response to initial objection completed by SCS by 2 September 2004. (Appendices 2 & 3)
- Further objection by objectors received by the MSC on 24 September 2004. (Appendix 1)
- Decision by the authorised members of the MSC Board of Trustees by 30 September 2004.

The Final Report by SCS on the BSAI fishery contains some 827 pages of detailed assessment against the MSC's Principles and Criteria for Sustainable Fishing. It describes the assessment process undertaken by SCS and the stakeholders consulted. The report provides stakeholder submissions, the peer review reports and submissions made at the Draft Report stage, and describes how these were incorporated into the Final Report. The report ultimately set out the Determination by SCS's independent assessment team about whether or not the fishery should be certified.

FURTHER OBJECTION – DOCUMENTS SUBMITTED

As MSC policy allows, the further objection by the objectors was both procedural and merits-based, as was their initial objection to SCS.

The further objection is in three parts. The first is on the MSC Objections Form, which essentially repeats what was on the Form for the initial objection submitted to SCS. The second and more substantive part of the further objection takes the form of a letter to the MSC's Chief Executive. The third and final part is a document that includes an additional paragraph on page 8 and minor amendments on pages 2 and 3 to the initial objection.

Trustees recognised and appreciated the thoroughness with which the material was prepared, both by the objectors and by the certification body. A full analysis by Trustees of the material revealed no new issues introduced in the further objection that were not raised in the initial objection. This is consistent with the requirements set out in MSC policy. The response by SCS to the initial objection also met MSC requirements by responding thoroughly to the issues raised by the objectors. The objectors' further objection set out the reasons for continuing the objection based upon the SCS response to the initial objection.

DECISION

The further objection on the Eastern Bering Sea / Aleutian Islands Pollock Fishery determination is dismissed and will not be referred to an Objections Panel.

The Trustees' analysis of the issues revealed that the further objection certainly is seriously intended and definitely not deceitful. However, the decision of the Board is that the further objection is invalid and to some extent implausible, hence it will not establish an independent Objections Panel.

The detailed reasons for this decision are given below.

Procedural objection

The decision of the authorised members of the MSC Board of Trustees is that there is no basis for allowing an objection to be heard on procedural grounds.

On the Objections Form, the objectors allege that the certification body did not follow the procedural requirements set out by the MSC for the conduct of an assessment. The Fisheries Certification Methodology applicable at the time of the BSAI assessment was Version 3 (valid up to March 2004). The July 2002 version of the MSC Objections Procedure, which also sets out the requirements for Draft and Final Reports, is the applicable version for this assessment.

The argument offered by the objectors is that procedure was not followed because the "certification team did not adequately consider comments submitted on the Draft Determination regarding certification. The scoring on the performance indicators is too generous." "...the Final Determination should have resulted in changes to the text and conditions and lower scores for the performance indicators and the overall determination."

SCS's assessment team, in its response to the initial objection, states "A reader of the Final Report will find on almost every page ... of the actual assessment, substantive evidence of the conservation stakeholders' affirmative influence."

Trustees found that there is clear evidence in the Final Report that SCS correctly followed the procedures set out in both Version 3 of the methodology and the MSC Objections Procedure, July 2002. This means that SCS issued a Draft Report, invited and received comments from stakeholders, and evidenced consideration of those comments in its Final Report.

The question of the *adequacy* of the assessment team/SCS's consideration of comments is not a procedural issue but a merits issue, therefore there is no basis for allowing an objection to be heard on these grounds.

A second allegation that relates to failure to follow procedure is the statement by the objectors in their letter that "Finally, the failure to include scores and weights of the individual Performance Indicators in the Draft Determination made it impossible to comment meaningfully and to see changes between the draft and final documents."

There was no procedural requirement at the time (September 2003) to include scores and weights in the Draft Report. This did not become a procedural requirement until April 2004 when the new methodology was released. For this reason also there is no basis for allowing an objection to be heard on procedural grounds.

Further objection – merits objection

In their detailed letter, the objectors meticulously set out the substance of their objection and reasons for being dissatisfied with SCS's response to their initial objection. Some of those issues fall outside the scope of an assessment against the MSC Principles and Criteria for Sustainable Fishing. These include allegations that the applicant appears not to act in good faith and that the MSC process should not rely so heavily on what the objectors consider is an unreasonable amount of stakeholder participation to influence the analysis and subsequent conditions.

Trustees also found that the assertion by objectors that the conclusions of the Wildhavens / Bridgespan evaluation reports are germane to the fishery assessment and lend support to their case against the fishery is an invalid argument. In particular, the Wildhavens report and subsequent recommendations about MSC processes and interpretation of the Principles and Criteria are the subject of active discussion by the MSC Board of Trustees, Stakeholder Council, Technical Advisory Board and the Executive. The case study on pollock cited by the objectors in the Wildhavens report puts forward the views of some of the same stakeholders involved in the further objection. Trustees rejected the objectors' notion that the evaluators were presenting an objective independent assessment of the fishery against the MSC standard and favoured the view that the case study constituted a re-statement of the objectors' own views which have been fully considered throughout the assessment process by SCS's assessment team.

Trustees found that there remained only two additional issues in the further objection that fall within the scope of an assessment against the Principles and Criteria:

- Opening of the Aleutian Islands fishery.
- Scope of the 'management system' and 'respect for domestic law'.

Opening of the Aleutian Islands fishery

In the initial objection the objectors contend that SCS failed to adequately address the opening of the Aleutian Islands fishery in January 2005. The objectors assert that the scores are inflated and that the proposed conditions are inadequate to deal with the potential opening of the fishery.

In its response, SCS declines to change the scores because the Aleutian Islands fishery is not yet open and stated that when the fishery is re-opened and fishing actually occurs, post certification work will have to consider the circumstances and re-evaluate the Aleutian Islands portion of the BS/AI fishery. The conditions relating to this issue were changed between the Draft Report and Final Report based upon peer review and public comments.

In answer to the SCS response to the initial objection, the further objection letter states that "we must also address the SCS team response regarding consideration of documents after the June 2003 'cut-off' for the assessment." "...the team states that it could not or would not consider the information contained [in documents prepared by the North Pacific Fishery Management Council and NMFS] because of the documents' late availability or lack of relevance because the fishery has not actually opened yet. However, elsewhere in the response, the SCS team stated that it reviewed the most recent stock assessment information from November 2003 which was after the June cut-offto justify its analysis". The objectors assert that "the SCS team should not review only the documents and information it chooses to support its conclusions before the Final Determination and avoid reviewing other information that might alter its analysis until a later date." The objectors also argue that the language of the conditions is confusing and should be clarified, and argue

that the Final Determination should expressly state that immediate reassessment is required if the Aleutian Islands pollock fishery opens in January 2005.

Trustees considered the fact that the Aleutian Islands fishery has not yet opened and therefore is not directly relevant to the assessment of the *current* fishing activity (at the time of the assessment) against the MSC Principles and Criteria. They noted that it is appropriate to identify post-certification conditions that would be triggered in the event of the fishery being opened or any other event that may effect the management of the fishery. In determining how selective the assessment team was in regard to information used to rationalise its decisions about the wording of conditions, Trustees noted that SCS states on page 36 of its Final Report the following:

“Where new information has become available since the release of the draft report, such as the SAFE Reports for EBS & AI, brief reference is made to that information. However the more recent information has not been used to alter the scoring, although some of it may go part of the way to meeting several of the conditions.”

Trustees were satisfied with the approach taken by SCS and its team in this regard, including the action by SCS to examine documents specifically referenced by stakeholders in comments on the Draft Report and in the initial objection. This approach is consistent with MSC methodological rules relating to post-certification and the audit of certification conditions.

With regard to the objectors’ assertion that the language of the conditions needs clarification, Trustees concluded that there is little ambiguity in the SCS response to the initial objection, i.e., that if the fishery re-opens, the situation will be the focus of some immediate activity by the assessment team. However, the MSC will instruct SCS to remove any ambiguity about the wording of the condition for Principle 1, Performance Indicator (PI) 1.1.1.3 in its Public Certification Report that will be released after this process is complete, to reflect those elements that will be addressed immediately and thus the certainty expressed in the response to the initial objection. This issue was not considered a valid issue to submit for hearing by an Objections Panel.

Scope of the “management system” and “respect for domestic law”

In their initial objection the objectors allege an ‘erroneous interpretation of the management system’. SCS, in response, asserted that “the fact that the Team and the Objectors disagree reveals the complex and controversial nature of this fishery, but it is not a sign of error by either party.”

The objectors in their further objection state:

- “The SCS team’s incorrect interpretation of these terms constitutes reversible error..” (Page 2, Letter)
- “The SCS team decided subjectively how to interpret these terms and we contend that they have wrongly defined them in a way that results in undeserved scores in the fishery.” (Page 2, Letter)
- “Instead of recognizing the failure of the agency and Council....., the team reframes the situation and says the management system is effectively working, rationalizing that even though the agency isn’t doing a good job, all the external checks – the courts, Congress, constituencies – are doing it for them. This is an absurd interpretation.” (Page 8, Further objection submission)

Trustees noted that pages 133 to 252 of SCS’s Final Report set out an extensive analysis of the fishery against Principle 3 (the management system and management operations). The overview on pages 133 to 163 explain the complexity of the

influences, both regulatory and others, that go to make up the management system. Specifically, pages 137 to 138 set out a broad definition of the term management system, which includes (but is not limited to) governmental and private sector components (including catch sector cooperatives). The governmental component includes all applicable government systems: the federal courts and Congress, and regulatory bodies NMFS and the NPFMC. The SCS team concluded that this complexity goes to make an intertwining whole. Pages 181 to 191 specifically deal with issues relevant to the 'respect for domestic law' argument. The footnote on Page 183 explains the rationale for what the assessment team determined the fishery management system to include and how this influenced the team's analysis of 'legal compliance' and 'respect for law'.

Trustees were satisfied with the approach taken by SCS in this regard. To restrict the definition of fishery management systems and subsequent analysis of their performance against the MSC's Principles and Criteria to regulatory bodies is not consistent with the intent of Principle 3. Such a restricted interpretation would, for example, preclude assessing fisheries that are managed through fishermen's and community cooperatives or voluntary codes of conduct. Such an interpretation would also preclude bringing into a certification assessment judicial and parliamentary decisions that result in adverse outcomes in relation to Principles 1 and 2 for a fishery under assessment. A fishery under assessment may not have the best or most efficient means of achieving Principle 1 and 2 outcomes, but the clear intent of Principle 3 is to ensure that Principles 1 and 2 can be achieved and certification bodies address that specifically in their assessments. These issues were therefore not considered valid issues to submit to an Objections Panel.

CONCLUSION

The MSC Board of Trustees has made the decision that the further objection on the Eastern Bering Sea / Aleutian Islands Pollock Fishery Determination is dismissed and will not be referred to an Objections Panel.

The certification body is required now by the MSC's Fisheries Certification Methodology to finalise a Public Certification Report that incorporates the Final Report and any written decisions arising from the objections process, including the initial objection, the response by SCS to the initial objection and this decision document.

SCS is instructed to remove any ambiguity about the wording of the condition for Principle 1, PI 1.1.1.3 in its Public Certification Report to reflect which elements will be addressed immediately and thus the certainty expressed in the response to the initial objection in relation to the opening of the Aleutian Islands fishery in January 2005.

In accordance with MSC accreditation and methodological requirements, SCS should now also follow procedure to ensure that a certification decision is made by SCS's decision-making entity and is published in a Public Certification Report.

This decision is final.

The Rt. Hon John Gummer MP (Chairman)
Dr Keith Sainsbury
Mr Kees Lankester
Mr Henrique Cavalcanti
30 September 2004

APPENDICES

1. **FURTHER OBJECTION TO THE MSC – LETTER, OBJECTIONS FORM, SUBMISSION**
2. **CERTIFICATION BODY, SCS – RESPONSE TO INITIAL OBJECTION**
3. **INITIAL OBJECTION TO THE CERTIFICATION BODY, SCS**

FURTHER OBJECTION TO THE MSC

Brendan May
Chief Executive
Marine Stewardship Council
Unit 4 Bakery Place
119 Altenburg Gardens
London
SW11 1JQ
UK

September 23, 2004

Sent via email

Dear Brendan,

On behalf of the Alaska Oceans Program, Greenpeace International, National Environmental Trust and Oceana, the public interest non-profit environmental law firm Trustees for Alaska submits this objection to the Marine Stewardship Council for consideration by the objections panel. We are dissatisfied with Scientific Certification System's (SCS) response to the objection we filed with the evaluation team on August 3, 2004 regarding its final determination to certify the Eastern Bering Sea / Aleutian Islands pollock fisheries.

First, we acknowledge the hard work that the SCS team has done throughout the assessment process, especially to involve stakeholders and to provide transparency when possible. We believe that Chet Chaffee as the team leader is a strong advocate for transparency and clarity in the MSC process. The MSC process overall can benefit from implementing many of his ideas in these areas.

Second, the applicant appears to have not acted in good faith. SCS's client in this certification has caused delays, withheld information, and is intentionally and disingenuously attempting to use the MSC certification to cast a shadow on the positive work of conservation organizations in the North Pacific. It has also sought appropriations riders in Congress via political favors as a means to undermine the rule of law.

Third, the SCS team committed serious errors in judgment in assessing the BS / AI pollock fisheries. We discuss these problems in our attached objection which is largely similar to that submitted to the SCS team. The SCS response to our initial objection, however, warrants additional discussion here.

SCS Response to the Objection

Under the first section entitled "SCS General Response to the Objection," the team notes that the "analysis of the BSAI pollock fishery was heavily influenced by the conservation stakeholder" and that "[m]any, maybe most of the conditions and recommendations we have prescribed for the fishery coincide directly with issues of concern raised by stakeholders." (p. 2). While it is heartening to read that there was some value to the team from our substantial involvement in the assessment process, it is distressing that without our participation the

conditions and analysis in the final determination would likely have been even weaker. This is a serious issue that the MSC must address because the current process demands an unreasonable level of participation from stakeholders who must devote very large blocks of time to participate in the process and communicate their issues and concerns. Further, we question how the information that we submitted to the team was actually used in the final report. It is difficult to believe that the team could conclude the Alaska pollock fisheries should be certified considering the information provided about the problems with the fishery and the management.

The SCS team states that the "Objectors have not presented any information identifying procedural or substantive failings within the scope of the Assessment Team's responsibilities." (p. 3). We strongly disagree and stand by the arguments submitted in our initial objection to the team. The team erred in its interpretation of what constitutes the "management system." A correct interpretation would have resulted in reaching the opposite conclusion on certification. It also failed to treat sufficiently the litigation history and adverse legal opinions against the management system and the fishery, and thus identify the continuous clear lack of legal compliance by the fishery's managers. In addition, the team did not adequately address the opening of the Aleutian Islands pollock fishery in January 2005, which it admits may be dispositive of the certification decision. Finally, the failure to include scores and weights of the individual Performance Indicators in the Draft Determination made it impossible to comment meaningfully and to see changes between the draft and final documents.

Scope of the "management system" and "respect for domestic law"

The SCS team asserts:

The Objectors point to many disagreements with the Assessment Team on certain issues, such as the proper meaning of "management system" or "respect for domestic law." But the Objectors have not shown any instance where the Assessment Team failed to consider their views or prevented full communication among all the parties on those issues. Indeed, the overwhelming majority of the text of the objection is simply cut and pasted from previous documents previously submitted to the Assessment Team and, as such, it shows how robust the dialogue has been. The fact that the Team and the Objectors disagree reveals the complex and controversial nature of this fishery, but it is not a sign of error by either party. The MSC surely has a process available to give even greater influence to the perspectives of conservation groups (or others) in the administration of MSC programs, but the objections process is not it. (p. 3-4).

The SCS team's mischaracterizes the pivotal issues about which we disagree such as the meaning of "management system" and "respect for domestic law" as a demonstration of the "complex and controversial nature of this fishery." The SCS team's incorrect interpretation of these terms constitutes reversible error as it brings the validity of the certification decision into question. As such, we assert that the team's interpretation of these terms is precisely a sign of error and the type of issue for which it is appropriate for the MSC panel to decide in the objections process. The SCS team decided subjectively how to interpret these terms and we contend that they have wrongly defined them in a way that results in undeserved scores for the fishery. The SCS team does not deny that if they used the interpretations for which we have long advocated, the Alaska pollock fisheries would likely have failed to meet the MSC Standard

and would not have been certified. These are very important issues, worthy of consideration by the MSC panel.

Opening the Aleutian Islands Fishery

On page 3, the SCS team states:

The Objectors point to certain materials or actions that are not in the Final Report. But all of those asserted omissions pertain to things that happened after the completion of the analysis reflected in the report. The assessment had to have a cut-off date and, after more than two years of analysis, the time-frame of our assessment ended in June, 2003. The actions or analyses generated after that date may well be highly germane to the question whether the fishery is sustainable under the MSC Principles and Criteria, but the proper place to consider them is in post-certification reviews of the fishery as prescribed by the MSC.

Presumably this is in response to our assertion that the team failed adequately to consider information we had provided before the Final Determination regarding the opening of the Aleutian Islands fishery for the next fishing season in January 2005. We find it unacceptable that the "cut-off date" for the assessment ended in June 2003, over a year prior to the final determination to certify the fishery, and that the proper place to address the actions that happened after the cut-off is in "post-certification reviews of the fishery as prescribed by the MSC." (p. 3). Such an early cut-off date for consideration of information is objectionable especially considering that there cannot be a final certification until this objection procedure is complete. At the very least, relevant and important information should have been considered up to the time the decision to certify was finalized, especially when we had communicated information about the changes to the fishery from the time they were proposed in the Congressional rider. In addition, SCS's client must have known about the rider prior to the end of the assessment. This knowledge should be imputed to the certifier that is acting on behalf of the client. In the alternative, the client should be judged as coming forward with unclean hands, assuming they did not disclose the rider and any involvement they had in its coming to fruition.

The comment period on the Draft Determination should exist to allow stakeholders and the client the opportunity to make sure the analysis addresses the current situation as well as to identify concerns about problems in the analysis. Waiting for the annual audit to consider information that should have been considered prior to the Final Determination makes no sense, is inefficient and risks discrediting the entire MSC process. Once a fishery has been certified, it is much more difficult to decertify it and communicate that decertification to the public.

Certifying a fishery for five years is a significant responsibility because it signifies to the public that the fishery has been assessed according to the MSC Standard. However, certifying a fishery that is quite different from the one assessed (i.e., it is open for fishing instead of closed) when it was known that changes were to occur, is misleading. In the alternative, it may constitute an unethical failure by the client to disclose relevant facts to the certifier prior to the end of the assessment, assuming the client did not disclose this information.

