

# **DECISION OF THE INDEPENDENT ADJUDICATOR IN THE MATTER OF AN OBJECTION TO THE FINAL REPORT AND DETERMINATION ON THE PROPOSED CERTIFICATION OF THE PACIFIC HAKE MID-WATER TRAWL FISHERY IN ACCORDANCE WITH THE MSC PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING**

## **INTRODUCTION AND PROCEDURAL BACKGROUND**

1. This is the decision of the MSC Independent Adjudicator relating to a notice of objection jointly filed by Oceana Inc., a non-profit organization with a strong interest in marine conservation, and the Monterey Bay Aquarium, Monterey, California, against the proposed certification, in accordance with the Marine Stewardship Council's Principles and Criteria for Sustainable Fishing ("MSC Principles and Criteria"), of the Pacific Hake Mid-Water Trawl Fishery carried out off the western coast of the United States and Canada in waters under the national jurisdiction of the U.S. and Canada.

2. In accordance with the MSC's Fisheries Certification Methodology, or "FCM" (the relevant version of this document being version 6, issued September 2006), a full assessment of the Pacific Hake fishery was conducted by an accredited certification body, TAVEL Certification Inc., between May 2007 and May 2009. The final report of the certification body, which is the subject of the present objection, was issued on 19 May 2009. The determination of that report was that, subject to certain conditions set out in chapter 10 of the report, the Pacific Hake fishery should be certified as a sustainable fishery in accordance with the MSC Principles and Criteria. The particular units of the Pacific Hake fishery to be certified (known as "the subject fishery") are described in the final report of the certification body and include (a) the mid-water trawl fishery for Pacific Hake (*Merluccius productus*) conducted in offshore Pacific waters in the U.S. exclusive economic zone, including the Makah tribal fishery, but excluding inshore coastal stocks native to Puget Sound and Strait of Georgia and (b) the mid-water trawl fishery for the same species conducted in the Canadian exclusive economic zone by vessels represented by the Association of Pacific Hake Fishermen.

3. In accordance with the MSC's Objection Procedure as set out in Section 4 of the FCM and subsequently revised by TAB Directive D-023 of 12 February 2009 (hereafter referred to as "the OP"), Oceana Inc. and the Monterey Bay Aquarium jointly filed a notice of objection to the final report of the certification body on 9 June 2009. The notice of objection was posted on the MSC website on 15 June 2009 which is of relevance in so far as that date then became the "date of publication" for purposes of the various timelines set out in the OP. Subsequently, and in accordance with the OP (§4.4.6), written representations on the matters raised in the notice of objection were received from the Pacific Whiting Conservation Cooperative, Greenpeace U.S.A. and the Marine Fish Conservation Network. The certification body provided its written response to the notice of objection on 15 July 2009 (the timeline for submission having been slightly extended to take account of U.S. and Canadian public holidays).

4. Following consultations conducted by telephone and email with the objectors, the subject fishery and the certification body, I reached the conclusion that, notwithstanding a written proposal submitted by the objectors on 31 July 2009, there was no "real and imminent prospect" of reaching a

negotiated solution to the concerns raised in the notice of objection that would be acceptable to all parties and therefore, on 13 August 2009, I formally notified all parties of my decision to proceed to formal adjudication. After further consultations, it was agreed between all parties that the oral hearing of the objection would take place on 14 September 2009 in San Francisco, California.

5. At the oral hearing, the objectors were represented by Michael LeVine, Pacific Senior Counsel, Oceana; Ben Enticknap, Pacific Project Manager, Oceana; Ed Cassano, Director, Sustainable Seafood Initiative, Monterey Bay Aquarium; Geoff Shester, Senior Science Manager, Monterey Bay Aquarium; and Sarah Winter Whelan, Pacific Counsel, Oceana. The certification body was represented by Steve Devitt, Lead Auditor and Operations Manager, TAVEL Certification Inc., Dr Max Stocker and Dr Mark Pedersen, both members of the assessment team. The subject fishery was represented by Dan Waldeck and Jan Jacobs, both of the Pacific Whiting Conservation Cooperative and Shannon Mann, of the Association of Pacific Hake Fishermen. Technical support was provided by Dan Averill of the MSC's U.S. office.

6. During the hearing, which took place on 14 and 15 September 2009, I heard oral arguments from all parties on the issues raised in the notice of objection. Prior to the hearing, I also received a bundle of supplementary documentation from the objectors pursuant to §4.7.4 of the OP. I wish to express appreciation to all parties for the exhaustive, yet very clear, manner in which they presented their respective submissions and for the courteous and constructive spirit in which the proceedings were conducted. At the end of the hearing I indicated that I would reserve my determination in order to fully consider the various issues raised.

7. Before dealing with the substance of the objection it is necessary to recall that the object and purpose of the OP, as revised and promulgated by MSC in February 2009, is "to provide an orderly, structured, transparent and independent process" by which objections can be resolved. The function of the Independent Adjudicator is to examine the claims made in a notice of objection and to make a written finding as to whether the certification body made an error which "materially affected" the outcome of its Determination. Only if such an error can be identified, and there is a "real possibility" that the certification body may have come to a different conclusion, may the Determination be remanded back to the certification body for reconsideration. More specifically, the Independent Adjudicator is required to issue a decision in writing either confirming the Determination by the certification body or remanding the Determination. Under §4.8.2 of the OP, a remand can only be ordered where the Independent Adjudicator determines that one or more of the following circumstances applies:

- (a) there was a serious procedural or other irregularity in the fishery assessment process that made a material difference to the fairness of the assessment; or
- (b) the score given by the certification body in relation to one or more performance indicators cannot be justified, and the effect of the score in relation to one or more of the

particular performance indicators in question was material to the outcome of the Determination, because:

- (i) the certification body made a mistake as to a material fact; or
  - (ii) the certification body failed to consider material information put forward in the assessment process by the fishery or a stakeholder; or
  - (iii) the scoring decision was arbitrary or unreasonable in the sense that no reasonable certification body could have reached such a decision on the evidence available to it; or
- (c) it is necessary to remand the Determination in order to enable the certification body to consider additional information described in Section 4.7.5(b) and described in the notice of objection. In such a case, the remand shall be limited to a request to the certification body to consider the impact of the additional information on its original Determination and to provide a response in accordance with Section 4.9.2.