We also must address the SCS team response regarding consideration of documents after the June 2003 "cut-off" for the assessment. Regarding the documents prepared by the North

Pacific Fishery Management Council and the National Marine Fisheries Service analyzing the opening of the Aleutian Islands pollock fishery, the team states that it could not or would not consider the information contained therein because of the documents' late availability or lack of relevance because the fishery has not actually opened yet. (p. 8). However, elsewhere in the response, the SCS team stated it reviewed the most recent stock assessment information from November 2003, which was after the June 2003 cut-off, regarding the Aleutian Islands pollock stock to justify its analysis. (See p. 7 ("... the new assessment [was] taken into account by the Assessment Team in reaching the Final Determination.") and p. 9). The SCS team should not review only the documents and information it chooses to support its conclusions before the Final Determination and avoid reviewing other information that might alter its analysis until a later date.

The SCS response states "There are hundreds of pages of text that both directly and indirectly consider the AI portion of the BSAI pollock fishery, including potential changes to its current status." (p. 6). This statement is misleading. While the report notes the concerns about the AI fishery in numerous locations, it does not refer to the potential changes to its current status except in the discussion of Principle 1, PI 1.1.1.3. The rest of the Final Determination is silent as to the January 2005 opening of the fishery. Thus, we stand by our assertion that the team did not devote adequate consideration in its assessment to the situation of an open fishery in the Aleutian Islands.

Regarding the condition for PI 1.1.1.3, the SCS team response states that our understanding that the fishery does not have to meet the bulleted sections of the condition until the second year the fishery is open is incorrect. Instead the team states the condition is "immediate." (p. 8).

The condition for PI 1.1.1.3 states the following:

To meet this condition, the fishery must ensure that the AI stock is above the minimum threshold (B_{msy} or a suitable proxy) before the fishery can be reopened, and that any ABC and TAC established for the Aleutian Islands is at least as precautionary as that which would be achieved by applying the harvest control rule used by the management authority for establishing the ABC and TAC for the EBS pollock fishery, which explicitly takes into account uncertainties in the assessment.

Should the AI portion of the fishery be re-opened under the above state (sic) circumstances, the fishery needs to additionally meet one of the two alternatives shown below before the area is fished for a second year:

- Improve the assessment for the AI stock so that it meets at least tier 3 information requirements, and also implement zero ABCs at stock sizes below $B_{20\%}$, (as for EBS and GOA stocks); or
- Formalize a revised harvest control rule, applicable at level 5 information requirements, which will protect the stock at low stock sizes at least as well as the current strategies for EBS and GOA stocks (which involve reductions in exploitation rate below B_{MSY} and closure below $B_{20\%}$).

If the first alternative is adopted, the resulting harvest strategy should subsequently be tested for robustness as outlined in the condition for scoring

indicator 1.1.1.5 (as part of meeting that condition and on the same time frame as the condition for 1.1.1.5). If the second alternative is adopted, the fishery should not be opened until the new proposed strategy has been tested as outlined for condition 1.1.1.5.

The language emphasized above in italics (“Should the AI portion of the fishery be re-opened under the above state (sic) circumstances, the fishery needs to additionally meet one of the two alternatives shown below before the area is fished for a second year”) was language added after the Draft Determination. This caused us to understand that the two alternatives would not be required until the area is fished for a second year, meaning the first year has already occurred. The SCS team now states that our understanding is not correct and the requirement is immediate. It is unclear what the “before the area is fished for a second year” means. This language is confusing and should be clarified.

We are pleased to see that the SCS team agrees that “there should be an immediate re-assessment of the situation to determine if the fishery meets the required condition as well as the MSC standards” if the fishery opens in January. “If it does not, it will fail certification.” (p. 8). We feel strongly that the immediate re-assessment should occur prior to any decision to certify because it would likely result in the decision not to certify. However, if the MSC decides certification is justified, the Final Determination should expressly state that immediate re-assessment is required if the Aleutian Islands pollock fishery opens come January because it is not evident in the current final report.

Bridgespan and Wildhavens Reports

In our objection to the SCS team (and now to the MSC), we incorporated the two reports written by Bridgespan and Wildhavens that identify numerous and serious problems with the MSC. We highlighted the concerns that directly speak to the final determination to certify the Alaska pollock fisheries regarding certification of fisheries that have not complied with the law, not requiring fisheries to meet the conditions prior to certification which is misleading to the public, and not rigorously applying the MSC standard.

The SCS team response states the following:

Two private consultants recently conducted reviews of the MSC process. Oddly, the Objectors ask that the assessment be judged in light of those reports. The consultants’ opinions of the MSC program offer no evidence one way or the other as to the judgment of the Assessment Team on the fit between the pollock fishery and the MSC Principles and Criteria or whether the team followed MSC rules. Again, the MSC surely has a process in place to deal with the consultant reports, but the objections process is not it. (p. 3).

We find nothing odd about raising these issues. Until the MSC makes the necessary changes to address its serious problems, it is premature and environmentally irresponsible to move ahead to certify the world’s largest white fish fishery. Further, we point out that recommendations that came from the two reports were made after considering the pollock fisheries along with other problematic fisheries involved in the MSC process and from interviewing stakeholders involved in the assessment process for pollock. In fact, the Wildhavens report specifically addressed the pollock fisheries as a case study.

In closing, we would like to express our appreciation of the opportunity to submit this objection to the MSC. We look forward to the rest of the process and the response from the panel. We trust that the MSC understands the importance of this process and the detrimental implications of certifying the Alaska pollock fisheries. If we can provide additional information, please do not hesitate to contact us.

Sincerely,

Stacey Marz
Consultant to Trustees for Alaska
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(907) 929-1562 (fax)
stacey-marz@gci.net

Cc: Alexia Cummins, MSC
Chet Chaffee, SCS

MSC Objections Form

This form should be completed in accordance with the MSC Objections Procedure. This form may be completed and emailed to the certification body and the MSC.

PART ONE: IDENTIFICATION DETAILS

Fishery assessment to which this objection applies	Eastern Bering Sea / Aleutian Islands Pollock
Name of certification body	Scientific Certification Systems
Contact details for objecting party	
Organisation(s)	Alaska Oceans Program, Greenpeace International, National Environmental Trust, Oceana
Contact person	Stacey Marz
Address	308 G St., Suite 219, Anchorage, AK 99501
Phone Number (including country code)	(907) 929-9372
Fax Number (including country code)	(907) 929-1562
Email address	stacey-marz@gci.net
Objecting party's credentials	
Please outline your prior involvement with this assessment	Written submissions <input checked="" type="checkbox"/> Meetings attended <input checked="" type="checkbox"/> Other <input type="checkbox"/> (please attach details of these)
Please state your interest in the fishery and its certification	The organizations listed above are committed to protecting the fish, wildlife, biodiversity and habitat in the North Pacific region and improving the effectiveness of the management system. The Alaska pollock fisheries have experienced serial stock depletions, have seriously impacted the marine ecology and their management system has major problems. These fisheries should not have passed the MSC Principles and Criteria. As such, we file this objection.

The following objection is being lodged on behalf of the above named organisation(s).

I am authorised to make this submission on the above named organisations' behalf.

Name: Stacey Marz
 Position: Consultant to Trustees for Alaska
 Signed: _____
 Dated: September 23, 2004

PART TWO: CATEGORISATION OF OBJECTIONS

You must complete one or more of Parts Three to Five in accordance with your answers to the following questions.

<p>Are you objecting on the basis that the assessment team has failed to follow the procedures set out in the relevant MSC Fisheries Certification Methodology?</p>	<p>Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If YES, go to Part 3, Procedural Objection</p>
<p>Are you objecting about the merits of the conclusions reached by the assessment team, with specific reference to the MSC Principles and Criteria for Sustainable Fishing and/or individual performance indicators?</p>	<p>Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If YES, go to Part 4, Merit Objection</p>
<p>Is this objection a further objection (i.e. request for an independent Objections Panel established by the MSC), subsequent to a response to your initial objection by the certification body?</p>	<p>Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> If YES, complete Part 5 (Further Objection). Note that you also need to complete Part 3 and/or Part 4 when making a further objection to enable us to identify the element(s) of your original objection that you wish to continue to pursue with an Objections Panel.</p>

PART THREE: PROCEDURAL OBJECTION

This section relates to objections that the certification body did not follow the procedural requirements set out by the MSC for the conduct of an assessment. These procedures are set out in the MSC Fisheries Certification Methodology and rules that were in force at the time of the assessment.

- 3.1 Please identify the procedure(s) that you believe were omitted or incorrectly followed by the certification body in the conduct of this assessment and the relationship of these matters to the MSC's procedural rules, as set out in the MSC Fisheries Certification Methodology or rules that were in force at the time of the assessment.

The certification team did not adequately consider comments submitted on the Draft Determination regarding certification. The scoring on the performance indicators is too generous.

- 3.2 Do you believe that the failure to follow procedures by the certification body has significantly affected the result of the Determination such that the Determination should be altered?

YES

If so how?

If the comments were adequately considered, the Final Determination should have resulted in changes to the text and conditions and lower scores for the performance indicators and the overall determination.

PART FOUR: MERITS OBJECTION

This section deals with objections about the merits of the conclusions reached by the certification body's assessment team, with specific reference to the relationship of these concerns to the MSC Principles and Criteria for Sustainable Fishing. *Before answering the questions please read Notes 1-4 at the bottom of this page.*

- 4.1 Listing the relevant MSC Principles and Criteria for Sustainable Fishing, and/or, precise performance indicators, please identify the issue(s) within the Final Report you believe meet or fail to meet one or more of the MSC's Principles and Criteria for Sustainable Fishing by omission of information or misinterpretation of information.
(Please include reference to page numbers / sections in the Final Report, and if applicable the relevant performance indicator number)

- *The certification team failed to adequately consider the substantive comments we submitted on why the pollock fisheries should have failed under MSC Principles 1, 2 & 3 and associated criteria and performance indicators and our comments on the Draft Determination. We incorporate by reference all information submitted to date, including discussion of problems with pollock stocks, impacts to the ecosystem and the ineffectiveness of the management system.*
- *The Final Determination regarding certification fails to consider the recent Congressional legislation (rider to appropriations legislation by Senator Ted Stevens) and North Pacific Fishery Management Council action to open the Aleutian Islands pollock fishery.*

- 4.2 For each issue identified in question 4.1, please explain your rationale and/or evidence, for a different conclusion, making particular reference to how this would be relevant to, and consistent with, an MSC Principle, Criteria and/or performance indicator. Please provide any supporting information that was available at the time of the original assessment you believe has not been used and is required in order to reach a proper decision.

- *To avoid repeating here the numerous issues and concerns raised in the hundreds of pages of comments we submitted on why the pollock fisheries do not comply with the MSC Principles and Criteria and associated performance indicators and on the Draft Determination, we incorporate by reference the information submitted to date. Those comments detail how the fisheries do not comply with virtually every performance indicator and which measures should be required as conditions.*
- *The analysis supporting the Draft Determination was done with the understanding that the Aleutian Islands pollock fishery was closed to commercial fishing. As such, opening that fishery and related North Pacific Fishery Management Council actions are material changes from the situation that existed when the certification team did its analysis and the fishery was closed. The certification team was aware of the Congressional legislation that authorized the opening of that*

fishery, but failed to change the Final Determination to address this significant change from the status quo.

- 4.3 For each issue identified in question 4.1, do you believe that the information deficiency / misinterpretation has significantly affected the result of the Determination such that the Determination should be altered?

YES

If so how?

- *Please see the information submitted to date which details how the Final Determination should have concluded the pollock fisheries fail to comply with the MSC Principles and Criteria and associated performance indicators. Our comments included measures that would bring the pollock fisheries into compliance with the Principles and Criteria and associated performance indicators.*
- *The team should have significantly revised the Final Determination to address the opening of the Aleutian Islands pollock fishery and related North Pacific Fishery Management Council actions and consequently issued failing scores.*

Note 1: You must structure your objection along the lines of the Principles and Criteria for Sustainable Fishing.
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Note 2: Published and peer reviewed information has greater weight than anecdotal information and should be provided where possible.

Note 3: If it is not possible to provide the material to which you refer then complete references are required. If the certification body has to obtain this information independently then the processing time for the objection may be delayed.
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Note 4: Information must have been available at the time of the original assessment, not published or made publicly available after the time of the original assessment.

PART FIVE: FURTHER OBJECTION

This section deals with only with those objections that have already been considered by the certification body. Notes 1-5 are applicable to further objections.

- 5.1 What is the date and reference of the response to your original objection?

On September 2, 2004, SCS certifier Chet Chafee emailed the team's response to our objection. I received this email on September 3, 2004.

- 5.2 Please state the reasons for your dissatisfaction with the certification body's response to your original objection.

These reasons should be linked directly to an MSC Principle, Criteria and/or specific performance indicator used in the assessment of the fishery and explain how the certification body, in its response to your original objection, has failed to demonstrate that the response meets one or more of the Principles and Criteria for Sustainable Fishing.

Please read the letter to Brendan May regarding the Objection to the MSC and the Objection to the MSC itself for discussion of why the SCS team's response does not adequately address our arguments on objection.

Please explain your evidence and/or rationale for a different conclusion, making particular reference to how this would be relevant to, and consistent with, an MSC Principle, Criteria and/or performance indicator.

Please read the letter to Brendan May regarding the Objection to the MSC and the Objection to the MSC itself for our arguments and rationale for why the SCS team erred in determining the EBS / AI Pollock fisheries should be certified.

Please provide any supporting information that was available at the time of the original assessment you believe has not been used and is required in order to reach a proper decision.

We incorporate by reference all information submitted to the SCS team during the assessment process. This includes our comments on why the pollock fisheries do not comply with the MSC Principles and Criteria, and comments on the Draft Determination. The SCS team not adequately consider this information in its Final Determination. In addition, please see our attached letter to Brendan May accompanying the Objection to the MSC and the Objection to the MSC itself regarding the opening of the Aleutian Islands Pollock fishery for a detailed discussion of information that was not considered adequately despite being known before the Final Determination.

(Please include reference to page numbers / sections in the Final Report, and if applicable the relevant performance indicator number)

5.3 We formally request that the MSC Board of Trustees convene an independent Objections Panel in accordance with its Objections Procedures:

YES

* Delete whichever is inapplicable

Note 5: Objectors should be aware that only issues raised in the original objection to the certification body will be considered. New issues may not be introduced at the further objection stage.

OBJECTION to FINAL DETERMINATION TO CERTIFY THE EASTERN BERING SEA / ALEUTIAN ISLANDS POLLOCK FISHERIES

Submitted to the MSC on behalf of:
Alaska Oceans Program
Greenpeace International
National Environmental Trust
Oceana

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We object to the Final Determination to certify the Bering Sea and Aleutian Islands pollock fisheries according to the MSC Standard. The certifier's team failed adequately to consider the information we submitted regarding why the pollock fisheries do not meet the MSC Principles and Criteria and associated Performance Indicators and our comments on the Draft Determination to Certify the Eastern Bering Sea / Aleutian Islands (EBS / AI) pollock fisheries. Over the last three and a half years, we supplied the team with extensive information about the problems with the pollock fisheries and the management by the National Marine Fisheries Service and the North Pacific Fisheries Management Council. This included specific comments on why the pollock fisheries do not comply with the MSC Principles and Criteria and the Draft Determination. Despite these efforts, there were no significant changes in the analysis of the Performance Indicators (PIs) or the Conditions in the Final Determination. Rather than repeat the numerous concerns and arguments that we have expressed to the team throughout the assessment process, we incorporate by reference all information supplied to the team to date. The information we provided should have resulted in a determination that the pollock fisheries do not meet the MSC Standard. We urge the MSC to review our prior comments and this Objection to conclude that the certifier's team erred in deciding to certify the EBS / AI pollock fisheries.

We also incorporate by reference the two reports written by Bridgespan and Wildhavens that identify numerous serious problems with the MSC and demonstrate that the organization is in desperate need of reform. We agree with the reports' concerns and recommendations, including those that resulted from the January 2004 Arlie House meeting. We highlight the following concerns:

- the MSC should not certify fisheries that have not complied with the law;
- the MSC certification claim is misleading, if not fraudulent, that certification means the fishery is in fact sustainable and well-managed because fisheries are certified without having met the conditions required for certification; and
- there has been lack of rigorous application of the MSC Principles and Criteria, resulting in very problematic fisheries being certified.

Until the MSC has made the necessary changes to address these and the other identified problems, it is premature and environmentally irresponsible to move ahead to certify the world's largest white fish fishery.

From the information submitted previously, we highlight a few points of significance below that warrant the team to reconsider its decision to certify these fisheries.² These include:

- the failure to include scores and weights on PIs in the Draft Determination;
- the erroneous interpretation of what constitutes the "management system";
- the opening the Aleutian Islands pollock fishery in January 2005;
- insufficient treatment of the litigation history and adverse legal opinions against the management system and fishery.

Scores and weights should have been included in the Draft Determination

² Our decision to not repeat most of the concerns and arguments raised below on each PI should not be interpreted as support for the treatment of those PIs in the Final Determination. The team should review all the points raised in our comments on the Draft Determination in reviewing this objection.

As we have stated to the certifier in the past, the Draft Determination should have included the scoring and weighting attributed to the individual PIs. As we pointed out before, stakeholders would be able to provide more informative comments to the Draft if they understand how the certification team evaluated the various PIs. Inclusion of the scores and weights in the Draft is essential to understanding how the fishery was evaluated and how to comment most responsively on the Draft Determination. This facilitates greater transparency in the assessment process.

Now, because scores and weights were not included in the Draft Determination, it is impossible to discern if the comments we provided on the Draft had any impact on the outcome of the Final Determination. If the scores were adjusted based on comments, it is invisible because only the final score is available and there is no previous score for comparison. In addition, it does not appear that any of the conditions changed or any new conditions were added as a result of stakeholder input. Thus, it makes one wonder whether the significant effort given to provide extensive comments on the Draft Determination was worth the time and had any impact on the Final Determination. In the absence of changed analysis from stakeholder comments, providing scores on both the Draft and Final Determinations would provide the stakeholders with a way to measure whether their comments had an impact on the final outcome.

Erroneous interpretation of the “management system”

In the Final Determination for the BSAI pollock fisheries, the certification team’s scope of review regarding what constitutes the “management system” under Principle 3 is unacceptably broad. The team considers the management system to be the National Marine Fisheries Service (NMFS), the North Pacific Fishery Management Council, the U.S. Congress, the federal courts, and industry co-operatives. Instead, the team should have considered only the actions of NMFS and the Council in its analysis of the management system, the two entities that are vested with responsibility to authorize and manage the activities of the groundfish fisheries. This error is significant because it applies to the entire analysis regarding Principle 3 and the associated criteria and performance indicators. It results in the team scoring the pollock fisheries higher than if the “management system” was more narrowly construed to be NMFS and the Council.

We submitted comments on two occasions during the assessment process, asserting that the scope of the “management system” was too broad and should be narrower. We initially commented on the scope of what should be considered the “management system” when we submitted comments entitled, *“Discussion of the Alaska Pollock Fisheries Under Principle 3 Performance Indicators”* in August 2002. We stated the following, initially quoting the objectionable language written by the team regarding Principle 3, SCS Criterion 1:

Under Principle 3, SCS Criterion 1 states, “The management system has a clearly defined scope capable of achieving MSC Principles and Criteria and includes short and long-term objectives, including objectives for managing ecological impacts of fishing, consistent with a well managed fishery.” This criterion explains that “As used throughout, the term “management system” is used broadly to include both governmental and private sector components. Governmental components include all applicable governmental systems, not merely the direct regulatory function of a single agency or statute. The judicial

system is intended to be considered part of the 'management system.' Private sector components include the fishing industry itself."

The judicial system should not be considered part of the management system. In the case of federal fisheries reform, seeking a remedy in court is a last resort, after failed attempts to get an agency to comply with the law through participation in regular and often lengthy Council and NMFS processes. Such processes are available to the public through notice and comment periods. Participation in court proceedings, however, is available exclusively to the parties involved in a specific lawsuit. Furthermore, resorting to litigation reflects that the Council and agency management of an issue has failed because there is no other recourse except to have a judge evaluate the situation and order the appropriate remedy. Thus, such management failure should not be considered part of the "management system."

Despite these comments, the Draft Determination regarding certification stated the following in footnote 2 on page 122:

As used in this report, the term "management system" is used broadly to include both governmental and private sector components. Governmental components include all applicable governmental systems, not merely the direct regulatory function of a single agency such as the National Marine Fisheries Service, which clearly has the dominant regulatory role, but often is not in full control of institutional forces affecting the fishery. The judicial system is intended to be considered part of the "management system", as is the federal legislative branch. Neither the courts nor Congress regulate the fishery in the traditional sense of the word, but from time-to-time it is undisputable that judges and legislators are deciding major issues for the fishery. Private sector components of the management system include the fishing industry itself and components thereof, such as catcher cooperatives. As both a matter of law and fact, responsibility for management of the pollock fishery lies in many hands throughout government and the private sector. The pollock management system is an intertwining of many subsystems, and it is the evaluation team's view that the system must be assessed as a whole.

In response, we submitted the following comments, telling the team that their interpretation of the "management system" was erroneously broad:

We strongly disagree with this broad construction of the term "management system". The management system does not consist of all or even most of the "institutional forces affecting the fishery." Rather, the management system is that system created by federal law to manage the federal fisheries. In the case of a U.S. fishery, the management system under evaluation should be the National Marine Fisheries Service (NMFS) and, and the agency's handling of the advice given to it by the North Pacific Fishery Management Council (the Council). These bodies have direct regulatory control of the pollock fisheries and are the sole entities that manage them. In fact the Magnuson-Stevens Fishery Conservation and Management Act, as amended by the Sustainable Fisheries Act, makes it clear that the management is comprised of NMFS and the Council.

The evaluation teams' defining the "management system" as "all applicable governmental systems" including the judicial system, the federal legislative branch, and private sector components such as catcher cooperatives is unacceptable. This is not an inquiry into whether a democratic system of government with three distinct branches works. It is an inquiry into whether the federal fisheries management regime, defined by statute and regulation, works. The courts and Congress get involved with the fisheries management system when it fails in some way. The judicial and legislative branches act as external correctives to the management system, not as an integral component.

The judicial system is not a part of the fishery management system, and its participation in any aspect of fisheries management does not demonstrate that fisheries management works. Rather it demonstrates precisely the opposite.

The judicial system has involvement with fisheries only when it has been demonstrated that fisheries management is illegal. That the federal courts can offer some redress for illegal fisheries management actions does not demonstrate that the fisheries management system works. To argue that it does is like arguing that the fact that one can sue a drunk driver for damages demonstrates that the traffic management system works. Courts redress wrongs. Courts correct illegal actions. Defining courts as part of the management system effectively assumes that illegal actions are par for the course. This is unacceptable.

The legislative branch is also not part of the fishery management system, and generally intervenes when some party is unsatisfied with the performance of the fisheries management system. While Congress passes the laws that affect the pollock fisheries, nobody in the Senate or House of Representatives has any formal involvement in the day-to-day management of the fisheries.

Although Alaska's Senator Ted Stevens is interested in the groundfish fisheries and has attempted to use his power as Chair of the Appropriations Committee by attaching fisheries related amendments to non-related pieces of appropriations legislation (known as riders), he does not manage the fishery.

Finally, the private sector is clearly not part of the management system. Cooperatives are comprised of corporate and private business entities that are primarily interested in making money. They are motivated by generating maximum profits and see fish as a market commodity. This is in marked contrast to government agencies that are charged with being stewards of public federal resources for the benefit of all citizens.

The broad interpretation of "management system" to include all branches of government and voluntary industry bodies has very significant consequences for this certification evaluation. It results in many of the PIs receiving higher scores than if the consideration of the management system was properly restricted to those legal entities charged with fisheries management – NMFS and the Council. If the scope of the management system was limited to the actual bodies that are involved in the daily management of the fisheries, the pollock fisheries would clearly fail under Principle 3 to meet the minimum score required for certification.

We urge the evaluation team to revise the definition of the "management system" to include only NMFS and the Council. This change would require the team to re-evaluate all PIs under Principle 3 and revise its analysis and

scoring. The outcome would certainly change and result in significant downward scoring.

Unfortunately, the Final Determination did not change to narrow the scope of what constitutes the “management system.” The Final Determination states the following:

It is important for the reader to understand that the assessment team’s review of the “management system” has been heavily influenced by our threshold decision to adopt a broad definition of that term. As used in this report, the term “management system” is used broadly to include both governmental and private sector components (i.e., catcher-cooperatives). And governmental components include all applicable governmental systems (i.e., the federal courts and Congress), not merely the direct regulatory function of the National Marine Fisheries Service and North Pacific Fisheries Management Council.

Our reasoning on how to conceptualize the pollock management system reflects the fact that, while NMFS and the Council clearly have dominant regulatory roles, they often are not in full control of institutional forces affecting the fishery. Neither the federal courts nor Congress regulate the fishery in the traditional sense of the word, but from time-to-time it is undisputable that judges and legislators are deciding major issues for the fishery. And they do so at the behest of stakeholders in the fishery, who seek leverage or support for their positions by opportunistically invoking the authorities of all of the branches of the U.S. federal government.

The conservation community’s comments on the draft assessment report included strong criticism of the team’s use of a broad definition of the pollock management system. They argue that the proper definition would be limited to NMFS and the North Pacific Council, and that the result of including the courts in the definition is to bias upward many of the scores awarded to Principle 3 scoring indicators. (The conservation stakeholders are silent on the question whether inclusion of Congress in the definition results in a scoring premium or discount).

The assessment team agrees that many of the scores awarded under Principle 3 are probably higher, even quite a bit higher, than they would have been if we had limited our review of the “management system” to only NMFS and the Council. We cannot rule out the possibility, cited by the conservation groups in their comments on the draft report, that the fishery’s passing score under Principle 3 rests predominately on the definition of “management system” we applied.

In asking the team to assess management of pollock by appraising NMFS and the Council in isolation from other influences, the conservation stakeholders would ask us to ignore the glaringly evident fact that the conservation stakeholders themselves regularly exert significant influence over management of the pollock fishery by invoking the authority of the courts, as well as by participating in the regulatory processes of NMFS and the Council.³

³ The Final Report states the following in reference to footnote 1 cited above:

Similarly, some of the most ambitious and progressive aspects of current fishery management exist because these conservation stakeholders and others successfully petitioned the Congress to amend federal fisheries law to require, for example, protection of essential fish habitat and adoption of ecosystem-based management.

It would have been unreasonable and arbitrary to assess the pollock management system solely in terms of the roles and performance of NMFS and the North Pacific Council. As a matter of both law and fact, responsibility for management of the pollock fishery lies in many hands throughout government and the private sector and all the principal stakeholders operate with full understanding of that fact. The pollock management system is an intertwining of many subsystems, and it is the assessment team's view that the system must be assessed as a whole.⁴

Considering the "management system" so broadly to include any entity that might affect the management of the fisheries is incorrect and extremely problematic. The excerpt included by

The conservation stakeholders assert that "The judicial system has involvement with fisheries only when it has been demonstrated that fisheries management is illegal." This statement is misleading because it ignores the very profound influence that the mere threat of litigation has on the management system. The stakeholders also complain "That the federal courts can offer some redress for illegal fisheries management actions does not demonstrate that the fisheries management system works. To argue that it does is like arguing that the fact that one can sue a drunk driver for damages demonstrates that the traffic management system works." This analogy is misleading. The "drunk driver" is to the highway system as an individual fisherman is to the fishery. The more apt comparison between fishery management and highway management would focus on the conjunction of governmental authorities and private sector interests involved in siting a new highway or setting the rules for use of the road once built, including penalties for violations, such as drunk driving.

⁴ The Final Report states the following in reference to footnote 2 cited in the text above:

We note that others have adopted an equivalent definition of the management system when trying to assess its performance. For example, a recent National Academy of Public Administration report on US fishery management says: "In a real sense, the fisheries management system is in disarray. Management is increasingly exercised by the courts through litigation, by Congress through its annual appropriations and reports, and by constituencies that seek redress through these forms. The regional councils and NMFS, which were assigned this mission by statute, are being driven to management-by-crisis due to a range of problems: litigation-related workload, court-ordered or sanctioned deadlines, process deficiencies, policy mandates, regulatory delays, inadequate resources, deficiencies in data, analyses, and science, and strained relationships between the system's managerial partners and their constituencies." National Academy of Public Administration, *Courts, Congress, and Constituencies: Managing Fisheries by Default*, p. xi (2002).

the team in footnote 3 quoted above is very telling. The point of this excerpt is that the “fisheries management system is in disarray” because the Council and the agency charged by statute with managing fisheries has failed and consequently, management actions are being forced by the courts, Congress and constituencies through the pressure they apply. It is management-by-crisis, not sound management by responsible agencies. Instead of recognizing the failure of the agency and Council to give the fishery a low score which is exactly what we have continuously argued, the team reframes the situation and says the management system is effectively working, rationalizing that even though the agency isn't doing a good job, all the external checks – the courts, Congress, constituencies – are doing it for them. This is an absurd interpretation.

The consequences of this decision are serious and far-reaching because the interpretation of “management system” directly affects the scope of review of the entire Principle 3 and associated Criteria and Performance Indicators. The Final Determination acknowledges that the outcome of the evaluation would be different if the team considered the management system to be the entities directly involved in managing the fisheries – the National Marine Fisheries Service and the body that advises it, the North Pacific Fishery Management Council:

The assessment team agrees that many of the scores awarded under Principle 3 are probably higher, even quite a bit higher, than they would have been if we had limited our review of the “management system” to only NMFS and the Council. We cannot rule out the possibility, cited by the conservation groups in their comments on the draft report, that the fishery's passing score under Principle 3 rests predominately on the definition of “management system” we applied.

Further, in footnote 55, the Final Report states the following:

It bears explaining that the assessment team's consideration of this indicator is particularly influenced by the team's threshold decision to consider the fishery management system to include, among other elements, the United States' federal courts, as well as the National Marine Fisheries Service and North Pacific Council. The team's analysis approached questions of “legal compliance” and “respect for law” from the perspective of the inter-related behavior of the various components of the system, especially the interaction of the courts and NMFS. Legal scholars, psychologists, and political scientists actively study how agency decision-making is affected by judicial review. The literature reveals strong disagreement on the question whether judicial review improves or impairs the quality of agency action, but there is no disagreement that agency rules, meaning in this case the way the pollock fishery is actually managed, ultimately manifest the energies and influences of the agency and the courts both carrying into motion the statutory directives of the Congress. (Citations omitted).

In addition, under PI 3.3, the Final Report states in relevant part the following:

The assessment team would not assign the score it did to this Indicator were it to define the management system to include only the administrative or regulatory process overseen by NMFS and the Council. But having included the federal judicial and legislative branches within the definition of the

management system, it is clear that all stakeholders ultimately have access to a mechanism to place relevant information before appropriately impartial decision-makers

Please note that the team scored the fisheries an 80 on this PI and if they had defined the management system more narrowly, this PI would have scored lower and required a condition.

In sum, the certification team erred in considering any entity that deals with the pollock fishery in any way to be part of the management system. We reiterate all the comments we submitted on the Draft Determination regarding this issue. We urge the team revise its analysis and evaluate the management system, looking solely at the actions, procedures and policies of the bodies that directly manage the pollock fisheries – the National Marine Fisheries Service and the North Pacific Fishery Management Council. Such a revision will result in downward scoring of the PIs and overall lower score of the pollock fisheries, additional conditions and a failure of one or more MSC principles.

Opening of the Aleutian Islands pollock fishery

When the team evaluated the Bering Sea and Aleutian Islands pollock fisheries, fishing was not occurring in the Aleutian Islands and had not since 1998 when the Council stopped authorizing a TAC level above zero because of the fishery's impacts on endangered Steller sea lions.⁵ In fact, the Final Determination states that “the AI is area is currently closed to directed pollock fishing. It is not at all clear under what circumstances it would be reopened.” (p. 41). In January 2005, however, the AI pollock fishery is expected to open to fishing. The following section summarizes the procedures involved in opening the AI pollock fishery for the coming January 2005 fishing season.

Procedural History of Reopening the AI Pollock Fishery

The U.S. Congress passed a rider⁶ (section 803) to the Consolidated Appropriations Act of 2004 (HR 2673) (CAA), now Public Law 108-199, requiring future directed fishing allowances of Aleutian Islands pollock be allocated to the Aleut Corporation. In June, the Council took final action to allocate Aleutian Islands pollock to the Aleut Corporation -- starting in 2005, the annual TAC will be 19,000 mt, with up to 40% harvested in the A season. When the AI ABC is equal to or more than 19,000 mt, the AI TAC shall equal 19,000 mt. When the AI ABC is less than 19,000 mt, the AI TAC shall be no more than the ABC. It is important to note that the Final Determination expressed concern over this very approach to setting TAC levels as not being precautionary:

⁵ The Final Determination recognized that “The AI fishing zone has been closed to directed pollock fishing since 1998.” (p. 36).

⁶ A “rider” is when an unrelated piece of legislation gets attached to a larger bill and there is no floor debate on the subject. The full text of this rider is found in Appendix A1 of the Revised Draft Environmental Assessment / Regulatory Impact Review for Amendment 82 to the BSAI FMP and regulatory amendments to allow the allocation of future Aleutian Islands pollock harvest to the Aleut Corporation as required by Public Law 108-199.

Although management sets a 2 million ton cap on the total harvest of groundfish, the management of the pollock fisheries has allowed the fishing mortality rate to increase as stock declines. When pollock stock is high (as is currently the case) the TAC has tended to be set well below the ABC, whereas with low stock the TAC has usually been set as high as the ABC permits. This could still be considered precautionary if the ABC already has taken into account the effects of the pollock fishery on other components of the ecosystem. However, ecosystem considerations are predominantly qualitative and therefore not used by the stock assessment in setting ABCs.

Increases in fishing mortality as stock declines, allows the fishery to remove an increasing (though still small) proportion of the stock at smaller stock size. Since this may also reduce availability of pollock to other predators under decreased stock biomass, this could make stock recovery increasingly less likely as stock falls. (p. 87).

Failure to address the opening of the AI fishery

Overall, the Final Determination fails to address the opening of the AI pollock fishery. This omission is particularly troubling because we notified the certifier that Alaska Senator Ted Stevens was moving a rider through Congress to require the Aleut Corporation receive allocation to fish for pollock and questioned how that would affect the outcome of the Draft Determination. We regularly informed the certifier of the progress of the legislation and sent the language via email and alerted the certifier about the final Congressional approval of Consolidated Appropriations Act of 2004 (HR 2673) (CAA), now Public Law 108-199 that authorized allocation of Aleutian Islands pollock to the Aleut Corporation in Section 803. Throughout we have asserted that the Council's initiation of fishing in the Aleutian Islands after there has been none authorized since before 1998 is a significant change from the status quo that the team evaluated and questioned how this would affect the conditions. Despite being given extensive notice about the "Steven's rider" and the implications of opening fishing where none has occurred for six years, the team finalized its Determination without adequately changing its analysis to address this significant and material change from the status quo that the team considered in deciding to certify the fishery.

In several Performance Indicators (PIs) under Principle 1 and throughout others under Principles 2 and 3, the report recognizes serious problems with the Aleutian Islands pollock fishery and the management system. The team expressly states that it scored certain PIs higher because of the fact that no fishing is occurring in the Aleutian Islands so that was sufficiently precautionary to address some of their concerns.

The following section references PIs that discuss the closure of the AI which resulted in higher scores for individual PIs and thus the overall score assigned to a Principle.

Principle 1, PI 1.1.1.3 states the following:

The Aleutian Islands stock is managed at tier 5, which does not involve a reduction in exploitation rate at low stock sizes. As already noted, the exploitation rate for this stock rose dramatically as the stock declined, prior to the imposition of the zero TAC (Barbeaux et al, 2003). The ABC for the AI stock under the tier 5 rules was over 39,000 tons in 2003 (Ianello et al., 2002).

Although the AI stock would appear to score at the 60 level based on the nature of the tier 5 rules, a higher score recognizes that the area has been closed to directed pollock fishing in recent years, despite an allowable ABC. However the management of the AI stock does not meet the 80 scoring standard because the current arrangements are ad hoc. (p. 46, emphasis added).

The text under this PI notes the existence of the rider that would open the AI fishery: “The team noted that there have been recent moves to reopen part of the AI fishery under a rider to an Appropriations bill (effectively over-riding the current closure), and *would be concerned if the fishery were reopened* under the current form of the tier 5 rule.” (p. 46, emphasis added).

To address the fishery’s deficiencies under this PI, the team requires the following condition:

To meet this condition, the fishery must ensure that the AI stock is above the minimum threshold (B_{msy} or a suitable proxy) before the fishery can be reopened, and that any ABC and TAC established for the Aleutian Islands is at least as precautionary as that which would be achieved by applying the harvest control rule used by the management authority for establishing the ABC and TAC for the EBS pollock fishery, which explicitly takes into account uncertainties in the assessment.

Should the AI portion of the fishery be re-opened under the above state circumstances, the fishery needs to additionally meet one of the two alternatives shown below before the area is fished for a second year:

- Improve the assessment for the AI stock so that it meets at least tier 3 information requirements, and also implement zero ABCs at stock sizes below $B_{20\%}$, (as for EBS and GOA stocks); or
- Formalize a revised harvest control rule, applicable at level 5 information requirements, which will protect the stock at low stock sizes at least as well as the current strategies for EBS and GOA stocks (which involve reductions in exploitation rate below B_{MSY} and closure below $B_{20\%}$).