§4.7.5(b) describes the category of “additional information” which may necessitate a remand as

any additional information, not forming part of the record, that is relevant to the circumstances at the date of the Determination that:

- (i) was known or should reasonably have been known to any party to the assessment process, and
- (ii) should reasonably have been made available to the certification body during the assessment process, and
- (iii) if considered, could have made a material difference to the outcome of the assessment;

8. The necessary implication of the provisions of §4.8.2 as set out above is that the Independent Adjudicator has no discretion to remand the Determination for any reason not set out in §4.8.2. and thus in all other circumstances, the Determination of the certification body must be confirmed.

9. The OP (§§4.7.5 and 4.7.6) further provide that:

4.7.5. The Independent Adjudicator shall evaluate objections solely on the basis of:

- (a) the record, which shall include and be limited to:
  - (i) the Final Report of the certification body and the record of oral, written and documentary evidence, submissions and reports that were provided to it during the assessment process;
  - (ii) the notice of objection;
  - (iii) any written representations submitted pursuant to Sections 5.4.6 and 5.6.4;
  - (iv) any representations made by any party at an oral hearing pursuant to these procedures;

- (v) other clarifications required by the Independent Adjudicator;
- (b) any additional information, not forming part of the record, that is relevant to the circumstances at the date of the Determination that:
  - (i) was known or should reasonably have been known to any party to the assessment process, and
  - (ii) should reasonably have been made available to the certification body during the assessment process, and
  - (iii) if considered, could have made a material difference to the outcome of the assessment;
- (c) the MSC Principles and Criteria for Sustainable Fishing; and
- (d) the Fisheries Certification Methodology and the Fisheries Assessment Methodology current at the time of the assessment in question, together with Directives, Guidance and amendments thereof made by the MSC Technical Advisory Board and the Board of Trustees, any related interpretations to these documents whether or not of mandatory effect with regard to certifying body compliance made by the MSC Executive and the MSC Accreditation Manual.

4.7.6. The Independent Adjudicator may not consider issues not raised in the notice of objection, even if the Adjudicator is of the view that a particular issue should have been raised. In no case shall the Independent Adjudicator substitute his or her own views or findings of fact for those of the certification body.

## **THE GROUNDS FOR THE OBJECTION**

10. As set out in the notice of objection and as further developed by the objectors during the oral hearing, there are essentially three grounds for objection to the final report of the certification body. First, it is asserted that the certification body failed to consider important evidence that was or should reasonably have been available to it, namely a 2009 assessment of the status of Pacific Hake stocks in U.S. and Canadian waters and related documents, that would have made a material difference to the outcome of the assessment. It is argued that the failure to consider this information requires a remand under §4.8.2 (a) and (c). Second, it is asserted that the scores given by the certification body in relation to a number of the performance indicators established by the certification body cannot be justified for one or more of the reasons specified in §4.8.2 (b) of the OP. Thirdly, it is asserted that there was a serious irregularity in the fishery assessment process in that certain specific performance indicators established by the certification body do not ensure compliance with the relevant MSC Principles and Criteria and that such irregularity made a material difference to the fairness of the assessment. I will deal with each of these issues in turn, beginning with the material relating to the 2009 stock assessment.

**(A) The 2009 Stock Assessment**

11. The objectors assert that a number of documents relating to the 2009 stock assessment for Pacific Hake were available to the certification body prior to the release of its final report and should have been considered by it. Specifically, these documents included the following:

- (a) Stock assessment of Pacific Hake in U.S. and Canadian waters for 2009;
- (b) Pacific Fishery Management Council (PFMC) 2009 supplementary Scientific and Statistical Committee (SSC) report, March 2009;
- (c) PFMC Supplemental Groundfish Management Team (GMT) report; and
- (d) PFMC Council Decision, March 2009.

The full sources of the relevant documents are referred to in the notice of objection and were included as Attachments 17, 19, 21 and 23, respectively, of the objectors' bundle of supplementary information. The significance of this material, it is contended, is threefold: taken as a whole it shows a substantial downward trend in the Pacific Hake stock; it demonstrates that the 2008 stock assessment, on which the certification body placed undue weight, was seriously flawed and; it provides strong evidence that the fishery is being managed in a manner inconsistent with MSC Principle 1 in that it is not being conducted in a manner that "does not lead to over-fishing or depletion of the exploited populations".

12. For its part, the certification body accepts that it did not take the 2009 information into account in preparing its final report, although it knew that the information existed and accepts that the material was available to it. Its position (and that of the fishery clients) is that it was not required to take into account the information because the fishery assessment was essentially complete before the information became available and the information could not therefore have been considered without re-opening the assessment process, which would have been practically impossible. Furthermore, the certification body and the fishery clients do not agree either that the 2009 information casts doubt on the 2008 assessment to the extent asserted by the objectors or that the management decisions taken by the PFMC in consequence of the 2009 assessment are inconsistent with proper management of the fishery; in other words, even had the material been considered, it would have made no material difference to the outcome of the assessment.

13. In their submissions, the objectors pointed out that the FCM provides no guidance as to the cut-off date for the consideration of information relating to the fishery. On the contrary, in stating that a full assessment is the "formal and public evaluation of a fishery against the MSC's Principles and Criteria", the FCM makes it clear that the assessment process is not complete until a certificate is issued. The only reference to timing is found at Section F (Step 4) of the FCM (at page 13), which states that "For a successful certification assessment the issuing of a certificate marks the end of the assessment process." It is simply not open to the certification body to limit its analysis by selecting an arbitrary cut-

off date for the consideration of relevant information, particularly when that information is of sufficient import to cast doubt on the conclusions already reached by the certification body.

14. In response, the certification body pointed out that the fishery assessment process is not a simple process. It is in fact a long and highly complex process, which requires considerable precision in planning and is designed to allow for maximum input by stakeholders prior to the issue of a reasoned final report. In the case of the Pacific Hake fishery, the assessment process began in May 2007. Performance indicators and scoring guideposts (PISGs) were developed and published in December 2007. The assessment of the fishery was conducted between July and November 2008 and the assessment team completed its scoring of the fishery on 11 November 2008 as required by the FCM (§3.2). The initial draft report was delivered to the fishery clients on 22 December 2008. Since the report proposed a number of conditions to be attached to the certification, it took until 22 January 2009 before the clients were in a position to respond to the initial draft in accordance with §3.6 of the FCM. The only remaining stages in the assessment process after this are peer review, public comment and preparation of the final report. Peer reviews (§3.7 FCM) were conducted between 18 February and 13 March 2009. The draft report was then opened for public comment (or stakeholder review) for the requisite 30 day period from 3 April to 1 May 2009 and various comments were received from stakeholders, including the present objectors. In accordance with §4.1.1 of the FCM, the certification body then compiled its final report which was duly published on 19 May 2009.