If the first alternative is adopted, the resulting harvest strategy should subsequently be tested for robustness as outlined in the condition for scoring indicator 1.1.1.5 (as part of meeting that condition and on the same time frame as the condition for 1.1.1.5). If the second alternative is adopted, the fishery should not be opened until the new proposed strategy has been tested as outlined for condition 1.1.1.5.

While it is appropriate that the team recognized the existence of the rider which may open the fishery (and it should have throughout its analysis but did not otherwise), the condition is not stringent enough given the stated concerns regarding the AI pollock fishery and problems with its management. Because the rider is now law, this condition is not required to apply until the second year that the AI fishery is to occur. In the Draft Determination, the team found the AI pollock situation sufficiently distressing to require this and other conditions “to be met prior to the opening of the AI zone to directed pollock fishing,” (Draft Determination, p. 49), and did not include a blanket waiver of the implementation of this condition until the second year. It can only be assumed that the team changed its mind at the industry’s request or as a result of the

rider. A more appropriate response would either be to require the fishery achieve the condition prior to any fishing occurring as the team deemed necessary in the Draft Determination, or scoring this and any PIs linked to this condition at the failing level if the fishery opens in January without achieving the condition's requirements.

The following are additional PIs that recognize the closure of the AI pollock fishery and either expressly or implicitly score the EBS / AI fisheries higher because of the presumed AI closure.

Principle 1, PI 1.1.2.2 states: "*For AI pollock, the current closure of the area to directed pollock fishing and very low by-catch limits imply very low exploitation rates. OFL limits for AI pollock are set at $M=0.3$ and are well below F_{MSY} . The closure to directed fishing is explicitly to protect predators. This suggests a score for AI pollock close to 100.*" (p. 54, emphasis added).

Principle 1, PI 1.1.2.3.3 states "Stock assessments explore sensitivities to assumptions, parameters and data, and key sensitivities are taken into account in the harvest strategy." The report states:

Sensitivity tests are not routinely undertaken for the AI stock, but this partly reflects its tier 5 status *and the current closure to directed pollock fishing*. Nevertheless, the method is clearly sensitive to the need to use an absolute estimate of stock abundance in applying the tier rule. It has been argued that basing the absolute estimate on use of the trawl survey assuming a catchability of one is precautionary. This assertion needs to be better supported (see comments and conditions for indicator 1.1.1.4).

Under the Principle 2 section entitled, "Pollock Abundance," the report states the following:

We note that the status of Aleutian Island pollock is much less certain. Fishery independent biomass estimates declined sharply from the mid 1980s to the mid 1990s (to about 20% of peak levels), with circumstantial evidence of sequential spatial depletion of stocks. *However, the AI fishery has had a zero TAC since 1998, to address a variety of concerns.* (p. 79, emphasis added).

Principle 2, PI 1.3.3 provides: "Data on spatial and temporal variations in abundances of animal populations and communities have been synthesized into a set of internally consistent explanatory hypotheses that can provide the basis for making predictions about future system states and consequences of management actions." The report states:

However, in the AI the fishery was closed as a precautionary measure that was intended to remove any (putative) impacts of the fishery on SSLs and the wider ecosystem of that area. Although this closure represents precautionary management exceeding the expectations enumerated by the 80 scoring criteria, the score for EBS/AI as a whole is based in part on the fact that there is not a systematic management approach that has been used in similar circumstances such as the prolonged decline in northern fur seal numbers.

It appears that the closure of the AI fishery helped the fisheries score as high as it did regarding this PI. If the AI fishery were open to fishing when analyzed, this PI likely would have scored lower than it did.

Principle 3, PI 4.1.1 states "Catch levels are set to maintain high productivity of the target population and the ecosystem." The report notes:

In addition, the Aleutian Islands fishery, added positively to the overall score because it can be conclusively shown to be having no adverse impacts on anything at present because no harvest is occurring there. The absence of fishing pressure probably is helping the as-yet-unfinished recovery and rebuilding efforts for depleted local pollock populations. (p. 202, emphasis added).

Again, it is likely that if the AI fishery were open, the analysis under this PI would have been different and the score lower.

Principle 3, PI 4.1.6 states "Provides for rebuilding and recovery, where applicable." The report states the following regarding the AI stock:

The team notes with some concern that there are particular, much smaller, populations in the Aleutians and the Bogoslof areas that are in much less certain condition having in the recent past been as low or lower than B_{35} , and for which rebuilding has been a much slower process. However, the assessment team also recognizes that the current management arrangement for both these areas has been to set a zero TAC, which is as much as can be accomplished toward rebuilding. (p. 208, emphasis added).

The team scored this PI at 85. Quite possibly if the AI fishery were evaluated when it was open, this PI could have resulted in a lower score.

Principle 3, PI 4.1.7 provides "Applies closures or restrictions when catch limits reached." The report states "*The Aleutian Islands fishery is effectively closed, thus doing quite well in terms of this indicator.*" (p. 209, emphasis added).

The team scored this PI at 100 and as such, a lower score is likely if the AI were open when reviewing the fishery under this PI.

Inflated PI scores

Analyzing the AI pollock fishery under the closed scenario resulted in scores on individual PIs that are higher than deserved if the AI pollock fishery is open, which will be the situation when the next fishing season begins in January. Scoring individual PIs higher means the overall Principles receive higher scores. Fairness dictates that the MSC re-evaluate the AI pollock fishery to consider how it scores when the AI pollock fishery is open. The team should consider the information contained in the final Council motion from June, the Revised Draft EA / RIR and the Supplement to the AI Pollock EA / RIR, the upcoming regulatory amendment and Fishery Management Plan (FMP) amendment that NMFS is drafting to open the AI pollock fishery and any other documents that regard the AI pollock fishery.

Lack of consideration of AI pollock entirely resulted in higher scored PIs

The Final Determination fails to address the AI pollock fishery under some PIs because those PIs evaluate aspects of stock assessments. Stock assessments are not done for the AI pollock

stock because insufficient information exists about AI pollock to conduct such an assessment. As such, the stock is managed in “Tier 5” under the Council’s system to manage fish stocks which is based on the amount of information known. The Final Determination reasons that the team did not evaluate the AI stock under Principle 1, PI 1.1.2.3.2 and PI 1.1.2.3.4.6 because the AI assessment is not based on a stock assessment model. Consequently, the team only scored the EBS stock which resulted in a higher score than if the AI were considered.

PI 1.1.2.3.2 states: “Stock assessment methods are statistically rigorous.” The team scored the fisheries higher under this PI than warranted, reasoning that “This indicator is not relevant to the current (2002) AI assessment (since it is not based on a stock assessment model), and so the score reflects only the EBS performance.” (p. 56). This rationale makes no sense. The fisheries should not be rewarded with a higher score because so little is known about the AI stock that cannot be evaluated using a stock assessment. Instead, the team should score this PI downward to account for this deficiency in information about the AI stock.

By not scoring this PI considering the noted deficiencies regarding the AI stock and scoring only the EBS stock, the team scores the fisheries higher overall than they deserve. The team has the discretion to link the condition for this PI to another PI as it implies regarding PI 1.1.1.5, however, it should not gloss over scoring the fisheries as their analysis merits. This should result in a downward score.

PI 1.1.2.3.4.6 states “There is knowledge of environmental influences on stock dynamics.” The report states:

Little attention is currently paid to effects of environmental variability for the AI stock, but FOCI data are available to investigate possible impacts. While the AI therefore appears to meet the 60 guidepost, the current tier rule and form of assessment for this area do not allow for consideration or incorporation of environmental variability. Rather than impose a condition to force such explicit consideration for AI, which would be difficult to implement or act on given the current form of assessment, it was considered by the SCS evaluation team to be much more fruitful to address the general issue of the robustness of the overall harvest strategies to environmental variability (both short and medium term), as required by the condition set for indicator 1.1.1.5, and to implement an appropriate management response to that condition.

The score for this indicator therefore reflects the score for the EBS.

Moreover, avoiding consideration of the AI stock because of the lack of a stock assessment is contrary to the treatment of the AI fishery under PI 1.1.2.3.1 where the team imposed a condition specifically because there is no quantitative assessment model for AI pollock.⁷ The

⁷ On page 55, the report states:

There is no (recent) quantitative assessment model for AI pollock. This is not required for a stock managed at tier level 5, but as noted in the evaluations for scoring indicators 1.1.1.3 to 1.1.1.5, the tier 5 harvest strategy may not be a robust one. The latest SAFE report (lanelli et al, 2002) notes that further efforts are being made to develop an appropriate assessment model for the AI stock.

team should score the above PIs downward to account for the problems with the AI stock that render it incapable of being assessed using the stock assessment model.

Lack of compliance with Domestic Law

The Final Determination erred in its analysis of Principle 3, PI 2.2 and scored the fisheries higher than deserved. The team should have found that the fisheries failed this PI according to the 60 Scoring Guidepost.

Principle 3, PI 2.2 states the following:

The fishery is managed and conducted in a manner that respects domestic law
[Relates to MSC Criterion 3.16]

Elements considered in scoring include:

- Consistency and quality of compliance with federal law (efforts to assure compliance, reasons for incidents of non-compliance, severity of consequences of non-compliance)
- Integration of compliance requirements among the multiple domestic legal regimes that apply to the fishery

100 Scoring Guidepost

- The management system is in compliance with all substantive and procedural aspects of applicable domestic law
- The management system, including its component institutional entities, has not been found at any time to be in willful violation of any order of any domestic court of jurisdiction on any matter related to performance of any statutory duty concerning the pollock fishery
- No officer or agent of the management system, including its component entities, has at any time been found to be in contempt of any domestic court of jurisdiction on any matter related to performance of official duties on behalf of the management system concerning the pollock fishery
- The management system regularly and consistently seeks and uses appropriately the advice of experts in domestic law, including independent experts

80 Scoring Guidepost

The AI fishery therefore does not meet the 80 scoring guidepost for this indicator. (Subsequent to the release of the draft SCS report, Barbeaux et al (2003) have presented a preliminary quantitative assessment model for AI that does appear to meet the 80 scoring guidepost).

The overall score for this indicator reflects the limitations of the AI analysis.

- The management system makes consistent, good faith efforts to be in compliance with all substantive and procedural aspects of applicable domestic law
- The management system, including its component institutional entities, has not been found repeatedly by any domestic court of jurisdiction to be in violation of any significant aspect of any domestic law related to protection of the human or natural environment, individual species, ecosystems, or fishery dependent communities
- The management system has access to and makes use of experts in domestic law.

60 Scoring Guidepost

- The management system fails to reliably monitor and assure its compliance with all substantive and procedural aspects of applicable domestic law
- Harvest management decisions made by fishery managers are regularly overturned or disallowed upon review by judicial authorities based on the same or substantially similar (i.e., chronic) violations of applicable substantive law

The team scored this PI a 65 and stated the following rationale:

The assessment team, mindful of the significance of this indicator, solicited and received specific advice from legal counsel for APA, NOAA, and conservation stakeholders. Their advice led us to conclude that the management system generally respects domestic law -- and that is what this indicator sets as a minimum threshold in order that the fishery be eligible for certification. Respect is different from enthusiasm or alacrity or perfection. This indicator does not require that the fishery management system be in perfect minute-to-minute compliance with every single piece of substantive and procedural law that governs the pollock fishery. It would elevate form over substance to set the bar that high and we did not do so. But compliance with the law is certainly the most revealing evidence of respect for the law, and the evidence here is very problematic.

The management system's record of compliance with domestic law, as evaluated over at least the last decade, reveals a number of instances where federal fishery managers have taken actions relevant to the pollock fishery that were challenged and overturned in court. When a federal court concludes that an agency action does not fulfill the requirements of a law, the agency is by definition "not in compliance" with applicable law.

For example, the U.S. District Court for the Western District of Washington has ruled that NMFS is not in compliance with NEPA with respect to North Pacific groundfish management. The U.S. District Court for the District of Columbia has ruled that the NMFS is not in compliance with NEPA with respect to promulgation of rules for designation of essential fish habitat as required by the Magnuson-Stevens Act. The U.S. District Court for the Western District of Washington has repeatedly found important infirmities in NMFS' compliance with the Endangered Species Act in connection with North Pacific groundfish fisheries' impact on Steller sea lions.

Disagreements among stakeholders about how the fishery ought to be managed, or disagreements between stakeholders and regulators, no matter how intense, do not of themselves demonstrate that the management system is failing to respect domestic law. Indeed, it may easily reveal that the system is working exactly as the law intends. Complex laws and complex facts, such as those associated with the pollock fisheries, can make compliance difficult despite good faith efforts to meet legal requirements. That said, a pattern of instances where agency decisions are overturned in court on the same or similar grounds does give rise to the inference that the agency has failed to give the law the respect it is due. And the basis on which an agency is found out-of-compliance can, and did in this case, reveal factors that were relevant to scoring of this indicator.

The assessment team has a concern that is directly related to NMFS' approach to the most recent biological opinion on Steller sea lions (the "2001 BiOp"). The team reviewed the 2001 BiOp, the BiOp that preceded it (the "FMP BiOp"), and related technical reports and we were not able to discern the scientifically determinative character of the new information--satellite tracking data on the movements of several sea lions over a limited period of time--cited by NMFS as the basis for authorizing significant changes in the location and timing of the pollock fisheries, particularly insofar as those changes resulted in increased fishing in areas designated as critical habitat for Stellar sea lions and in areas of known fur seal foraging.⁸

The conservation stakeholders challenged the 2001 BiOp in federal court citing, among other alleged shortcomings, the same concern noted by the assessment team. The federal court upheld the conservationists' challenge on that very ground, finding that NMFS had not performed "the necessary analysis of the impact of the [new biological opinion's recommended harvest criteria] on Steller sea lions, their prey, and their critical habitat." The court ordered NMFS to prepare the analysis missing from the 2001 BiOp.

It is among the most worrisome signs of failure to respect domestic law that an agency would not properly analyze or explain the basis for a major decision on

⁸ The report includes the following footnote:

The management system's receptivity to and use of the newly reported sea lion tracking data gave the evaluation team the impression of having been based on a less rigorous standard of scientific proof and conservatism than the standard normally applied within this system to new research results or other information submitted in connection with management of the fishery. The assessment team heard from many individuals both inside government and out that the data was applied in an expedient way through a less-than-open process tailored to prevent the economic harm feared from certain proposed area closures. Others we interviewed defended the process and the use of the data. On balance, the team felt the critics had the more convincing perspective. See the detailed discussion of the tracking data issue under Principle 2 , Indicator 1.2.1

a controversial matter that the agency had litigated and lost before, meaning, in this case, sea lion conservation. NMFS itself has testified before the U.S. Congress that the agency is well aware that it has a chronic problem successfully meeting the terms of NEPA and the ESA and that the courts were taking a dim view of the agency's administration of the law (Hogarth, 2002). A former NMFS director testified (Dalton, 2002) before Congress that:

Beginning in 1996, legal challenges have risen from an average of 1 or 2 each year to a current high of 26 in 2001. While much of the rise has been blamed on enactment of the Sustainable Fisheries Act, a larger proportion of the new cases have been challenges under the National Environmental Policy Act, the Endangered Species Act and the Regulatory Flexibility Act....

More troubling than the cases themselves has been the decline in the ability of NMFS to prevail when agency decisions are challenged. Before 1994, the government lost very few cases. In recent years, however, this record has been reversed and in the last four years the agency has lost more cases than it has won. This gives rise to expectations of success by other potential litigants, and issues that might have been resolved by the give and take of the regulatory process are remanded for consideration by the courts.

NMFS' problem stems from many sources, some of which are in the agency's power to change and some of which are not. The assessment team's perspective on this indicator is heavily influenced by the equivocal impression given by NMFS officials interviewed by the assessment team concerning the agency's determination to take measures in-house to improve its ability to meet the terms of those laws. In brief, some officials clearly believe that the agency's compliance problem results from bad laws, hostile stakeholders and litigants, unreasonable judges, or all of them together. Other officials assign fault to the agency's complex internal structure, diverse and evolving mission, and limited resources.

The assessment team is aware that NMFS, with assistance from NPFMC and others, is taking steps to bring the management of the fishery into compliance with NEPA, ESA, and the Magnuson-Stevens Act. Importantly, NMFS, APA, and the conservation stakeholders recently agreed to settle pending litigation on terms that have been adopted by the federal court and entered as an order to the parties, effective April 1, 2003. The order covers all of the significant NEPA and ESA compliance matters that have been the subject of recent disputes among the parties. The settlement among the parties requires NMFS to bring the management of the North Pacific groundfish fisheries into full compliance with NEPA and the ESA (as to the issues under litigation) within certain timeframes set for this year and in 2004. It appears that the agency is on schedule to complete the analyses required under the settlement, although the PSEIS received voluminous adverse comment from some stakeholders.

The assessment team notes that the PSEIS in preparation for the groundfish management plan is quite impressive in its scope and depth and analytical sophistication. Indeed, the team has relied extensively on the first draft of that document in performing our evaluation of the fishery. The PSEIS, when

finished as ordered by the court, may come to serve as an analytical resource that will support better-informed and even more successful management of the pollock fisheries. The PSEIS may come to represent a transformational force in the history of the pollock management system, a tool that allows the Council and NMFS to integrate ecosystem, listed species, habitat and other considerations fully into the fishery management planning process. It has that potential.

But the agency has not yet completed the work ordered by the court and a great deal of difficult work and decision-making remain to be done. NEPA does not require decision makers to make good decisions about implementing the Magnuson-Stevens Act or ESA; it simply requires that they have the information to do so if they choose to. The pattern of past compliance difficulties raises the question whether the management system will indeed perform its obligations in a manner that shows the measure of respect for domestic law contemplated by this indicator.

Condition

To improve the deficiencies in performance for this indicator, the fishery is required to remain in compliance with the pertinent outstanding orders of the U.S. District Court for the Western District of Washington and the settlement reached before the U.S. District Court for the District of Columbia in the EFH controversy. The fishery must, in particular, meet the terms of the Order dated April 1, 2003, which sets specific deadlines in 2003 and 2004 for completion of ESA- and NEPA-related analyses and procedures. That Order requires NMFS to revise its 2001 Steller sea lion biological opinion not later than June 30, 2003 and to issue the final PSEIS (and a decision based on the analysis) not later than September 1, 2004. The revised Steller sea lion biological opinion was signed on June 19, 2003.⁹ As of May 2004, NMFS reports that it expects to release the final PSEIS in June 2004, and will issue a final Record of Decision based on the EIS not later than September 1, 2004.¹⁰

The assessment team advises that it will be strongly inclined to reconsider the score for this indicator if harvest regimes are set for upcoming years that have the result of placing harvest activities in areas of designated critical habitat for ESA-listed species unless the impacts of those activities on listed species are analyzed and documented in a manner consistent with the high standards of scientific technique and public involvement of which the fishery management system is capable. The scoring of this indicator will be revisited, and likely revised downward, if a court finds that the fishery is being managed in a manner that fails to comply with any significant provision of applicable law, whether or not the issue in question has been the subject of prior disputes.