15. It is agreed by all parties that the 2009 stock assessment became available to the public on 25 February 2009. The PFCM SSC issued its supplementary report on 8 March and the PFMC itself issued a decision based on the 2009 stock assessment on 13 March in which it adopted a catch level of 184,000 mt for 2009 (according to Attachment 23 of the objectors' supplementary bundle, it appears that this decision was formally published only on 17 March, although it was adopted during the Council's 197th session from 8 to 13 March).

16. The fundamental point that is made by the certification body is that, notwithstanding the fact that the 2009 information was released during the latter phases of the assessment process, its final scoring of the fishery was completed in November 2008 and was based on the information available up to that date, including the stock assessments for 2008 and previous years. To re-score the fishery against the 2009 information would have meant going back to at least July 2008 and would have required a revised data submission by the fishery client, another assessment visit and series of stakeholder meetings, re-writing of the draft report as necessary, re-scoring of the fishery against the PISGs, and so on. Even assuming this may have resulted in any change to the scoring, to do this would have been completely impractical and commercially unrealistic (it being important to note that certification is essentially a commercial process in which the fishery clients bear the costs of the assessment). Furthermore, the assessment process is not designed to be open-ended. It is a finite process, governed by strict procedures, and those procedures include audit procedures which are designed specifically for the purpose of dealing with new information and changes in the fishery

conditions over time. According to these procedures, the 2009 information would (and will, assuming the fishery is certified) be taken into account during the first surveillance audit scheduled for 2010. The FCM explicitly provides that certification may be withdrawn in consequence of a surveillance audit if fishery conditions have changed to such an extent that the fishery no longer satisfies the MSC Principles and Criteria.

17. There is considerable force in these submissions. Notwithstanding the lack of an explicit enabling clause that permits or requires the certification body to set a cut-off date for consideration of relevant information, it seems to me that the entire structure of the FCM foresees an iterative approach to the assessment process which of necessity requires the certification body to score the fishery on the basis of agreed PISGs at a certain point in time based on the information available to the certification body at that particular time. This view is supported by a detailed examination of the FCM.

18. As explained on the title page, the FCM is a document adopted from time to time by the MSC Technical Advisory Board (TAB). Although partly procedural in nature, the FCM are essentially statements of policy and practice containing a mixture of procedural and substantive provisions. They are not amenable to interpretation in the same way as statutes or statutory instruments, but need to be given a flexible and rational interpretation consistent with the overall objective of fishery certification against MSC Principles and Criteria.

19. As noted in the section headed “MSC Assessment and Certification Process Overview” [the FCM is regrettably notable for having no consistency in numbering of paragraphs and sections, with some sections indicated by letters, some by paragraph numbers and some merely with headings], the purpose of the FCM is to prescribe “the methodology that a certification body will undertake in carrying out an assessment of a fishery”. The term “shall” is used throughout to indicate that a particular requirement is mandatory, and the term “should” is used to indicate provisions that a certification body is expected to apply in the absence of express justification to the contrary. The Overview section then explains that the FCM is divided into three tiers that are designed to provide increasing levels of detailed information. These tiers are:

Tier 1: Overview of the main steps and associated actions/outputs

Tier 2: Detailed prescription of the mandatory steps to follow

Tier 3: Additional supporting guidance and advisory documents.

The Tier 1 Overview section (again, not numbered), provides useful guidance as to the intended scope of the assessment process. Sections C to E (found at pages 9 to 12 of the published FCM) indicate that the assessment process takes place in 4 steps. Step 1 covers the pre-assessment process, up to the publication of the assessment tree or PISGs. Step 2 consists of the following steps

**Major actions/outcomes (certification body/client)**

- An evaluation of the fishery against the MSC’s Principles and Criteria for Sustainable Fishing, including, if relevant, the drafting of measurable, outcome oriented and time-bounded conditions of certification.
- Stakeholders provided the opportunity to input to the evaluation process.
- Client given the opportunity to respond to the preliminary draft report, including any conditions, with the client’s responses taken into consideration, along with the actions agreed between the client and certification body to address improvements required for continued certification.
- Stakeholders given the opportunity to comment upon the selection of peer reviewers.
- Peer review of a draft report of the fishery assessment and conditions.
- Stakeholders given the opportunity to comment upon the public comment draft report.

Step 3 then includes the publication of the final report and the process of dealing with any objection filed against it, whilst Step 4 deals with the publication of a final report and the issue of a certificate. It is primarily on the basis of the wording of Step 4 that the objectors base their argument that the assessment process continues until such time as the final report is issued. Under Step 4 it is stated that:

#### **F. CERTIFICATE ISSUED AND PUBLIC REPORT- STEP 4**

For a successful certification assessment the issuing of the certificate marks the end of the fishery assessment process.

20. By itself, this statement might well be capable of implying, as the objectors suggest, that the assessment process continues until such time as a certificate is issued. However, this would be to interpret Step 4 in isolation from the more detailed mandatory steps which are set out in Tier 2 of the FCM (and which are helpfully numbered by paragraph as Section 1 through Section 7.6). This part of the FCM elaborates upon the four Steps of assessment identified in the Tier 1 Overview section. In particular, it makes it clear that the duty of the assessment team is to “ensure that all relevant information (including technical, written and anecdotal sources) is analysed prior to scoring the fishery” (§3.1.3). However, the point at which this scoring is to be done is after the certification body has conducted an assessment visit and any necessary stakeholder interviews. It is implicit in this that the certification body is required to set a timetable for the various steps required to be taken. Scoring is dealt with in §3.2, which provides as follows:

3.2.1 After the evidence is compiled and assessed by the certification body’s team, the assessment team shall score the fishery against the Principles and Criteria in the final assessment tree (including Principles, Criteria, any Sub-criteria, Performance Indicators and Scoring Guideposts).

3.2.2 In scoring the fishery’s performance, the assessment team shall use the methodology set out in the guidance document entitled “Using the AHP and Expert Choice to Support the MSC Certification Process”.

There then follows, in order, a review by the client of the preliminary draft report, an external peer review process, and the issue of a public comment draft report; in each case with the possibility of revisions being made to the substance of the report and to any corrective conditions in light of the comments provided at each stage. No specific mention is made of changes to the scoring of the fishery as a consequence of comments by the clients, other stakeholders, or peer reviewers. Nevertheless, a very cogent point is made by the objectors that, unless the FCM (and in particular §4.1) is read in such a way as to permit the certification body to revise its scores in the light of stakeholder comments, then very little purpose is served by the provision of a public comment phase, since the public comment phase is the only opportunity between initial scoring (§3.2) and the issue of a final report (§3.8) for stakeholders other than the client fishery to have any input into the scoring decisions made by the certification body. I would therefore consider that it is permissible (indeed in appropriate circumstances it may be required) for the certification body to re-score the fishery at any stage prior to the issue of the Final Report and Determination in the light of comments or submissions relating to errors of fact or additional objective evidence provided by stakeholders.