While the above analysis indicates that the team comprehends the significance of the litigation history involving the pollock fisheries and NMFS and the Council, the Final Determination fails to score properly the fisheries according to the PI's scoring guideposts. The distinction is absurd that the fisheries pass this PI because the management system "respects" the law,

⁹ <http://www.fakr.noaa.gov/protectedresources/stellers/biop2002/703remand.pdf>

¹⁰ <http://www.fakr.noaa.gov/sustainablefisheries/seis/news13.pdf>

although it has demonstrated a severe problem in complying with the law. As the report notes the best way to show that you respect the law is to actually comply with the law. The protracted litigation history to protect Steller sea lions and the ecosystem from the fisheries' impacts and the numerous court rulings against the management of the pollock fisheries speaks volumes about this PI and should result in a failing score.

The 60 Scoring Guidepost provides that:

- The management system fails to reliably monitor and assure its compliance with all substantive and procedural aspects of applicable domestic law
- Harvest management decisions made by fishery managers are regularly overturned or disallowed upon review by judicial authorities based on the same or substantially similar (i.e., chronic) violations of applicable substantive law

These bullets perfectly exemplify the management system situation in the North Pacific. The team should review the legal history that we have provided in previous comments. This will demonstrate that NMFS and the Council failed "to reliably monitor and assure its compliance with all substantive and procedural aspects of" National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). The comments should illuminate that the management decisions regarding the pollock fisheries have been "regularly overturned or disallowed upon review by" the federal district court "based on the same or substantially similar (i.e., chronic) violations of" NEPA and the ESA.

The team recognized the fisheries' and management system's significant problems in complying with this PI. However, the Condition required to address the fisheries' deficiencies regarding this PI is incredibly troubling. The first part of the Condition for this PI fails to add any new requirement to the already existing legal requirements as set out in the April 1, 2003 court order. Regarding the statement in the second part of the condition that the team "will be strongly inclined to reconsider the score for this indicator if harvest regimes are set for the 2003-2004 fishery that have the result of placing harvest activities in areas of designated critical habitat for ESA-listed species," in our comments on the Draft Determination we urged the team to require NMFS immediately to provide this information to determine if harvest regimes for the upcoming fisheries will allow catch in Steller sea lion critical habitat. We also asserted that if the team scored the fisheries above the 60 SG level and thus required a condition, it should require management measures that require more precaution given the significant legal compliance problems to date. "This includes reduced ABC and TAC levels, including adequate consideration of uncertainty, and no trawl fishing in SSLCH." (Comments on *The MSC Assessment Report for the United States Bering Sea and Aleutian Islands Pollock Fisheries*, p. 74). In the Final Determination, the team failed to alter its analysis or the associated Condition. This is particularly distressing because the failure to comply with domestic law is the fisheries' and management system's most obvious weakness because it has already been extensively documented and adjudicated by the federal court. The team's failure to include a condition of substance that requires serious change in the way these entities do business is to say the least distressing. It raises the question of whether the team intended to give away this certification because it failed to take the opportunity to require change regarding the PI where the fisheries scored the lowest in the entire assessment.

Conclusion

The MSC assessment process for the Alaska pollock fisheries has been a long and time-consuming process. We are disappointed in the decision that these fisheries should be certified according to the MSC Standard. For the reasons stated in our previous comments and in this Objection, the certification team made a serious mistake in its Final Determination. Certifying a fishery with a history of depleted stocks, significant ecosystem impacts and staggering management problems is a grave error. The pollock fisheries and their management are not models for the world's fisheries. In so many ways, their problems provide examples of how not to conduct fisheries. We sincerely hope that the MSC concludes the Alaska pollock fisheries do not deserve to bear the distinction of MSC certification and its label. We fear that a decision to certify will haunt the certification team and the Marine Stewardship Council.

CERTIFICATION BODY (SCS) RESPONSE TO INITIAL OBJECTION



2 September 2004

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Stacey:

This letter and the attached document are being submitted to Alaska Oceans Program, Greenpeace International, National Environmental Trust, and Oceana by Scientific Certification Systems, Inc. as a formal response to the report entitled "OBJECTION to FINAL DETERMINATION TO CERTIFY THE EASTERN BERING SEA / ALEUTIAN ISLANDS POLLOCK FISHERIES" received by SCS on 4 September 2004.

We acknowledge that the process has been extremely time consuming for you and your colleagues given the many hours of phone conversations, email exchanges, and filing of reports with SCS that have taken place over the past 3 years. We thank you and applaud your continued professionalism, candor, and cooperation in working through the full set of procedures set forth under the Marine Stewardship Council program for the assessment and certification of fisheries in spite of your continued concerns about the viability of the MSC program.

I look forward to your comments regarding our response to your objection, and as always, will endeavor to help in any way I can to clarify issues and procedures as they arise. As you are aware, if you are dissatisfied with our response you have the right and opportunity to re-file your objection with the MSC for further review and consideration. This must be accomplished within 14 working days of receiving this response. If you receive the SCS response on 3 September 2004, as you most probably will due to the late hour for the email transmission of this document, I calculate that you will need to re-file with the MSC by end of day on 24 September

2004 (this calculation excludes 6 September 2004 as a working day as it is an official federal holiday, not a working day).

Sincerely,

Chet Chaffee
Scientific Certification Systems, Inc.

<p>SCS RESPONSE TO “OBJECTIONS TO FINAL DETERMINATION TO CERTIFY THE EASTERN BERING SEA / ALEUTIAN ISLANDS POLLOCK FISHERIES”</p>
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SCS General Response to the Objection

This document is the response of the assessment team convened by Scientific Certification Systems, Inc., to evaluate the Bering Sea and Aleutian Islands (BSAI) pollock fishery (“Assessment Team”) objection received on 4 August 2004 from the Alaska Oceans Program, Greenpeace International, National Environmental Trust, Oceana, and Trustees for Alaska (hereafter “conservation stakeholders” or “Objectors”) regarding the Assessment Team’s *Report on the United States Bering Sea and Aleutian Islands Pollock Fishery* (“Final Report”).

Although this report was authored by and approved by all member of the assessment team (Dr. Chet Chaffee, Mr. Tom Jensen, Dr. Tony Smith, and Dr. Bob Furness), SCS asked Tom Jensen, a partner in the nationwide law firm of Sonnenschein Nath & Rosenthal heading the Washington D.C. based environmental and natural resources practice, to take a significant role in drafting this response. SCS asked Mr. Jensen to provide this assistance not only because of his in-depth knowledge of environmental law in the United States, but because he is the only practicing attorney that has ever participated in an MSC assessment process and an MSC objections process. Mr. Jensen’s in-depth knowledge of the procedures and processes followed by the Marine Stewardship Council (MSC) to address filed objections comes from participating as a member of an MSC objections panel responding to an objection filed against a determination made for Patagonia Toothfish.

We note at the outset that our analysis of the BSAI pollock fishery was heavily influenced by the conservation stakeholders. The conservation stakeholders supplied the Assessment Team with valuable information on virtually every topic and graciously responded to our many requests for insight and advice over the 2-3 year period of the assessment. Many, maybe most of the conditions and recommendations we have prescribed for the fishery coincide directly with issues of concern raised by stakeholders. The conditions in the assessment team’s final draft determination are intended to address those concerns about the performance of the fishery and its managers where the assessment team found that the preponderance of evidence was insufficient to deem a specific aspect of the management system in full compliance with MSC standards. A reader of the Final Report will find on almost every page of the chapter on the actual assessment, substantial evidence of the conservation stakeholders’ affirmative influence. We endeavored at every juncture of the assessment report to directly cite the information and evidence presented by stakeholder groups and the assessment client and supporting agencies, and to explain our consideration of the information in our final judgment. We are deeply indebted to the conservation stakeholders for their contributions to the pollock assessment process.

The procedure established by the MSC to allow affected interests to “object” to the determination of a certification body does not automatically guarantee a change in the draft determination from an initial objection or from further processes that take it out of the hands of the certifier and place it the hands of an MSC established “objections panel.” The objecting party needs to show reasonable evidence of procedural or substantive error in the course of the assessment. We are aware, of course, that the controversial nature of the pollock fishery and the institutional interests of many of the parties involved in the MSC process make it likely that the objections process will continue through the convening of an objections panel. If such a panel is ultimately convened, we do not envy its members the task they will bear.

There can be no pretending about the problem that an objections panel will face if the affected parties pursue this objection further. The Objectors have not presented any information identifying procedural or substantive failings within the scope of the Assessment Team’s responsibilities.

The Objectors point to certain materials or actions that are not in the Final Report. But all of those asserted omissions pertain to things that happened after the completion of the analysis reflected in the report. The assessment had to have a cut-off date and, after more than two years of analysis, the time-frame of our assessment ended in June, 2003. The actions or analyses generated after that date may well be highly germane to the question whether the fishery is sustainable under the MSC Principles and Criteria, but the proper place to consider them is in post-certification reviews of the fishery as prescribed by the MSC.

It is not as if the Assessment Team turned a blind eye to the potential that certain things might occur in the future, such as the opening of the Aleutian Islands fishery or new decisions by the federal courts. The Final Report specifically includes numerous references to potential actions by the fishery and its managers, and we set conditions or made recommendations that are framed to deal with alternative prospective scenarios. The Assessment Team looked as far over the horizon as feasible, particularly given the MSC-imposed requirement that the fishery undergo periodic re-evaluation. An assessment decision cannot be kept open indefinitely, at least under current (or reasonably conceivable) MSC rules. There will always be new things happening after the things happen that occur within the time frame of the initial analysis. The MSC has a process to deal with such post-hoc events, and the objections process is not it.

Two private consultants recently conducted reviews of the MSC process. Oddly, the Objectors ask that the assessment be judged in light of those reports. The consultants’ opinions of the MSC program offer no evidence one way or the other as to the judgment of the Assessment Team on the fit between the pollock fishery and the MSC Principles and Criteria or whether the team followed MSC rules. Again, the MSC surely has a process in place to deal with the consultant reports, but the objections process is not it.

The Objectors point to many disagreements with the Assessment Team on certain issues, such as the proper meaning of “management system” or “respect for domestic law.” But the Objectors have not shown any instance where the Assessment Team failed to consider their views or prevented full communication among all the parties

on those issues. Indeed, the overwhelming majority of the text of the objection is simply cut and pasted from previous documents previously submitted to the Assessment Team and, as such, it shows how robust the dialogue has been. The fact that the Team and the Objectors disagree reveals the complex and controversial nature of this fishery, but it is not a sign of error by either party. The MSC surely has a process available to give even greater influence to the perspectives of conservation groups (or others) in the administration of MSC programs, but the objections process is not it.

The task of an MSC objections process is to make sure the assessment team followed the MSC's rules and did not commit significant errors of judgment. We understand that from the conservation stakeholders' points of view, this alone is a difficult matter to interpret, since the conservation stakeholders have noted on numerous occasions that the MSC certification methodology description often lacks the specificity required to determine what processes are necessary and that there is a lack of written documentation on the proper interpretation and use of the MSC standards by certification bodies. As a result, the objections process in this case will be under tremendous pressure to do much more than review the certification body's actions by serving as the venue in which to litigate, at a minimum, all of the problems that conservation stakeholders have with the MSC itself, commercial fishing generally, and the pollock fisheries in particular.

The Assessment Team believes strongly that the conservation stakeholders have legitimate concerns about many matters that deserve to be taken very seriously by the MSC. The Assessment Team has done just that, and taken the conservation stakeholders input at all times very seriously. From the beginning of the assessment, SCS as the certification body of record took steps to go well beyond MSC processes to include stakeholders, even to the point of conducting a long and drawn out process of stakeholder consultation to select the assessment team, and then selecting Tom Jensen directly in response to comments from Trustees for Alaska stating concern about assessment team expertise on legal matters associated with US fisheries. We also believe that the pollock fishery entered into the certification process in the understanding that it would be objectively and competently assessed under the MSC Principles and Criteria. That is the only question at this point. Was the BSAI pollock fishery properly assessed? This should also be the only question before an MSC objections panel should these proceedings continue.

SCS Responses to Points of Significance Raised in the Objection

In addition to many general aspects dealt with above, the objection received by SCS dealt with several "points of significance" as follows:

- the failure to include scores and weights on PIs in the Draft Determination;
- the erroneous interpretation of what constitutes the "management system";
- the opening the Aleutian Islands pollock fishery in January 2005;
- insufficient treatment of the litigation history and adverse legal opinions against the management system and fishery.

Below, are our responses to these issues. Although not necessarily provided in order or individually, our responses go to the intent and the content of these issues.

The Failure to Include Scores and Weights on Pls in the Draft Determination

The objectors clearly state their dissatisfaction with the fact that weights and scores were not provided in the initial draft of the assessment report released for public comment. This neither speaks to a procedural or a merit objection. It merely states dissatisfaction with MSC approved processes, which as we stated in our general comments, is something that needs to be dealt with, just not in the objections process. Regardless, it may be instructive to the objectors and any future deliberations about the BSAI pollock assessment to state the requirements as they now stand and provide a brief history of their inception.

The certification requirements at the time of the signing of the pollock contract did not require public disclosure of the draft report for public comment at all, let alone disclose weights and scores. Only in July 2002 did the requirements for public disclosure and public comment get instituted through an imposed change in the MSC process – the implementation of an Objections Procedure. Prior to July 2002, the MSC did not have an express Objections Procedure. The enormous pressures put on the MSC during an objection to the Hoki fishery certification forced the MSC to create a policy. In July 2002, the MSC finalized an objections procedure and then required that all fishery certification assessments abide by the new policy, regardless of the fact that some fishery assessment, such as the BSAI pollock fishery, agreed by contract to undergo an MSC assessment that did not include this requirement. The change in this requirement put enormous financial pressure on certification bodies that now had to meet a different set of requirements for both drafting MSC reports and revising MSC reports based on a whole new set of comments, even though the existing contracts and agreed budgets did not take these procedures into consideration. It also put fishery clients in a precarious spot. The client (APA) for the BSAI pollock fishery assessment has argued vociferously that the implementation of new requirements mid-stream has caused them both financial and public relations losses. However, the MSC still required that SCS follow the new procedures.

SCS requested advice from the MSC on the specific requirements under the new (July 2002) Objections Procedures. It became evident that the MSC did not have fully written procedures or guidance on what was to be included or excluded from a fishery assessment report made available for public comment. By precedent, one can determine that the MSC initially decided that weights and scores would not be part of the report reviewed by clients or stakeholders, but only by peer reviewers (see Patagonia Toothfish). In fact, the MSC equivocated in its response to SCS stating that it was not a direct requirement. SCS therefore proceeded to follow original MSC requirements and MSC set precedents in the absence of more specific and direct guidance. Dissatisfaction with this part of the process is therefore something that needs to be addressed to the MSC. In fact, the MSC has further revised its certification methodology (version 5 April 2004) which contains a bit more explicit language around objections procedures.

Opening of the Aleutians Islands Pollock Fishery in 2005

The objectors assert that the Aleutian Islands (AI) fishery may open in 2005, and that the assessment team’s final determination “fails to address the opening of the AI pollock fishery.”

It is incorrect to assert that the SCS Assessment Team failed to consider the reopening of the AI fishery. Within the objection report itself, the objectors contradict this objection numerous times. For example, the objectors state:

Page 11 Objection Report – “The text under this PI notes the existence of the rider that would open the AI fishery: “The team noted that there have been recent moves to reopen part of the AI fishery under a rider to an Appropriations bill (effectively overriding the current closure), and would be concerned if the fishery were reopened under the current form of the tier 5 rule.” (p. 46, emphasis added).

Page 11 Objections Report – “While it is appropriate that the team recognized the existence of the rider which may open the fishery (and it should have throughout its analysis but did not otherwise), the condition is not stringent enough given the stated concerns regarding the AI pollock fishery and problems with its management.”

There are hundreds of pages of text that both directly and indirectly consider the AI portion of the BSAI pollock fishery, including potential changes to its current status.

More specifically, the objectors assert that:

Throughout we have asserted that the Council’s initiation of fishing in the Aleutian Islands after there has been none authorized since before 1998 is a significant change from the status quo that the team evaluated and questioned how this would affect the conditions. Despite being given extensive notice about the “Steven’s rider” and the implications of opening fishing where none has occurred for six years, the team finalized its Determination without adequately changing its analysis to address this significant and material change from the status quo that the team considered in deciding to certify the fishery.

Again, the fishery is not yet open, and so there is no necessity to change the scores just on the proposed fishing. If (which is no longer much of an if) and when the fishery is opened and fishing actually occurs, we agree with the conservation stakeholders that post-certification work will have to consider the circumstances and re-evaluate the AI portion of the BSAI fishery.

Again, even with all of this in mind, we did consider the potential opening of the AI fishery. The condition associated with PI 1.1.1.3 expressly deals with the potential re-opening of the AI fishery. In addition, the assessment team altered scores from the draft report to the final report based on peer review and public comments and a re-evaluation of the issues surrounding the AI fishery.

In several Performance Indicators (PIs) under Principle 1 and throughout others under Principles 2 and 3, the report recognizes serious problems with the Aleutian Islands pollock fishery and the management system. The team expressly states that it scored certain PIs higher because of the fact that no fishing is occurring in the Aleutian Islands so that was sufficiently precautionary to address some of their concerns. The additional PIs cited by the objectors as recognizing the closure of the AI pollock fishery and either

expressly or implicitly scoring the EBS / AI fisheries higher because of the presumed AI closure include:

- a. Principle 1, PI 1.1.2.2
- b. Principle 1, PI 1.1.2.3.3
- c. Principle 2, PI 1.3.3
- d. Principle 3, PI 4.1.1
- e. Principle 3, PI 4.1.6
- f. Principle 3, PI 4.1.7
- g. PI 1.1.2.3.2
- h. PI 1.1.2.3.4.6

As noted by the objectors, each of these Performance Indicators in turn considers the effects of the AI fishery on the overall score. This in and of itself is proof that the assessment team did consider the AI pollock fishery quite thoroughly in the assessment. And again we note that the fishery has not opened. When (and if) it does, we agree the situation will need to be re-evaluated immediately. If the situation around the opening of the AI fishery does not meet the performance measures used to assess the fishery, then a re-evaluation could find that the AI portion of the fishery does not deserve certification. But this is merely supposition as the fishery has not yet opened. On top of all these things, the Assessment Team did take into account the proposed re-opening of the AI fishery to directed pollock fishing, but also took into account a second key piece of new information concerning this fishery in revising the scoring from the Draft Determination to the Final Determination. This second piece of information was the new quantitative stock assessment for AI Pollock undertaken in 2003 and presented in the SAFE Report in November 2003. This new assessment provides both a vastly improved and a much more optimistic assessment of the status of the AI resource than was available at the time of the draft Determination. Both the proposed re-opening and the new assessment were taken into account by the Assessment Team in reaching the Final Determination.

The fact that the assessment team did not agree with the assertions made by the objectors is based on the team's objective assessment of the information. The objectors have not provided any additional information or evidence that was not fully considered by the assessment team.

Because the [Steven's] rider is now law, this condition [PI 1.1.1.3] is not required to apply until the second year that the AI fishery is to occur. In the Draft Determination, the team found the AI pollock situation sufficiently distressing to require this and other conditions "to be met prior to the opening of the AI zone to directed pollock fishing," (Draft Determination, p. 49), and did not include a blanket waiver of the implementation of this condition until the second year. It can only be assumed that the team changed its mind at the industry's request or as a result of the rider. A more appropriate response would either be to require the fishery achieve the condition prior to any fishing occurring as the team deemed necessary in the Draft Determination, or scoring this and any PIs linked to this condition at the failing level if the fishery opens in January without achieving the condition's requirements.

The objectors have read the condition for this PI improperly. In fact, the changes made to this indicator specifically try to clarify issues raised through stakeholder

comments. The condition requires that to maintain certification, the AI portion of the BSAI fishery needs to meet specific conditions before any fishing occurs. This is exactly what the objectors have said should be done, yet they now object to it. The condition does not require waiting for a second year as asserted by the objectors. This part of the condition is immediate. If the AI fishery does not meet the specifications, it will fail certification.

In addition, the assessment team found that it was not sufficient to simply require that the fishery meet a specific standard for re-opening. The assessment team also felt that even if the circumstances were favorable to re-opening with a sufficiently increased abundance and a TAC set under the same precautionary approach applied to the rest of the BSAI fishery, the fishery still needed to re-evaluate the AI fishery Tier designation and meet the additional conditions specified under PI 1.1.1.5. Again, the conservation stakeholders state "...or scoring this and any PIs linked to this condition at the failing level if the fishery opens in January without achieving the condition's requirements." We agree. If the fishery opens in January, there should be an immediate re-assessment of the situation to determine if the fishery meets the required condition as well as the MSC standards. If it does not, it will fail certification. However, January is not yet upon us, so it is not possible to say just yet what will happen.

The team should consider the information contained in the final Council motion from June, the Revised Draft EA / RIR and the Supplement to the AI Pollock EA / RIR, the upcoming regulatory amendment and Fishery Management Plan (FMP) amendment that NMFS is drafting to open the AI pollock fishery and any other documents that regard the AI pollock fishery.

Again, these are documents that were either not available during the assessment, or pertain to a possible situation that has not yet occurred. These, and other documents that are now available, we agree must be part of a re-assessment process of the AI fishery if and when it reopens. Without a proper review of these documents, the re-assessment of the AI portion of the fishery would be insufficient. In fact, it is required by contract between SCS and APA that any substantive and significant changes in management that occur must be communicated to SCS immediately and the client must agree to and pay for a re-assessment of the changes. If the client does not follow through with this, certification would be revoked.

Even though the revised scoring of the BSAI pollock fishery did consider all available information that is pertinent to the current situation in the fishery, and although the assessment team reached further by setting conditions that require further analysis by the fishery before re-opening the fishery, we recognize the concerns that the objectors have with regard to changing management in the fishery and the use of legislative riders to dictate management. Therefore, in the interim period between the writing of the final assessment report and the filing of the objection we re-reviewed many of the documents that are mentioned by the objectors to respond directly to concerns raised by conservation stakeholders.

The Objection implicitly assumes that the re-opening of the AI fishery is taking place in the same context as its closure in 1998. The earlier closure was undertaken in response to the perceived depleted state of the resource at the time (the 1994

groundfish survey biomass estimate was only 15% of the survey value in 1983). However the comparability of the survey estimates over time has been questioned in recent SAFE Reports, and the 2003 reference assessment suggests that the stock has actually been increasing steadily since 1983 (2003 SAFE, Figure 1A.20). The assessment also suggests that the stock is currently at more than double the B40% reference level. The proposed TAC for the re-opening is well below the conservative ABC levels recommended by the Plan Team in 2003. Although the stock assessment has not yet been formally endorsed by the SSC as meeting Tier 3 requirements, the Tier 5 ABCs are more conservative than the Tier 3 levels, and the failure of the Tier 5 rules to reduce catches at low stock size is not of immediate concern given the apparent current status of the resource.

In this context, the statement of concern in the Objection about the fishery being re-opened under Tier 5 rules does not seem to apply. In any case, the fact is that the stock has been closed to directed fishing for 6 years in the face of apparent concerns about the status of the resource, despite the Tier 5 rules not requiring such precautionary action. The fact that the fishery management system did respond in this way means that the PIs listed in the Objection as being inappropriately scored, given the plans to re-open, were and are appropriately scored. Nevertheless, the Condition for PI 1.1.1.3 was retained, in a modified form, to require that the stock move towards Tier 3 status within a reasonable time frame.

The erroneous interpretation of what constitutes the “management system” and insufficient treatment of the litigation history and adverse legal opinions against the management system and fishery.

In this section we deal with both of these criticisms together as they are intimately tied together.

The Objectors raise objections that pertain specifically to the Assessment Team’s interpretation of the meaning of “management system” and “respect for domestic law”-- key terms taken from the MSC’s Principles and Criteria.¹¹ The objections are not new and, indeed, the Objectors quote extensively from earlier materials submitted by them or produced by the Assessment Team on these matters. The Objectors essentially restate, with additional emphasis, points that they have pressed vigorously throughout the pollock assessment process. The objections do not contain new information or other material that has not previously been conveyed to and considered by the Assessment Team.

The Assessment Team agrees with the Objectors that our interpretations of the term “management system” and the phrase “respect for domestic law,” and our application of those interpretations to the evidence presented to us significantly influence the outcome of this assessment. We said so in the final report and we acknowledge it again now: It is possible that the fishery might not receive a score adequate for certification under the MSC Principles and Criteria if the pollock fishery’s

¹¹ MSC Principle 3 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.” Fifteen individual criteria are specified for the “management system” and six additional criteria are set for “fishing operations.” One of the terms at issue here, “respect for domestic law” is not, strictly speaking, a verbatim restatement of the MSC’s own provision, though we consider it to mean the same thing. The term “respect for domestic law” was set and applied by the Assessment Team as scoring indicator 2.2.

“management system” or “respect for domestic law” were assessed pursuant to the interpretations of those elements that the Objectors contend we should have used.

The Assessment Team applied its best judgment to interpret individually each of the many standards included in the MSC’s Principles and Criteria. No doubt we could have interpreted various parts of the Principles and Criteria, including, but by no means limited to, the provisions in dispute here, to have different meanings than those we chose. The Assessment Team repeatedly, and at length, considered alternative interpretations of the MSC’s Principles and Criteria, including the interpretations urged by the Objectors. [This clearly speaks to the need for greater precision by the MSC in language used in the standards, the certification methodology, and any additional guidance documents provided to certifiers, clients, and stakeholders. This issue was raised by both the Bridgespan and Wildhavens reports that reviewed the MSC program, as well as follow-on letters to the MSC sent by concerned stakeholders in the environmental community.]

Principle 3, in particular, presents any thoughtful reader (whether a participant in a fishery, marine resource conservationist, member of an assessment team, or expert serving on an MSC-convened objections panel) with numerous pieces of ambiguous text. The phrasing of the Principle and its criteria combine to create rich media for fertile minds. *Respect for the law? Effective management? Appropriate to the size and scale of the fishery?* Adding to the complexity, many individual criteria combine several concepts. Criterion 1, for example, appears to encompass at least a dozen different concepts or factors.

The Assessment Team anticipated that, had we simply set scoring indicators for each criterion as written for Principle 3, we would likely not be able to reveal clearly our reasoning because of the difficulty of explaining exactly how the individual factors were considered, how the factors related to each other, and how they were weighed. In order to help the Objectors and other readers understand the assessment, we elected to prepare a parallel set of criteria that, in our view, do a better job of describing (but do not bias, weaken or omit) the factors stated or implied by the Principle 3 criteria prescribed by the MSC (see Final Report at 25-27). We believe that the way we “de-constructed” the relevant criteria made our analysis more transparent, lent even more substance and rigor to the assessment, and forced more details of the fishery to the surface for evaluation, discussion, and scoring. This is certainly true with regard to the issues of apparent greatest concern to the Objectors, namely, the characteristics of the fishery management system and the system’s respect for applicable law, where we identified and assessed many individual components of “management systems” not described in the criteria, and tested the concept of “respect for law” through multiple factors.

The Objectors were never less than absolutely straightforward and professional in explaining their views. The potential implications of the Objectors’ preferred interpretations were always clear and well documented in their report to the SCS Assessment Team as part of the stakeholder consultation. Yet even so, we took the precautionary step of requesting specific additional briefings from the Objectors on their high-priority issues, including the complex and important question of the fishery’s compliance with domestic law.

The Objectors’ comments on the Draft Assessment Report were also extensive and useful. We made substantial changes in the report between the draft and final stages to respond to those comments. The Team amended the draft report to address specifically the Objectors’ critique of our interpretations of “management system” and “respect for law.” We would have no objection whatsoever to providing the

Objectors (or anyone else) with copies of the draft and final reports showing the revisions made on account of their comments.

Having considered all of the advocacy from the Objectors, and numerous thoughtful queries and probings from parties interested in the MSC certification process generally, we believe that our interpretations are the most appropriate in the circumstances of this fishery. We think the explanations of our reasoning, presented in the Draft and Final Report and quoted at length by the Objectors, are transparent, complete and substantively responsive to the points raised by the Objectors throughout this proceeding.

In sum, we have never believed it appropriate for the Assessment Team to set or change its interpretations of the Principles and Criteria in order to achieve a particular result. We set indicators based on our understanding of the MSC provisions, sought and applied relevant evidence, and identified the results. It would be disingenuous to reverse that analytical sequence and we respectfully decline the opportunity urged upon us to do so now.

Concluding Remarks

We do not believe that we have overlooked or dismissed any pertinent information that was placed in our hands. We do not believe we misinterpreted any information placed before us. We believe we adequately addressed and reported on all the issues raised by the conservation stakeholders during the assessment, during the report writing and review processes, and now in this response to their objections.

As we stated earlier in this document under general remarks, the fact that the Assessment Team and the Objectors disagree reveals the complex and controversial nature of this fishery, but it is not a sign of error by either party.

INITIAL OBJECTION TO THE CERTIFICATION BODY, SCS

**OBJECTION to FINAL DETERMINATION TO
CERTIFY THE EASTERN BERING SEA /
ALEUTIAN ISLANDS POLLOCK FISHERIES**

Submitted on behalf of:
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We object to the Final Determination to certify the Bering Sea and Aleutian Islands pollock fisheries according to the MSC Standard. The team failed to adequately consider the information we submitted regarding why the pollock fisheries do not meet the MSC Principles and Criteria and associated Performance Indicators and on the Draft Determination to Certify the Eastern Bering Sea / Aleutian Islands pollock fisheries. Over the last three and a half years, we have supplied the team with extensive information about the problems with the pollock fisheries and the management by the National Marine Fisheries Service and the North Pacific Fisheries Management Council. This included specific comments on why the pollock fisheries do not comply with the MSC Principles and Criteria and the Draft Determination. Despite these efforts, unfortunately we do not notice any significant changes in the analysis of the Performance Indicators (PIs) or the Conditions. Rather than repeat the numerous concerns and arguments that we have already communicated to the team, we incorporate by reference all information supplied to the team during the assessment process. The information we provided should have resulted in a determination that the pollock fisheries do not meet the MSC Standard. We urge the team to reconsider that information and the Final Determination.

We also incorporate the two reports written by Bridgespan and Wildhavens that identify numerous serious problems with the MSC and demonstrate that the MSC is in desperate need of reform. We agree with the reports' concerns and recommendations, including those that resulted from the January 2004 Arlie House meeting. We highlight the following concerns:

- the MSC should not certify fisheries that have not complied with the law;
- the MSC certification claim is misleading, if not fraudulent, that certification means the fishery is in fact sustainable and well-managed because fisheries are certified without having met the conditions required for certification; and
- there has been lack of rigorous application of the MSC Principles and Criteria, resulting in very problematic fisheries being certified.

Until the MSC has made the necessary changes to address these and the other identified problems, it is premature and environmentally irresponsible to move ahead to certify the world's largest white fish fishery.

From the information submitted previously, we highlight a few points of significance below which warrant the team to reconsider its decision to certify these fisheries.¹² These include:

- the failure to include scores and weights on PIs in the Draft Determination;
- the erroneous interpretation of what constitutes the "management system";
- the opening the Aleutian Islands pollock fishery in January 2005;
- insufficient treatment of the litigation history and adverse legal opinions against the management system and fishery.

Scores and weights should have been included in the Draft Determination

As we have stated in the past, the Draft Determination should have included the scoring and weighting attributed to the individual PIs. As we pointed out before, stakeholders would be able to provide more informative comments to the Draft if they understand how the certification team evaluated the various PIs. Inclusion of the scores and weights in the draft is essential to

¹² Our decision to not repeat most of the concerns and arguments raised below on each PI should not be interpreted as support for the treatment of those PIs in the Final Determination. The team should review all the points raised in our comments on the Draft Determination in reviewing this objection.

understanding how the fishery was evaluated and how to comment most responsively on the Draft Determination.

Now, because scores and weights were not included in the Draft Determination, it is impossible to discern if the comments we provided on the Draft had any impact on the outcome of the Final Determination. If the scores were adjusted based on comments, it is invisible because only the final score is available and there is no previous score for comparison. In addition, it does not appear that any of the conditions changed or any new conditions were added as a result of stakeholder input. Thus, it makes one wonder whether the significant effort given to provide extensive comments on the Draft Determination was worth the time and had any impact on the Final Determination. In the absence of changed analysis from stakeholder comments, providing scores on both the Draft and Final Determinations would provide the stakeholders with a way to measure whether their comments had an impact on the final outcome.

Erroneous interpretation of the “management system”

In the Final Determination for the BSAI pollock fisheries, the certification team's scope of review regarding what constitutes the “management system” under Principle 3 is unacceptably broad. The team considers the management system to be the National Marine Fisheries Service (NMFS), the North Pacific Fishery Management Council, the U.S. Congress, the federal courts, and industry co-operatives. Instead, the team should have considered only the actions of NMFS and the Council in its analysis of the management system, the two entities that are vested with responsibility to authorize and manage the activities of the groundfish fisheries. This error is significant because it applies to the entire analysis regarding Principle 3 and the associated criteria and performance indicators. It results in the team scoring the pollock fisheries higher than if the “management system” was more narrowly construed to be NMFS and the Council.

We submitted comments on two occasions during the assessment process, asserting that the scope of the “management system” was too broad and should be narrower. We initially commented on the scope of what should be considered the “management system” when we submitted comments entitled, *“Discussion of the Alaska Pollock Fisheries Under Principle 3 Performance Indicators”* in August 2002. We stated the following, initially quoting the objectionable language written by the team regarding Principle 3, SCS Criterion 1:

Under Principle 3, SCS Criterion 1 states, “The management system has a clearly defined scope capable of achieving MSC Principles and Criteria and includes short and long-term objectives, including objectives for managing ecological impacts of fishing, consistent with a well managed fishery.” This criterion explains that “As used throughout, the term “management system” is used broadly to include both governmental and private sector components. Governmental components include all applicable governmental systems, not merely the direct regulatory function of a single agency or statute. The judicial system is intended to be considered part of the ‘management system.’ Private sector components include the fishing industry itself.”

The judicial system should not be considered part of the management system. In the case of federal fisheries reform, seeking a remedy in court is a last resort, after failed attempts to get an agency to comply with the law through

participation in regular and often lengthy Council and NMFS processes. Such processes are available to the public through notice and comment periods. Participation in court proceedings, however, is available exclusively to the parties involved in a specific lawsuit. Furthermore, resorting to litigation reflects that the Council and agency management of an issue has failed because there is no other recourse except to have a judge evaluate the situation and order the appropriate remedy. Thus, such management failure should not be considered part of the “management system.”

Despite these comments, the Draft Determination regarding certification stated the following in footnote 2 on page 122:

As used in this report, the term “management system” is used broadly to include both governmental and private sector components. Governmental components include all applicable governmental systems, not merely the direct regulatory function of a single agency such as the National Marine Fisheries Service, which clearly has the dominant regulatory role, but often is not in full control of institutional forces affecting the fishery. The judicial system is intended to be considered part of the “management system”, as is the federal legislative branch. Neither the courts nor Congress regulate the fishery in the traditional sense of the word, but from time-to-time it is undisputable that judges and legislators are deciding major issues for the fishery. Private sector components of the management system include the fishing industry itself and components thereof, such as catcher cooperatives. As both a matter of law and fact, responsibility for management of the pollock fishery lies in many hands throughout government and the private sector. The pollock management system is an intertwining of many subsystems, and it is the evaluation team’s view that the system must be assessed as a whole.

In response, we submitted the following comments, telling the team that their interpretation of the “management system” was erroneously broad:

We strongly disagree with this broad construction of the term “management system”. The management system does not consist of all or even most of the “institutional forces affecting the fishery.” Rather, the management system is that system created by federal law to manage the federal fisheries. In the case of a U.S. fishery, the management system under evaluation should be the National Marine Fisheries Service (NMFS) and, and the agency’s handling of the advice given to it by the North Pacific Fishery Management Council (the Council). These bodies have direct regulatory control of the pollock fisheries and are the sole entities that manage them. In fact the Magnuson-Stevens Fishery Conservation and Management Act, as amended by the Sustainable Fisheries Act, makes it clear that the management is comprised of NMFS and the Council.

The evaluation teams’ defining the “management system” as “all applicable governmental systems” including the judicial system, the federal legislative branch, and private sector components such as catcher cooperatives is unacceptable. This is not an inquiry into whether a democratic system of government with three distinct branches works. It is an inquiry into whether the federal fisheries management regime, defined by statute and regulation, works. The courts and Congress get involved with the fisheries management

system when it fails in some way. The judicial and legislative branches act as external correctives to the management system, not as an integral component.

The judicial system is not a part of the fishery management system, and its participation in any aspect of fisheries management does not demonstrate that fisheries management works. Rather it demonstrates precisely the opposite.