21. The question is, of course, whether such a re-scoring was required in this particular case in view of the existence of new information that cast a different light on the information available several months earlier. Put another way, was it reasonable for the certification body to decide to limit its scoring to the cut-off date of November 2008, or should it have decided to “rewind” the assessment process and re-score the fishery, accepting that this would also require the certification body to go through the process of seeking the views of all parties on the new information as well as conducting a new analysis of the evidence as a whole.

22. To some extent, this question is inextricably connected to the question of whether the new information was “material”, in the sense that it would have made a difference to the existing assessment (a point denied by the certification body). However, before dealing with that issue, it can be observed that the FCM provides further guidance on the proper approach to be taken to updated information which tends to confirm the position taken by the certification body. Section 6 of the FCM, for example, deals with post-certification requirements. It provides in essence that every certification is to be accompanied by a surveillance programme throughout the period of certification. At a minimum, the surveillance programme is to include annual audits of the fishery, to be conducted as far as possible by the same assessment team, which will take into account, *inter alia*, any changes to the scientific base of information relative to the fishery, including stock assessments. Two provisions are of particular relevance: first, §6.5 places an obligation on the client fishery to disclose any “major change” to the fishery since the Final Report was issued and further provides that “important changes”, including “major changes in management or new information describing a major impact of the fishery” shall trigger an audit of the certification status. Second, §6.5.1 provides that “if significant new information becomes available, including between the original assessment and the issue of a certificate, [my emphasis] an expedited audit is indicated.” The outcome of an audit may include the imposition of further conditions to the certification or even withdrawal of certification.

23. It is fair to say that these provisions could be criticized on a number of grounds, including a lack of precision in wording and lack of clarity as to what is meant by an “expedited audit” as opposed to a regular audit, but to my mind the intent of the procedures is clear enough. They are designed to ensure that following the initial assessment, the certification status of the fishery is kept under regular review and that there is a process in place to respond in a timely manner to changes in the fishery, including any changes in the status of the stocks. It is reasonable to conclude that, whether or not the certification body took into account the 2009 stock assessment for Pacific Hake, the impact of that assessment will inevitably be considered at the first surveillance audit.

24. It is of course unfortunate that the 2009 stock assessment was released during the final stages of the present certification assessment. Had it been released a few weeks later, or had the Final Report been issued a few weeks earlier, the position would have been much clearer. Similarly, it would be relatively easy to conclude that where there is a very substantial delay between the initial scoring decision and the issue of the Final Report the certification body would be wrong to ignore new information, even where substantial additional work and expense is needed. Under the FCM as applicable in this case, it is perhaps a rather blurred line, but the over-riding consideration is whether the certification body acted reasonably, or whether its decisions were capricious or otherwise tainted. In my view, the evidence is such that the decision of the certification body to base its assessment on the evidence available to it as of November 2008 was reasonable in the circumstances, notwithstanding the fact that the certification body had been made aware of alleged flaws in the 2008 stock assessment in July 2008 following representations from one of the objectors. To re-assess the fishery in March 2009, on the basis of a new stock assessment, would have involved considerable expense and would have taken several months work. It would also have negated much of the work that had already been done to complete a process that was almost finished. Furthermore, the certification body, and the subject fishery, were clearly aware (and accept) that the FCM explicitly makes provision for the 2009 information to be taken into account during the first surveillance audit or in an expedited audit and that this may result in withdrawal of the certification if the stock has declined to an over-fished state. To my mind, there is a clear distinction to be drawn between revising or fine-tuning the scores in light of errors of fact identified during the peer review and consultation process set out in FCM §3.7 and §3.8 and effectively shifting the temporal scope of the assessment by a whole year, which is the implication of the objectors’ position.

25. As far as the alleged flaws in the 2008 assessment are concerned, it is clear from the Final Report and the response of the certification body to the notice of objection, as well as the submissions made by Mr Waldeck for the subject fishery, that the minority position put forward by Sinclair and others (reproduced at Attachment 12 to the objectors’ supplementary bundle), as well as the alternative assessment model proposed by Martell (Attachment 13) were taken into consideration by the certification body and that the conclusion was that both these documents had received due process within the applicable management structure of the fishery, but that the majority decision was not to accept these alternative models. Whilst it would have been wrong of the certification body to fail to

give any consideration at all to legitimate alternative models that were on the public record, it would have also been wrong of the certification body to fail to attach due weight to the majority view as well as to the SSC-approved stock assessment methodology and default harvest rate of  $F_{40}$  on which the allowable catch was based.

26. As far as the 2009 stock assessment information is concerned, I find that the certification body acted reasonably and within its mandate in deciding not to re-open the part of the assessment process that had concluded as at December 2008 in order to take account of the updated 2009 stock assessment information that became available in March 2009 immediately prior to the issue of the Final Report. I do not find that the nature of the information necessitates a remand under FCM §4.8.2(c).

27. Before concluding on this ground of objection, it is necessary briefly to deal with the question of whether, had the 2009 information been considered, it would have made a material difference to the outcome of the assessment. The objectors' position is that the information would have made a material difference because the final catch level for 2009 of 184,000 mt, established by the National Marine Fisheries Service in consequence of the 2009 stock assessment data results (according to the SSC) in "a 50 percent probability of the stock dropping below the minimum stock size threshold in 2010." Added to this, concerns already expressed relating to the use of an inappropriate model for the 2007 and 2008 stock assessments mean that there is at least a 50 percent probability of the stock declining below the over-fished level of  $B_{25\%}$  in 2010 and a greater than 50 percent probability of the stock declining below that level in 2011 (the estimate is currently  $B_{23\%}$ ). This would have a significant impact on the scoring of several Principle 1 performance indicators and would be incompatible with MSC Principle 1 itself, which requires that "[a] fishery must be conducted in a manner that does not lead to over-fishing or depletion of the exploited populations and, for those populations that are depleted, the fishery must be conducted in a manner that demonstrably leads to their recovery."