The judicial system has involvement with fisheries only when it has been demonstrated that fisheries management is illegal. That the federal courts can offer some redress for illegal fisheries management actions does not demonstrate that the fisheries management system works. To argue that it does is like arguing that the fact that one can sue a drunk driver for damages demonstrates that the traffic management system works. Courts redress wrongs. Courts correct illegal actions. Defining courts as part of the management system effectively assumes that illegal actions are par for the course. This is unacceptable.

The legislative branch is also not part of the fishery management system, and generally intervenes when some party is unsatisfied with the performance of the fisheries management system. While Congress passes the laws that affect the pollock fisheries, nobody in the Senate or House of Representatives has any formal involvement in the day-to-day management of the fisheries.

Although Alaska's Senator Ted Stevens is interested in the groundfish fisheries and has attempted to use his power as Chair of the Appropriations Committee by attaching fisheries related amendments to non-related pieces of appropriations legislation (known as riders), he does not manage the fishery.

Finally, the private sector is clearly not part of the management system. Cooperatives are comprised of corporate and private business entities that are primarily interested in making money. They are motivated by generating maximum profits and see fish as a market commodity. This is in marked contrast to government agencies that are charged with being stewards of public federal resources for the benefit of all citizens.

The broad interpretation of "management system" to include all branches of government and voluntary industry bodies has very significant consequences for this certification evaluation. It results in many of the PIs receiving higher scores than if the consideration of the management system was properly restricted to those legal entities charged with fisheries management – NMFS and the Council. If the scope of the management system was limited to the actual bodies that are involved in the daily management of the fisheries, the pollock fisheries would clearly fail under Principle 3 to meet the minimum score required for certification.

We urge the evaluation team to revise the definition of the "management system" to include only NMFS and the Council. This change would require the team to re-evaluate all PIs under Principle 3 and revise its analysis and scoring. The outcome would certainly change and result in significant downward scoring.

Unfortunately, the Final Determination did not change to narrow the scope of what constitutes the "management system." The Final Determination states the following:

It is important for the reader to understand that the assessment team's review of the "management system" has been heavily influenced by our threshold

decision to adopt a broad definition of that term. As used in this report, the term “management system” is used broadly to include both governmental and private sector components (i.e., catcher-cooperatives). And governmental components include all applicable governmental systems (i.e., the federal courts and Congress), not merely the direct regulatory function of the National Marine Fisheries Service and North Pacific Fisheries Management Council.

Our reasoning on how to conceptualize the pollock management system reflects the fact that, while NMFS and the Council clearly have dominant regulatory roles, they often are not in full control of institutional forces affecting the fishery. Neither the federal courts nor Congress regulate the fishery in the traditional sense of the word, but from time-to-time it is undisputable that judges and legislators are deciding major issues for the fishery. And they do so at the behest of stakeholders in the fishery, who seek leverage or support for their positions by opportunistically invoking the authorities of all of the branches of the U.S. federal government.

The conservation community’s comments on the draft assessment report included strong criticism of the team’s use of a broad definition of the pollock management system. They argue that the proper definition would be limited to NMFS and the North Pacific Council, and that the result of including the courts in the definition is to bias upward many of the scores awarded to Principle 3 scoring indicators. (The conservation stakeholders are silent on the question whether inclusion of Congress in the definition results in a scoring premium or discount).

The assessment team agrees that many of the scores awarded under Principle 3 are probably higher, even quite a bit higher, than they would have been if we had limited our review of the “management system” to only NMFS and the Council. We cannot rule out the possibility, cited by the conservation groups in their comments on the draft report, that the fishery’s passing score under Principle 3 rests predominately on the definition of “management system” we applied.

In asking the team to assess management of pollock by appraising NMFS and the Council in isolation from other influences, the conservation stakeholders would ask us to ignore the glaringly evident fact that the conservation stakeholders themselves regularly exert significant influence over management of the pollock fishery by invoking the authority of the courts, as well as by participating in the regulatory processes of NMFS and the Council.¹³

¹³ The Final Report states the following in reference to footnote 1 cited above:

The conservation stakeholders assert that “The judicial system has involvement with fisheries only when it has been demonstrated that fisheries management is illegal.” This statement is misleading because it ignores the very profound influence that the mere threat of litigation has on the management system. The stakeholders also complain “That the federal courts can offer some redress for illegal fisheries management actions does not demonstrate that the fisheries management system works. To argue that it does is like arguing that the fact that one can sue a drunk driver for damages

Similarly, some of the most ambitious and progressive aspects of current fishery management exist because these conservation stakeholders and others successfully petitioned the Congress to amend federal fisheries law to require, for example, protection of essential fish habitat and adoption of ecosystem-based management.

It would have been unreasonable and arbitrary to assess the pollock management system solely in terms of the roles and performance of NMFS and the North Pacific Council. As a matter of both law and fact, responsibility for management of the pollock fishery lies in many hands throughout government and the private sector and all the principal stakeholders operate with full understanding of that fact. The pollock management system is an intertwining of many subsystems, and it is the assessment team's view that the system must be assessed as a whole.¹⁴

Considering the "management system" so broadly to include any entity that might affect the management of the fisheries is incorrect and extremely problematic. The consequences of this decision are serious and far-reaching because the interpretation of "management system" directly affects the scope of review of the entire Principle 3 and associated Criteria and Performance Indicators. The Final Determination acknowledges that the outcome of the evaluation would be different if the team considered the management system to be the entities directly involved in managing the fisheries – the National Marine Fisheries Service and the body that advises it, the North Pacific Fishery Management Council:

demonstrates that the traffic management system works." This analogy is misleading. The "drunk driver" is to the highway system as an individual fisherman is to the fishery. The more apt comparison between fishery management and highway management would focus on the conjunction of governmental authorities and private sector interests involved in siting a new highway or setting the rules for use of the road once built, including penalties for violations, such as drunk driving.

¹⁴ The Final Report states the following in reference to footnote 2 cited in the text above:

We note that others have adopted an equivalent definition of the management system when trying to assess its performance. For example, a recent National Academy of Public Administration report on US fishery management says: "In a real sense, the fisheries management system is in disarray. Management is increasingly exercised by the courts through litigation, by Congress through its annual appropriations and reports, and by constituencies that seek redress through these forms. The regional councils and NMFS, which were assigned this mission by statute, are being driven to management-by-crisis due to a range of problems: litigation-related workload, court-ordered or sanctioned deadlines, process deficiencies, policy mandates, regulatory delays, inadequate resources, deficiencies in data, analyses, and science, and strained relationships between the system's managerial partners and their constituencies." National Academy of Public Administration, *Courts, Congress, and Constituencies: Managing Fisheries by Default*, p. xi (2002).

The assessment team agrees that many of the scores awarded under Principle 3 are probably higher, even quite a bit higher, than they would have been if we had limited our review of the “management system” to only NMFS and the Council. We cannot rule out the possibility, cited by the conservation groups in their comments on the draft report, that the fishery’s passing score under Principle 3 rests predominately on the definition of “management system” we applied.

Further, in footnote 55, the Final Report states the following:

It bears explaining that the assessment team’s consideration of this indicator is particularly influenced by the team’s threshold decision to consider the fishery management system to include, among other elements, the United States’ federal courts, as well as the National Marine Fisheries Service and North Pacific Council. The team’s analysis approached questions of “legal compliance” and “respect for law” from the perspective of the inter-related behavior of the various components of the system, especially the interaction of the courts and NMFS. Legal scholars, psychologists, and political scientists actively study how agency decision-making is affected by judicial review. The literature reveals strong disagreement on the question whether judicial review improves or impairs the quality of agency action, but there is no disagreement that agency rules, meaning in this case the way the pollock fishery is actually managed, ultimately manifest the energies and influences of the agency and the courts both carrying into motion the statutory directives of the Congress. (Citations omitted).

In addition, under PI 3.3, the Final Report states in relevant part the following:

The assessment team would not assign the score it did to this Indicator were it to define the management system to include only the administrative or regulatory process overseen by NMFS and the Council. But having included the federal judicial and legislative branches within the definition of the management system, it is clear that all stakeholders ultimately have access to a mechanism to place relevant information before appropriately impartial decision-makers

Please note that the team scored the fisheries an 80 on this PI and if they had defined the management system more narrowly, this PI would have scored lower and required a condition.

In sum, the certification team erred in considering any entity that deals with the pollock fishery in any way to be part of the management system. We reiterate all the comments we submitted on the Draft Determination regarding this issue. We urge the team revise its analysis and evaluate the management system, looking solely at the actions, procedures and policies of the bodies that directly manage the pollock fisheries – the National Marine Fisheries Service and the North Pacific Fishery Management Council. Such a revision will result in downward scoring of the PIs and overall lower score of the pollock fisheries, additional conditions and a failure of one or more MSC principles.

Opening of the Aleutian Islands pollock fishery

When the team evaluated the Bering Sea and Aleutian Islands pollock fisheries, fishing was not occurring in the Aleutian Islands and had not since 1998 when the Council stopped authorizing a TAC level above zero because of the fishery's impacts on endangered Steller sea lions.¹⁵ In fact, the Final Determination states that "the AI is area is currently closed to directed pollock fishing. It is not at all clear under what circumstances it would be reopened." (p. 41). In January 2005, however, the AI pollock fishery is expected to open to fishing. The following section summarizes the procedures involved in opening the AI pollock fishery for the coming January 2005 fishing season.

Procedural History of Reopening the AI Pollock Fishery

The U.S. Congress passed a rider¹⁶ (section 803) to the Consolidated Appropriations Act of 2004 (HR 2673) (CAA), now Public Law 108-199, requiring future directed fishing allowances of Aleutian Islands pollock be allocated to the Aleut Corporation. In June, the Council took final action to allocate Aleutian Islands pollock to the Aleut Corporation -- starting in 2005, the annual TAC will be 19,000 mt, with up to 40% harvested in the A season. When the AI ABC is equal to or more than 19,000 mt, the AI TAC shall equal 19,000 mt. When the AI ABC is less than 19,000 mt, the AI TAC shall be no more than the ABC. It is important to note that the Final Determination expressed concern over this very approach to setting TAC levels as not being precautionary:

Although management sets a 2 million ton cap on the total harvest of groundfish, the management of the pollock fisheries has allowed the fishing mortality rate to increase as stock declines. When pollock stock is high (as is currently the case) the TAC has tended to be set well below the ABC, whereas with low stock the TAC has usually been set as high as the ABC permits. This could still be considered precautionary if the ABC already has taken into account the effects of the pollock fishery on other components of the ecosystem. However, ecosystem considerations are predominantly qualitative and therefore not used by the stock assessment in setting ABCs.

Increases in fishing mortality as stock declines, allows the fishery to remove an increasing (though still small) proportion of the stock at smaller stock size. Since this may also reduce availability of pollock to other predators under decreased stock biomass, this could make stock recovery increasingly less likely as stock falls. (p. 87).

Failure to address the opening of the AI fishery

¹⁵ The Final Determination recognized that "The AI fishing zone has been closed to directed pollock fishing since 1998." (p. 36).

¹⁶ A "rider" is when an unrelated piece of legislation gets attached to a larger bill and there is no floor debate on the subject. The full text of this rider is found in Appendix A1 of the Revised Draft Environmental Assessment / Regulatory Impact Review for Amendment 82 to the BSAI FMP and regulatory amendments to allow the allocation of future Aleutian Islands pollock harvest to the Aleut Corporation as required by Public Law 108-199.

Overall, the Final Determination fails to address the opening of the AI pollock fishery. This omission is particularly troubling because we notified the certifier that Alaska Senator Ted Stevens was moving a rider through Congress to require the Aleut Corporation receive allocation to fish for pollock and questioned how that would affect the outcome of the Draft Determination. We regularly informed the certifier of the progress of the legislation and sent the language via email and alerted the certifier about the final Congressional approval of Consolidated Appropriations Act of 2004 (HR 2673) (CAA), now Public Law 108-199 that authorized allocation of Aleutian Islands pollock to the Aleut Corporation in Section 803. Throughout we have asserted that the Council's initiation of fishing in the Aleutian Islands after there has been none authorized since before 1998 is a significant change from the status quo that the team evaluated and questioned how this would affect the conditions. Despite being given extensive notice about the "Steven's rider" and the implications of opening fishing where none has occurred for six years, the team finalized its Determination without adequately changing its analysis to address this significant and material change from the status quo that the team considered in deciding to certify the fishery.

In several Performance Indicators (PIs) under Principle 1 and throughout others under Principles 2 and 3, the report recognizes serious problems with the Aleutian Islands pollock fishery and the management system. The team expressly states that it scored certain PIs higher because of the fact that no fishing is occurring in the Aleutian Islands so that was sufficiently precautionary to address some of their concerns.

The following section references PIs that discuss the closure of the AI which resulted in higher scores for individual PIs and thus the overall score assigned to a Principle.

Principle 1, PI 1.1.1.3 states the following:

The Aleutian Islands stock is managed at tier 5, which does not involve a reduction in exploitation rate at low stock sizes. As already noted, the exploitation rate for this stock rose dramatically as the stock declined, prior to the imposition of the zero TAC (Barbeaux et al, 2003). The ABC for the AI stock under the tier 5 rules was over 39,000 tons in 2003 (Ianelli et al., 2002). *Although the AI stock would appear to score at the 60 level based on the nature of the tier 5 rules, a higher score recognizes that the area has been closed to directed pollock fishing in recent years, despite an allowable ABC.* However the management of the AI stock does not meet the 80 scoring standard because the current arrangements are ad hoc. (p. 46, emphasis added).

The text under this PI notes the existence of the rider that would open the AI fishery: "The team noted that there have been recent moves to reopen part of the AI fishery under a rider to an Appropriations bill (effectively over-riding the current closure), and *would be concerned if the fishery were reopened* under the current form of the tier 5 rule." (p. 46, emphasis added).

To address the fishery's deficiencies under this PI, the team requires the following condition:

To meet this condition, the fishery must ensure that the AI stock is above the minimum threshold (Bmsy or a suitable proxy) before the fishery can be reopened, and that any ABC and TAC established for the Aleutian Islands is at least as precautionary as that which would be achieved by applying the

harvest control rule used by the management authority for establishing the ABC and TAC for the EBS pollock fishery, which explicitly takes into account uncertainties in the assessment.

Should the AI portion of the fishery be re-opened under the above state circumstances, the fishery needs to additionally meet one of the two alternatives shown below before the area is fished for a second year:

- Improve the assessment for the AI stock so that it meets at least tier 3 information requirements, and also implement zero ABCs at stock sizes below $B_{20\%}$, (as for EBS and GOA stocks); or
- Formalize a revised harvest control rule, applicable at level 5 information requirements, which will protect the stock at low stock sizes at least as well as the current strategies for EBS and GOA stocks (which involve reductions in exploitation rate below B_{MSY} and closure below $B_{20\%}$).

If the first alternative is adopted, the resulting harvest strategy should subsequently be tested for robustness as outlined in the condition for scoring indicator 1.1.1.5 (as part of meeting that condition and on the same time frame as the condition for 1.1.1.5). If the second alternative is adopted, the fishery should not be opened until the new proposed strategy has been tested as outlined for condition 1.1.1.5.

While it is appropriate that the team recognized the existence of the rider which may open the fishery (and it should have throughout its analysis but did not otherwise), the condition is not stringent enough given the stated concerns regarding the AI pollock fishery and problems with its management. Because the rider is now law, this condition is not required to apply until the second year that the AI fishery is to occur. In the Draft Determination, the team found the AI pollock situation sufficiently distressing to require this and other conditions “to be met prior to the opening of the AI zone to directed pollock fishing,” (Draft Determination, p. 49), and did not include a blanket waiver of the implementation of this condition until the second year. It can only be assumed that the team changed its mind at the industry’s request or as a result of the rider. A more appropriate response would either be to require the fishery achieve the condition prior to any fishing occurring as the team deemed necessary in the Draft Determination, or scoring this and any PIs linked to this condition at the failing level if the fishery opens in January without achieving the condition’s requirements.

The following are additional PIs that recognize the closure of the AI pollock fishery and either expressly or implicitly score the EBS / AI fisheries higher because of the presumed AI closure.

Principle 1, PI 1.1.2.2 states: “*For AI pollock, the current closure of the area to directed pollock fishing and very low by-catch limits imply very low exploitation rates. OFL limits for AI pollock are set at $M=0.3$ and are well below F_{MSY} . The closure to directed fishing is explicitly to protect predators. This suggests a score for AI pollock close to 100.*” (p. 54, emphasis added).

Principle 1, PI 1.1.2.3.3 states “Stock assessments explore sensitivities to assumptions, parameters and data, and key sensitivities are taken into account in the harvest strategy.” The report states:

Sensitivity tests are not routinely undertaken for the AI stock, but this partly reflects its tier 5 status *and the current closure to directed pollock fishing*. Nevertheless, the method is clearly sensitive to the need to use an absolute estimate of stock abundance in applying the tier rule. It has been argued that basing the absolute estimate on use of the trawl survey assuming a catchability of one is precautionary. This assertion needs to be better supported (see comments and conditions for indicator 1.1.1.4).

Under the Principle 2 section entitled, "Pollock Abundance," the report states the following:

We note that the status of Aleutian Island pollock is much less certain. Fishery independent biomass estimates declined sharply from the mid 1980s to the mid 1990s (to about 20% of peak levels), with circumstantial evidence of sequential spatial depletion of stocks. *However, the AI fishery has had a zero TAC since 1998, to address a variety of concerns.* (p. 79, emphasis added).

Principle 2, PI 1.3.3 provides: "Data on spatial and temporal variations in abundances of animal populations and communities have been synthesized into a set of internally consistent explanatory hypotheses that can provide the basis for making predictions about future system states and consequences of management actions." The report states:

However, in the AI the fishery was closed as a precautionary measure that was intended to remove any (putative) impacts of the fishery on SSLs and the wider ecosystem of that area. Although this closure represents precautionary management exceeding the expectations enumerated by the 80 scoring criteria, the score for EBS/AI as a whole is based in part on the fact that there is not a systematic management approach that has been used in similar circumstances such as the prolonged decline in northern fur seal numbers.

It appears that the closure of the AI fishery helped the fisheries score as high as it did regarding this PI. If the AI fishery were open to fishing when analyzed, this PI likely would have scored lower than it did.

Principle 3, PI 4.1.1 states "Catch levels are set to maintain high productivity of the target population and the ecosystem." The report notes:

In addition, the Aleutian Islands fishery, added positively to the overall score because it can be conclusively shown to be having no adverse impacts on anything at present because no harvest is occurring there. The absence of fishing pressure probably is helping the as-yet-unfinished recovery and rebuilding efforts for depleted local pollock populations. (p. 202, emphasis added).

Again, it is likely that if the AI fishery were open, the analysis under this PI would have been different and the score lower.

Principle 3, PI 4.1.6 states "Provides for rebuilding and recovery, where applicable." The report states the following regarding the AI stock:

The team notes with some concern that there are particular, much smaller, populations in the Aleutians and the Bogoslof areas that are in much less certain condition having in the recent past been as low or lower than B_{35} , and for which rebuilding has been a much slower process. *However, the assessment team also recognizes that the current management arrangement for both these areas has been to set a zero TAC, which is as much as can be accomplished toward rebuilding.* (p. 208, emphasis added).

The team scored this PI at 85. Quite possibly if the AI fishery were evaluated when it was open, this PI could have resulted in a lower score.

Principle 3, PI 4.1.7 provides "Applies closures or restrictions when catch limits reached." The report states "*The Aleutian Islands fishery is effectively closed, thus doing quite well in terms of this indicator.*" (p. 209, emphasis added).

The team scored this PI at 100 and as such, a lower score is likely if the AI were open when reviewing the fishery under this PI.

Inflated PI scores

Analyzing the AI pollock fishery under the closed scenario resulted in scores on individual PIs that are higher than deserved if the AI pollock fishery is open, which will be the situation when the next fishing season begins in January. Scoring individual PIs higher means the overall Principles receive higher scores. Fairness dictates that the team re-evaluate the AI pollock fishery to consider the how it scores when the AI pollock fishery is open. The team should consider the information contained in the final Council motion from June, the Revised Draft EA / RIR and the Supplement to the AI Pollock EA / RIR, the upcoming regulatory amendment and Fishery Management Plan (FMP) amendment that NMFS is drafting to open the AI pollock fishery and any other documents that regard the AI pollock fishery.

Lack of consideration of AI pollock entirely resulted in higher scored PIs

The Final Determination fails to address the AI pollock fishery under some PIs because those PIs evaluate aspects of stock assessments. Stock assessments are not done for the AI pollock stock because insufficient information exists about AI pollock to conduct such an assessment. As such, the stock is managed in "Tier 5" under the Council's system to manage fish stocks which is based on the amount of information known. The Final Determination reasons that the team did not evaluate the AI stock under Principle 1, PI 1.1.2.3.2 and PI 1.1.2.3.4.6 because the AI assessment is not based on a stock assessment model. Consequently, the team only scored the EBS stock which resulted in a higher score than if the AI were considered.

PI 1.1.2.3.2 states: "Stock assessment methods are statistically rigorous." The team scored the fisheries higher under this PI than warranted, reasoning that "This indicator is not relevant to the current (2002) AI assessment (since it is not based on a stock assessment model), and so the score reflects only the EBS performance." (p. 56). This rationale makes no sense. The fisheries should not be rewarded with a higher score because so little is known about the AI stock that cannot be evaluated using a stock assessment. Instead, the team should score this PI downward to account for this deficiency in information about the AI stock.

By not scoring this PI considering the noted deficiencies regarding the AI stock and scoring only the EBS stock, the team scores the fisheries higher overall than they deserve. The team has the discretion to link the condition for this PI to another PI as it implies regarding PI 1.1.1.5, however, it should not gloss over scoring the fisheries as their analysis merits. This should result in a downward score.

PI 1.1.2.3.4.6 states “There is knowledge of environmental influences on stock dynamics.” The report states:

Little attention is currently paid to effects of environmental variability for the AI stock, but FOCI data are available to investigate possible impacts. While the AI therefore appears to meet the 60 guidepost, the current tier rule and form of assessment for this area do not allow for consideration or incorporation of environmental variability. Rather than impose a condition to force such explicit consideration for AI, which would be difficult to implement or act on given the current form of assessment, it was considered by the SCS evaluation team to be much more fruitful to address the general issue of the robustness of the overall harvest strategies to environmental variability (both short and medium term), as required by the condition set for indicator 1.1.1.5, and to implement an appropriate management response to that condition.

The score for this indicator therefore reflects the score for the EBS.

Moreover, avoiding consideration of the AI stock because of the lack of a stock assessment is contrary to the treatment of the AI fishery under PI 1.1.2.3.1 where the team imposed a condition specifically because there is no quantitative assessment model for AI pollock.¹⁷ The team should score the above PIs downward to account for the problems with the AI stock that render it incapable of being assessed using the stock assessment model.

Lack of compliance with Domestic Law

¹⁷ On page 55, the report states:

There is no (recent) quantitative assessment model for AI pollock. This is not required for a stock managed at tier level 5, but as noted in the evaluations for scoring indicators 1.1.1.3 to 1.1.1.5, the tier 5 harvest strategy may not be a robust one. The latest SAFE report (Iannelli et al, 2002) notes that further efforts are being made to develop an appropriate assessment model for the AI stock. The AI fishery therefore does not meet the 80 scoring guidepost for this indicator. (Subsequent to the release of the draft SCS report, Barbeaux et al (2003) have presented a preliminary quantitative assessment model for AI that does appear to meet the 80 scoring guidepost).

The overall score for this indicator reflects the limitations of the AI analysis.

The Final Determination erred in its analysis of Principle 3, PI 2.2 and scored the fisheries higher than deserved. The team should have found that the fisheries failed this PI according to the 60 Scoring Guidepost.

Principle 3, PI 2.2 states the following:

The fishery is managed and conducted in a manner that respects domestic law
[Relates to MSC Criterion 3.16]

Elements considered in scoring include:

- Consistency and quality of compliance with federal law (efforts to assure compliance, reasons for incidents of non-compliance, severity of consequences of non-compliance)
- Integration of compliance requirements among the multiple domestic legal regimes that apply to the fishery

100 Scoring Guidepost

- The management system is in compliance with all substantive and procedural aspects of applicable domestic law
- The management system, including its component institutional entities, has not been found at any time to be in willful violation of any order of any domestic court of jurisdiction on any matter related to performance of any statutory duty concerning the pollock fishery
- No officer or agent of the management system, including its component entities, has at any time been found to be in contempt of any domestic court of jurisdiction on any matter related to performance of official duties on behalf of the management system concerning the pollock fishery
- The management system regularly and consistently seeks and uses appropriately the advice of experts in domestic law, including independent experts

80 Scoring Guidepost

- The management system makes consistent, good faith efforts to be in compliance with all substantive and procedural aspects of applicable domestic law
- The management system, including its component institutional entities, has not been found repeatedly by any domestic court of jurisdiction to be in violation of any significant aspect of any domestic law related to protection of the human or natural environment, individual species, ecosystems, or fishery dependent communities
- The management system has access to and makes use of experts in domestic law.

60 Scoring Guidepost

- The management system fails to reliably monitor and assure its compliance with all substantive and procedural aspects of applicable domestic law

- Harvest management decisions made by fishery managers are regularly overturned or disallowed upon review by judicial authorities based on the same or substantially similar (i.e., chronic) violations of applicable substantive law

The team scored this PI a 65 and stated the following rationale:

The assessment team, mindful of the significance of this indicator, solicited and received specific advice from legal counsel for APA, NOAA, and conservation stakeholders. Their advice led us to conclude that the management system generally respects domestic law -- and that is what this indicator sets as a minimum threshold in order that the fishery be eligible for certification. Respect is different from enthusiasm or alacrity or perfection. This indicator does not require that the fishery management system be in perfect minute-to-minute compliance with every single piece of substantive and procedural law that governs the pollock fishery. It would elevate form over substance to set the bar that high and we did not do so. But compliance with the law is certainly the most revealing evidence of respect for the law, and the evidence here is very problematic.

The management system's record of compliance with domestic law, as evaluated over at least the last decade, reveals a number of instances where federal fishery managers have taken actions relevant to the pollock fishery that were challenged and overturned in court. When a federal court concludes that an agency action does not fulfill the requirements of a law, the agency is by definition "not in compliance" with applicable law.

For example, the U.S. District Court for the Western District of Washington has ruled that NMFS is not in compliance with NEPA with respect to North Pacific groundfish management. The U.S. District Court for the District of Columbia has ruled that the NMFS is not in compliance with NEPA with respect to promulgation of rules for designation of essential fish habitat as required by the Magnuson-Stevens Act. The U.S. District Court for the Western District of Washington has repeatedly found important infirmities in NMFS' compliance with the Endangered Species Act in connection with North Pacific groundfish fisheries' impact on Steller sea lions.

Disagreements among stakeholders about how the fishery ought to be managed, or disagreements between stakeholders and regulators, no matter how intense, do not of themselves demonstrate that the management system is failing to respect domestic law. Indeed, it may easily reveal that the system is working exactly as the law intends. Complex laws and complex facts, such as those associated with the pollock fisheries, can make compliance difficult despite good faith efforts to meet legal requirements. That said, a pattern of instances where agency decisions are overturned in court on the same or similar grounds does give rise to the inference that the agency has failed to give the law the respect it is due. And the basis on which an agency is found out-of-compliance can, and did in this case, reveal factors that were relevant to scoring of this indicator.

The assessment team has a concern that is directly related to NMFS' approach to the most recent biological opinion on Steller sea lions (the "2001 BiOp"). The team reviewed the 2001 BiOp, the BiOp that preceded it (the "FMP BiOp"), and related technical reports and we were not able to discern the scientifically determinative character of the new information--satellite tracking data on the movements of several sea lions over a limited period of time--cited by NMFS as the basis for authorizing significant changes in the location and timing of the pollock fisheries, particularly insofar as those changes resulted in increased fishing in areas designated as critical habitat for Stellar sea lions and in areas of known fur seal foraging.¹⁸

The conservation stakeholders challenged the 2001 BiOp in federal court citing, among other alleged shortcomings, the same concern noted by the assessment team. The federal court upheld the conservationists' challenge on that very ground, finding that NMFS had not performed "the necessary analysis of the impact of the [new biological opinion's recommended harvest criteria] on Steller sea lions, their prey, and their critical habitat." The court ordered NMFS to prepare the analysis missing from the 2001 BiOp.

It is among the most worrisome signs of failure to respect domestic law that an agency would not properly analyze or explain the basis for a major decision on a controversial matter that the agency had litigated and lost before, meaning, in this case, sea lion conservation. NMFS itself has testified before the U.S. Congress that the agency is well aware that it has a chronic problem successfully meeting the terms of NEPA and the ESA and that the courts were taking a dim view of the agency's administration of the law (Hogarth, 2002). A former NMFS director testified (Dalton, 2002) before Congress that:

Beginning in 1996, legal challenges have risen from an average of 1 or 2 each year to a current high of 26 in 2001. While much of the rise has been blamed on enactment of the Sustainable Fisheries Act, a larger proportion of the new cases have been challenges under the National Environmental Policy Act, the Endangered Species Act and the Regulatory Flexibility Act....

¹⁸ The report includes the following footnote:

The management system's receptivity to and use of the newly reported sea lion tracking data gave the evaluation team the impression of having been based on a less rigorous standard of scientific proof and conservatism than the standard normally applied within this system to new research results or other information submitted in connection with management of the fishery. The assessment team heard from many individuals both inside government and out that the data was applied in an expedient way through a less-than-open process tailored to prevent the economic harm feared from certain proposed area closures. Others we interviewed defended the process and the use of the data. On balance, the team felt the critics had the more convincing perspective. See the detailed discussion of the tracking data issue under Principle 2, Indicator 1.2.1

More troubling than the cases themselves has been the decline in the ability of NMFS to prevail when agency decisions are challenged. Before 1994, the government lost very few cases. In recent years, however, this record has been reversed and in the last four years the agency has lost more cases than it has won. This gives rise to expectations of success by other potential litigants, and issues that might have been resolved by the give and take of the regulatory process are remanded for consideration by the courts.

NMFS' problem stems from many sources, some of which are in the agency's power to change and some of which are not. The assessment team's perspective on this indicator is heavily influenced by the equivocal impression given by NMFS officials interviewed by the assessment team concerning the agency's determination to take measures in-house to improve its ability to meet the terms of those laws. In brief, some officials clearly believe that the agency's compliance problem results from bad laws, hostile stakeholders and litigants, unreasonable judges, or all of them together. Other officials assign fault to the agency's complex internal structure, diverse and evolving mission, and limited resources.

The assessment team is aware that NMFS, with assistance from NPFMC and others, is taking steps to bring the management of the fishery into compliance with NEPA, ESA, and the Magnuson-Stevens Act. Importantly, NMFS, APA, and the conservation stakeholders recently agreed to settle pending litigation on terms that have been adopted by the federal court and entered as an order to the parties, effective April 1, 2003. The order covers all of the significant NEPA and ESA compliance matters that have been the subject of recent disputes among the parties. The settlement among the parties requires NMFS to bring the management of the North Pacific groundfish fisheries into full compliance with NEPA and the ESA (as to the issues under litigation) within certain timeframes set for this year and in 2004. It appears that the agency is on schedule to complete the analyses required under the settlement, although the PSEIS received voluminous adverse comment from some stakeholders.

The assessment team notes that the PSEIS in preparation for the groundfish management plan is quite impressive in its scope and depth and analytical sophistication. Indeed, the team has relied extensively on the first draft of that document in performing our evaluation of the fishery. The PSEIS, when finished as ordered by the court, may come to serve as an analytical resource that will support better-informed and even more successful management of the pollock fisheries. The PSEIS may come to represent a transformational force in the history of the pollock management system, a tool that allows the Council and NMFS to integrate ecosystem, listed species, habitat and other considerations fully into the fishery management planning process. It has that potential.

But the agency has not yet completed the work ordered by the court and a great deal of difficult work and decision-making remain to be done. NEPA does not require decision makers to make good decisions about implementing the Magnuson-Stevens Act or ESA; it simply requires that they have the information to do so if they choose to. The pattern of past compliance

difficulties raises the question whether the management system will indeed perform its obligations in a manner that shows the measure of respect for domestic law contemplated by this indicator.

Condition

To improve the deficiencies in performance for this indicator, the fishery is required to remain in compliance with the pertinent outstanding orders of the U.S. District Court for the Western District of Washington and the settlement reached before the U.S. District Court for the District of Columbia in the EFH controversy. The fishery must, in particular, meet the terms of the Order dated April 1, 2003, which sets specific deadlines in 2003 and 2004 for completion of ESA- and NEPA-related analyses and procedures. That Order requires NMFS to revise its 2001 Steller sea lion biological opinion not later than June 30, 2003 and to issue the final PSEIS (and a decision based on the analysis) not later than September 1, 2004. The revised Steller sea lion biological opinion was signed on June 19, 2003.¹⁹ As of May 2004, NMFS reports that it expects to release the final PSEIS in June 2004, and will issue a final Record of Decision based on the EIS not later than September 1, 2004.²⁰

The assessment team advises that it will be strongly inclined to reconsider the score for this indicator if harvest regimes are set for upcoming years that have the result of placing harvest activities in areas of designated critical habitat for ESA-listed species unless the impacts of those activities on listed species are analyzed and documented in a manner consistent with the high standards of scientific technique and public involvement of which the fishery management system is capable. The scoring of this indicator will be revisited, and likely revised downward, if a court finds that the fishery is being managed in a manner that fails to comply with any significant provision of applicable law, whether or not the issue in question has been the subject of prior disputes.

While the above analysis indicates that the team comprehends the significance of the litigation history involving the pollock fisheries and NMFS and the Council, the Final Determination fails to score properly the fisheries according to the PI's scoring guideposts. The distinction is absurd that the fisheries pass this PI because the management system "respects" the law, although it has demonstrated a severe problem in complying with the law. As the report notes the best way to show that you respect the law is to actually comply with the law. The protracted litigation history to protect Steller sea lions and the ecosystem from the fisheries' impacts and the numerous court rulings against the management of the pollock fisheries should speak volumes about this PI and result in a failing score.

The 60 Scoring Guidepost provides that:

- The management system fails to reliably monitor and assure its compliance with all substantive and procedural aspects of applicable domestic law
- Harvest management decisions made by fishery managers are regularly overturned or disallowed upon review by judicial authorities based on the same or substantially similar (i.e., chronic) violations of applicable substantive law

¹⁹ <http://www.fakr.noaa.gov/protectedresources/stellers/biop2002/703remand.pdf>

²⁰ <http://www.fakr.noaa.gov/sustainablefisheries/seis/news13.pdf>

These bullets perfectly exemplify the management system situation in the North Pacific. The team should review the legal history that we have provided in previous comments. This will demonstrate that NMFS and the Council failed “to reliably monitor and assure its compliance with all substantive and procedural aspects of” National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). The comments should illuminate that the management decisions regarding the pollock fisheries have been “regularly overturned or disallowed upon review by” the federal district court “based on the same or substantially similar (i.e., chronic) violations of” NEPA and the ESA.

The team recognized the fisheries’ and management system’s significant problems in complying with this PI. However, the Condition required to address the fisheries’ deficiencies regarding this PI is incredibly troubling. The first part of the Condition for this PI fails to add any new requirement to the already existing legal requirements as set out in the April 1, 2003 court order. Regarding the statement in the second part of the condition that the team “will be strongly inclined to reconsider the score for this indicator if harvest regimes are set for the 2003-2004 fishery that have the result of placing harvest activities in areas of designated critical habitat for ESA-listed species,” in our comments on the Draft Determination we urged the team to require NMFS to provide immediately this information to determine if harvest regimes for the upcoming fisheries will allow catch in Steller sea lion critical habitat. We also asserted that if the team scored the fisheries above the 60 SG level and thus required a condition, it should require management measures that require more precaution given the significant legal compliance problems to date. “This includes reduced ABC and TAC levels, including adequate consideration of uncertainty, and no trawl fishing in SSLCH.” (Comments on *The MSC Assessment Report for the United States Bering Sea and Aleutian Islands Pollock Fisheries*, p. 74). In the Final Determination, the team failed to alter its analysis or the associated Condition. This is particularly distressing because the failure to comply with domestic law is the fisheries’ and management system’s most obvious weakness because it has already been extensively documented and adjudicated by the federal court. The team’s failure to include a condition of substance that requires serious change in the way these entities do business is to say the least distressing. It raises the question of whether the team intended to give away this certification because it failed to take the opportunity to require change regarding the PI where the fisheries scored the lowest in the entire assessment.

Conclusion

The MSC assessment process for the Alaska pollock fisheries has been a long and time-consuming process. We are disappointed in the team’s decision that these fisheries should be certified according to the MSC Standard. For the reasons stated in our previous comments and in this Objection, the team made a serious mistake in its Final Determination. Certifying a fishery with a history of depleted stocks, significant ecosystem impacts and staggering management problems is a grave error. The pollock fisheries and their management are not models for the world’s fisheries. In so many ways, their problems provide examples of how not to conduct fisheries. We sincerely hope that the certification team reconsiders its decision and ultimately concludes the Alaska pollock fisheries do not deserve to bear the distinction of MSC certification and its label. We fear that a decision to certify will haunt the certification team and the Marine Stewardship Council.