28. The response of the certification body on this point was simply to reiterate that the fishery assessment was conducted on the basis of the information available at November 2008 and that a future surveillance audit would determine whether the 2009 information made a material difference to that scenario. This is not a particularly helpful position, because the test set out in the OP is whether the information "could have made a material difference to the outcome of the assessment". Clearly this necessitates at least some examination of the import of the information in question and its potential effect upon the fishery assessment had it been considered. At the same time, however, I bear in mind that what is required is a real possibility of a material difference to the overall outcome, not just a minor or technical adjustment to the scores on one or more PISGs.

29. The position of the fishery client (elaborated by Mr Waldeck) was that, applying this test, the 2009 information could not have made a material difference to the outcome. The reason for this is that, notwithstanding the concerns that have been expressed relating to the stock status metrics for Pacific Hake, the default harvest policy has not changed and the catch rate set as a result of the outcome of the 2009 stock assessment is one that is consistent with the current default harvest policy. This policy

(referred to as the 40:10 rule) specifies a target reference point for the allowable biological catch at  $F_{40}$  (being the rate of fishing mortality that will reduce female spawning biomass per recruit to 40 percent of its unfished level). The stock is considered over-fished when unfished biomass declines to 25 percent, and at 10 percent unfished biomass, optimum yield is set at zero. It is accepted by all those involved in the fishery that the current default harvest policy needs further review and evaluation in light of evolving views as to the status of the stocks, and the applicability of the current models for conducting stock assessments. Nevertheless, until such a review and evaluation has been carried out, it remains the default harvest policy, and the neither the fact that it is under review, nor the reservations expressed about it, should be treated as a relevant factor to be taken into account in assessing the degree of probability that the stock will reach an over-fished state in 2010.

30. It seems to me that Mr Waldeck must be correct in his assertion. The default harvest policy is one which is designed to avoid over-fishing, as informed by currently accepted stock assessment models from which information as to the status of the stock is derived. What the objectors are attacking is not so much the decisions reached in reliance on that policy, but the basis for the policy itself and in particular the definition of what constitutes over-fishing for this purpose. The problem with this approach is that MSC Principle 1 does not define a single objective standard for over-fishing applicable to all fisheries. In respect of any particular fishery, over-fishing can only be defined by consideration of the best available scientific evidence within the context of the relevant management framework. In the context of the Pacific Hake fishery this has been done by the establishment of the 40:10 rule. At present, the fishery complies with that standard and although there is an “even chance” that the fishery will reach its limit reference point in 2010, that point has not yet been reached and it cannot be said therefore that the fishery is being conducted in a manner that leads to over-fishing. Even if there were to be a further decline in the status of the stock, over-fishing would not necessarily occur, depending upon the nature of the management response to any decline. Whilst there are clearly legitimate concerns over the nature of the models used for stock assessment, it is impossible to say that the objectors’ approach is to be preferred over the currently established policy. I am not satisfied, therefore, that consideration of the 2009 information would have made a material difference to the outcome of the assessment.

**(B) Errors in scoring**

31. The second ground of objection asserts that the scores given by the certification body for several of the performance indicators cannot be justified and such errors were material to the outcome of the determination. The performance indicators in question are 1.1.4.3., 1.1.5.1., 2.1.3.1., 2.1.4.1., 2.1.4.2., 2.1.5.1., 2.1.5.2., and 3.7.2. The original notice of objection also contained reference to performance indicator 2.2.2.5., however this was not pursued at the hearing. Mr LeVine further accepted that the objection to the score given on performance indicator 1.1.3.1. (whether the assessment model is appropriate) was effectively subsumed into the first ground of objection discussed above and did not need to be dealt with separately.

32. Before examining each of the scores on these performance indicators, it is worth reiterating that the OP permits the adjudicator to interfere with the score given by the certification body if the score cannot be justified for one of the reasons set out in §4.8.2(b). In particular, in the absence of a clear error of fact, or failure to consider material information, it is the prerogative of the certification body to draw inferences and make assessments as to credibility based on the evidence available to it. It is not for the adjudicator to substitute his or her own judgment for that of the certification body so long as the findings of the certification body are adequately anchored in the record of evidence. It is also important to note that it must also be demonstrated that the effect of an incorrect score in relation to one or more of the performance indicators was material to the outcome of the Determination. This implies that any error in scoring needs to have been so egregious as to alter the outcome of the Determination (i.e. by bringing any individual score below the baseline of 60 or bringing the weighted aggregated scores on each MSC Principle below the required level of 80), or at least to have been sufficiently serious as to warrant a remand to the certification body for further consideration.

(1) Performance indicator 1.1.4.3. (Score awarded 70)

33. This performance indicator assesses whether the “harvest strategy can be shown to precautionary”. To reach a passing score of 60 requires a finding that “a precautionary harvest strategy has been defined but not evaluated to determine effectiveness”. A score of 80 is attained if the “harvest strategy has been demonstrated to be effective and precautionary, based on past management responses.” In the present case, the certification body awarded a score of 70, recognizing that, although a harvest strategy (i.e. the 40:10 rule) had been identified, it had not been demonstrated to be precautionary, and establishing a corrective condition requiring further evaluation of the harvest strategy.

34. I accept that there some difficulty with the wording of the 60 and 80 PISGs – it is hard to see how a precautionary harvest strategy could be defined without having first been evaluated to assess whether it promises a reasonable likelihood of delivering a precautionary outcome. I also accept, as pointed out by the objectors, that significant concerns exist about the quality of the scientific information available to implement the 40:10 rule. Nevertheless, it is evident from the record that the certification body was also aware of these concerns and explicitly took them into account in scoring at a level below the 80 PISG but above the 60 PISG. I find it impossible to agree with the objectors that the fishery should have scored below 60 – whatever its merits, the 40:10 rule is a defined harvest strategy that is intended, on the basis of reasonable considerations, to be precautionary – but I equally find it difficult to identify any error of fact that would warrant interference with the exercise of the certification body’s discretion to score the fishery at 70 on this performance indicator. I agree that the justifications given by the certification body lack specificity, but they are not so arbitrary or capricious as to justify intervention at this stage. Furthermore, the conditionalities attached to the fishery are clearly designed to provide the detailed evaluation of effectiveness that is presently lacking. I see no reason to remand the Determination to the certification body in respect of this performance indicator.

(2) Performance indicator 1.1.5.1. (Score awarded 90)

35. This performance indicator is designed to assess whether the current stock size is above the limit reference point. Both the U.S. and Canadian portions of the fishery were awarded a score of 90 on the basis that there was a high probability that the stock was above the limit reference point of 25 percent of unfished spawning stock biomass (“high” being described as a greater than 50 percent and less than 90 percent probability). On this basis, the fishery was adjudged to exceed the 80 PISG, but not reach the 100 PISG, which required a greater than 90 percent probability.

36. The objectors make two points in relation to this performance indicator. First, in light of the 2009 stock assessment, they assert that it is inherently unlikely that the stock can be maintained above the limit reference point in the future. Second, it is asserted that the certification body failed to give full consideration to the second part of the 80 PISG, which requires not only that there is a greater than 50 percent probability of the stock being maintained above the limit reference point but also that it is “likely to be around the target reference point currently and in the future”.

37. For the reasons set out in relation to the first ground for objection, I do not accept that the 2009 stock assessment data is relevant to the scoring of this performance indicator. The fact that the probability of the stock being above the limit reference point is based on the 2008 data has in fact been clarified by the certification body in a proposed revision to the Final Report contained in its initial response to the notice of objection (dated 15 July 2009). I consider that this proposed clarification is adequate to meet the first part of the objectors’ concerns. As to the second element, though, I had more difficulty in determining whether the certification body had given proper consideration to the probability of the stock remaining at “around” the target reference point (of 40 percent of unfished biomass). It has to be said that much of this difficulty is associated with the lack of clarity in what is meant by “likely” and “around” in this context. They seem remarkably vague formulations to use in contrast to the precise probability estimates associated with the limit reference points. It also has to be said that neither the Final Report, nor the 15 July response document deal very explicitly with this point. Nevertheless, the evidence of the record is that, as a matter of fact, the stock was found to be at 37.9 percent of unfished biomass following the 2008 stock assessment, with a (very slightly) better than 50 percent probability of remaining above the target reference point in 2009, subject to the actual catch rate established. I appreciate that this may not be viewed as a very satisfactory conclusion, but given the lack of clarity in the PISG, I consider it is impossible to say that the score given is not supported by the evidence and I see no reason to remand the Determination to the certification body in respect of this performance indicator.

(3) Performance indicator 2.1.3.1. (Score awarded 90)

38. Performance indicator 2.1.3.1. measures the extent of knowledge of the physical impacts of fishing gear upon habitats. A score of 90 was awarded to both fisheries on the basis that the hake fishery is a mid-water trawl fishery with infrequent bottom contact and thus very little impact on habitat

in the pelagic zone. The objectors submit that this assertion is not supported by the evidence which actually demonstrates that there has been no evaluation of the impacts of the fishery on habitat. The objectors go on to cite information from other fisheries which tends to suggest that mid-water trawl fisheries do frequently impact the seafloor, especially in shallow water.

39. There are a number of problems with both assertions. As far as the certification body is concerned, the scoring rationale appears weak and it is difficult to assess from the content of the Final Report alone how the rationale relates to the precise language of the scoring guideposts, which (at the 100 level) actively require not just that there is no unacceptable impact, but also that the physical impact on habitat has been studied and evaluated. To simply state that there is very little impact is patently not the same as saying that such impact as there is has been studied and evaluated. On the other hand, it seems difficult for the objectors to make the assertion that there is a significant impact on habitat by citing studies from other fisheries, specifically the Alaskan Pollock fishery, which are not directly comparable and have different characteristics.

40. A more detailed study of the record shows that there is cogent support for the certification body's finding that there is no unacceptable impact of the fishery on habitats. This may be found in the 2005 NMFS environmental impact assessment cited by the client fishery (reference at page 108 of the Final Report), as well as in the FAO documents cited in the certification body's response of 15 July 2009. I am satisfied that the conclusion that the 80 PISG was met is justified. In the absence of any recent detailed study of the actual impacts, I am also satisfied that a score of 100 could not be justified. The score of 90, however, appears not to be unreasonable, bearing in mind that the justification given is that the 80 PISG, plus two out of the three elements of the 100 PISG, were met. Again, the problem with this is really the lack of clarity used in setting the scoring guideposts and I see no reason to remand the Determination to the certification body in respect of this performance indicator.

(4) Performance indicator 2.1.4.1. (Score awarded 70)

41. Performance indicator 2.1.4.1. assesses the impact on ecosystem structure and functioning from the removal of target species. The objection was presented on the basis that a score of 80 on this performance indicator was not justified. In fact, it transpired that the certification body had in fact allocated a score of 70 to this performance indicator, which the objectors contended was an appropriate score, and so it was not necessary to consider the matter further.

(5) Performance indicator 2.1.4.2. (Score awarded 80)

42. Performance indicator 2.1.4.2. assesses the impact on ecosystem structure and functioning from the removal of non-target species. A score of 80 was awarded. To justify such a score there must be "some quantitative information ... on the consequences of the current levels of removal of non-target species" and such information must "suggest that there are no unacceptable fishery impacts on ecosystem structure and function within key fishing areas". The objectors assert that there is no such

quantitative information available, and cite the Final Report at page 115 where the certification body expressly states that “there is qualitative information regarding ecosystem consequences ... but not quantitative”, and further assert that the certification body’s conclusion that there are no unacceptable fishery impacts is based on an irrational argument, to the effect that since bycatch levels are very low (0.2%) they cannot reasonably be expected to have an adverse impact on the ecosystem.

43. In its response to the notice of objection (at page 15), the certification body accepts that the basis for the score was poorly expressed, but defends its score of 80 and offers a revised scoring rationale. This revised rationale notes that quantitative information on bycatch levels is available in the form of stock assessments of non-target species. This information supports the finding that bycatch levels in the fishery are at the level of 0.2% of the hake catch and, importantly, do not exceed the limits established by regulation. It is reasonable to assume that part of the basis for such regulation is to preserve the ecosystem functions of such species and therefore that there are presently no adverse impacts on the ecosystem from the current level of bycatch.

44. I accept the revised scoring rationale. The objectors have not taken issue with the assertion that the bycatch level is 0.2% of the hake catch, nor with the assertion that allowable bycatch levels are not exceeded. It seems reasonable to assume, in the absence of any better information, that this level of bycatch has no significant adverse impact on the ecosystem. The objectors make the point that it is not the quantity of bycatch that matters, but the impact of the removals, and that there is a lack of information about the functional role of the relevant bycatch species within the ecosystem. This is a fair point, and if there were any evidence that certain bycatch species provided critical ecosystem functions which could be adversely impacted even at very low catch rates, it would clearly be necessary to provide additional information to demonstrate that ecosystem impacts are acceptable. However, no such evidence has been cited. At present, the best available information is that current bycatch rates are quantifiable and do not have an unacceptable impact on the ecosystem structure and function.

45. I find that the revised scoring rationale justifies a score of 80 and there is no reason to remand the Determination to the certification body in respect of this performance indicator.

(6) Performance indicator 2.1.5.1. (Score awarded 70)

46. Performance indicator 2.1.5.1. assesses whether levels of acceptable impact on ecosystem function have been determined and reviewed. In the notice of objection, the objectors erroneously stated that a score of 80 had been awarded. In fact, the certification body awarded a score of 70 on this PISG with an associated condition to provide evidence that levels of acceptable impact are estimated and reviewed within a period of two years.

47. The objectors now maintain that even a score of 70 is not justified and that the fishery should score, at most, 60 against this PISG. The objection is based on similar arguments to those presented in respect of performance indicator 2.1.4.2., namely that information is available only in relation to

bycatch rates and not on the ecosystem impacts of those rates of bycatch. This is therefore an inadequate basis to make an assessment.

48. The certification body in effect adopts the same argument that it adopted for performance indicator 2.1.4.2. Bycatch rates are low and maintained at acceptable levels. In the absence of evidence to the contrary, it is reasonable to assume that current levels represent acceptable levels of impact.

49. The 60 PISG requires only that there is “some information” to determine acceptable levels of impact for target and non-target species, whilst the 80 PISG requires that levels of acceptable impact have been “estimated” and are regularly reviewed. It seems to me that the score of 70, with an associated condition, given by the assessment team recognizes explicitly the existence of “some information” which affords a reasonable, albeit insufficient, basis for estimating acceptable impact, but requires that more is done to reach the 80 PISG. I see no reason to interfere with the certification body’s assessment on this performance indicator.

(7) Performance indicator 2.1.5.2. (Score awarded 90)

50. Performance indicator 2.1.5.2. is designed to ensure that “[m]anagement strategies are in place to avoid and/or to reduce ecosystem impacts (i.e. Physical impacts, lost gear, operational waste, effects on ecosystem structure.” Both the U.S. and Canadian elements of the fishery were awarded a score of 90, possibly in recognition of the fact that there appears to be very little difference between the 80 and 100 scoring guideposts. The 80 PISG requires that:

- Management strategies exist to detect and to reduce impacts although these have not been fully tested.
- The management strategies are designed and proven to adequately protect key aspects of the ecosystem within main fishing areas.

The 100 PISG requires that:

- Tested management strategies are in place to detect and reduce impacts.
- The management strategies are designed and proven to adequately protect ecosystems and habitats throughout the range of the fishery.

A score of 90 was awarded on the basis that both the U.S. and Canadian fisheries are subject to considerable regulation relating to bycatch, closed areas, operational waste etc. (specified in detail in the Final Report) and, since ecosystem effects of the fishery were minor, it was reasonable to assume that these strategies were effective. The fishery therefore exceeded the 80 PISG.

51. The objectors claim that this is unsatisfactory for two reasons. First, it is logically inconsistent with the score of 70 awarded for PISG 2.1.5.1. If there is insufficient evidence available to estimate acceptable levels of ecosystem impact and to establish standards, then it is logically impossible to

determine that management strategies designed to reduce such impacts are effective in meeting the required standard. Second, (as pointed out in relation to PISG 2.1.4.2.) there is no evidence available relating to ecosystem impacts apart from the general evidence that bycatch levels in the fishery are low.

52. In its response to the notice of objection, the certification body reiterated that the evidence available to it indicated that there was an effective regulatory regime in place governing ecosystem impacts of the type referred to under this PISG. A finding had already been made that the fishery has relatively little contact with the bottom (see discussion under PISG 2.1.3.1.) and the evidence indicated that incidences of lost gear were extremely rare. The objectors had been unable to cite any evidence to suggest that there were ecosystem impacts that were not adequately dealt with by existing regulation and comparisons with other fisheries, such as the Alaska Pollock fishery, were irrelevant.

53. I see a real difficulty with the score awarded on this performance indicator. On the one hand, I accept that there is clear evidence that management strategies exist and that they are designed to protect “key aspects of the ecosystem within main fishing areas”. A finding that the 80 PISG is met is clearly reasonable and justified by the evidence. On the other hand, for the reasons given by the objectors, it is difficult to see how a score above 80 could be justified. Plainly, the management strategies have not been tested, because (in light of the finding on PISG 2.1.3.1.) there is nothing to test them against. The mere fact that bycatch levels are low does not equate to a testing of the management strategy against an objective benchmark. To my mind, the score of 90 on this PISG is not reasonable and cannot be justified.

54. However, that by itself is not enough to justify a remand under §4.8.2(b). It must also be shown that the effect of the score in relation to this PISG was material to the outcome of the Determination. In relation to MSC Principle 2 as a whole, the aggregated score awarded to the fishery was 84.14. If the score were to be adjusted to 80 on PISG 2.1.5.2., the fishery would still attain a score of 83.95, which would have no material impact on the outcome of the Determination. Accordingly, whilst the certification body will be required to make any necessary amendments to the Final Report in accordance with §4.9.7. of the OP, I decline to remand the Determination under §4.8.2. on the basis of the error in the scoring of PISG 2.1.5.2.

(8) Performance indicator 3.7.2 (Score awarded 75 (U.S.), 95 (Canada))

55. Performance indicator 3.7.2. relates to MSC Principle 3, which requires that “[t]he 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.” Specifically, PISG 3.7.2. assesses the extent to which “surveillance and enforcement are in place to ensure that the fishery complies with requirements of the management system.” A score of 60 may be achieved where “surveillance activities and enforcement measures are reactive and focused on key management measures” and compliance is “sporadically” monitored but not fully demonstrated. A score of 80 is achieved where “enforcement systems have been implemented

and there is control and high compliance with most management measures". A score of 100 is achieved where there is "a high degree of control and compliance with all regulations ... for target and non-target populations, over all fishing areas." In respect of this PISG, the certification body found that the U.S. portion of the fishery attained a score of 75, whilst the Canadian portion attained a score of 95.

56. In the notice of objection (page 17) the objectors point to a number of incidents of illegal dumping of bycatch that occurred in 2007 and an enforcement consultants' report to the PFMC which recommended a number of additional or enhanced surveillance needs (the report is included at Attachment 8 of the objectors' supplementary bundle). According to the objectors, these recommendations have not been implemented to date and there are "substantial components" of the U.S. fishery that are subject to no surveillance or enforcement.

57. This interpretation is not accepted by the certification body or the subject fishery. Whilst they accept that surveillance and enforcement have been mainly "reactive", they point out that there have been relatively few individual instances of non-compliance (including the 2007 incident). They also note that the key recommendations of the enforcement consultants' report, including 100 percent observer coverage of landings and electronic monitoring of catcher vessels, are being implemented and will be guaranteed by a condition attached to the certification.

58. No issue is taken with the score awarded to the Canadian portion of the fishery.

59. I accept that there is a considerable problem with the wording of the scoring guideposts. It is very difficult to make an objective assessment of terms such as "sporadic", "high compliance" and "high degree of control and compliance", and there seems to be very little evidence on which to base any finding, in the sense of published statistics. Nevertheless, such evidence as there is, including the evidence cited in the certification body's formal response (at page 24) would appear reasonably to justify a score of at least 60 for the U.S. fishery (reactive measures). The consultants' report, which outlines defects in some of the current enforcement systems, could also lead reasonably to a finding that "enforcement systems have been implemented" (albeit not perfectly), and a finding of "high compliance" might well follow from the fact that relatively few individual incidents of non-compliance have been disclosed, although this may be regarded as somewhat problematic if there is no definition of what percentage of compliance is to be regarded as "high" or statistical information to support the finding. Of course, it is a well known conundrum whether the reason there have been few incidents of illegality can be attributed to the effectiveness of the enforcement measures or is simply because the perpetrators have not been caught.

60. On balance, however, although I may well have scored this PISG slightly lower, I do not think that a score of 75 could be described as unreasonable. There is good evidence to support a score of at least 60, as well as evidence that a score of 80 would be unsustainable, and for those reasons a score within the range of 65 to 85, with appropriate conditions attached, seems to me to be within the margin

of appreciation allowed to the certification body. I see no reason to interfere with the certification body's assessment on this performance indicator.

**(C) Inconsistency of performance indicators with MSC Principles 1 and 2**

61. The final ground of objection relates to the way in which performance indicators 1.1.3.1, 2.1.5.1 and 2.1.5.2. were set. It is asserted that these performance indicators do not ensure compliance with MSC Principles 1 and 2 and that this constitutes a "serious procedural or other irregularity", justifying a remand under §4.8.2. of the OP. It is to be noted that the objectors do not object to the performance indicators on procedural grounds; they are not suggesting that improper process was followed in establishing the assessment tree, but on the substantive ground that the performance indicators as set by the certification body are inconsistent with the governing Principles on which they are required to be based.

62. In relation to MSC Principle 1, the argument, which is set out in the objectors' supplementary documentation at pages 34 to 37, is that the performance indicators, and particularly performance indicator 1.1.3.1., which evaluates whether the assessment models used in the fishery are appropriate to the biology of the stock and the nature of the fishery, do not provide an appropriate measure of compliance with the overarching requirement in MSC Principle 1 that the fishery must be conducted in such a manner that does not lead to over-fishing. In particular, the 60 scoring guidepost under PISG 1.1.3.1 is set artificially low in that it allows the fishery to meet the certification standard even if (as in this case) an inappropriate stock assessment model is used. It is further argued that the certification body erred because it did not use two further PISGs that had been used in the case of the MSC certification of the Alaska Pollock fishery. These PISGs had been more precautionary in nature than the PISGs used for the hake fishery because they used the likelihood of the Pollock stock being at or above the target reference point as the basis for awarding a score of 60 rather than the likelihood of the stock being above the limit reference point in the case of hake.

63. It has to be recalled that under the FCMv6, it is a matter for the certification body to define the PISGs for each fishery, as well as the weighting to be applied to each PISG in scoring. There is a consultation process, involving MSC, the subject fishery and any other stakeholders, during which the PISGs may be revised as appropriate. The objectors did not participate in this consultation process, however I do not necessarily think that bars them from objecting on the ground that the performance indicators are inconsistent with the governing principles on which they should be based, particularly as there appears to be no other way, under FCMv6, for objection to be raised to the compliance of PISGs with MSC Principles and Criteria. I have not heard full argument on this issue, and I understand that in any event, the FCM is to be revised through the introduction of a new methodology for the establishment of the assessment tree, but for the purposes of the present objection I have proceeded on the basis that the objectors are permitted to pursue an objection on the grounds they have stated.

64. Nevertheless, I see a number of flaws in the logic of the objectors' arguments. First, the FCM makes it very clear (§2.3.1.) that the performance indicators and scoring guideposts are to be "developed operationally for each fishery". Furthermore, §2.3.3. goes on to state that the assessment team "shall define, for the fishery being assessed, the scoring guideposts for each performance indicator" [emphasis added]. There is no requirement, under FCMv6, for certification bodies to use the same performance indicators and scoring guideposts as used in other fishery certifications. Naturally, where two fisheries are directly comparable, it may be appropriate for certification bodies to draw on the PISGs set in other cases, but this is not a requirement. In any event, it may be the case that target reference points and limit reference points for different fisheries are set at different levels, in which case direct comparisons could be misleading. In the present case, no evidence has been produced to establish that the Alaska Pollock fishery and the Pacific Hake fishery are comparable to the extent that the same PISGs should have been used in both cases. Secondly, as already elaborated above in connection with the first ground for objection and the specific objections under PISGs 1.1.4.3. and 1.1.5.1., the current default harvest rule for Pacific Hake (at least based on the 2008 stock assessment) is in fact sufficient to prevent over-fishing. The 60 scoring guidepost for PISG 1.1.3.1. cannot be considered in isolation from the other performance indicators under Principle 1. The fishery actually scored 85 under PISG 1.1.3.1. and even if, as the objectors propose, the requirements for a score of 60 had been made more rigorous, the fishery would have still passed under Principle 1. I do not accept, therefore, that the PISGs under Principle 1 are in any way inconsistent with the MSC Principles and Criteria.

65. In relation to MSC Principle 2, which is aimed at encouraging the management of fisheries from an ecosystem perspective, the essential complaint is that insufficient weight was given to evaluating the effectiveness of management strategies to reduce and prevent adverse impacts on ecosystem function. Only two PISGs addressed this specific issue (PISG 2.1.5.1. and 2.1.5.2.) out of a total of 14 under Criteria 2.1 of Principle 2, which has the effect of marginalizing an issue of critical importance and thus led to an artificially high score on Principle 2.

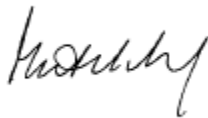
66. The real difficulty with the objectors' argument in relation to Principle 2 is that no evidence has been produced either to show the effect the alleged improper weighting had on the scores given by the certification body or to demonstrate how the certification body should have weighted the various sub-criteria and performance indicators. The establishment of the PISGs, as noted above, is a matter within the discretion of the certification body, subject to the consultation procedure set out in the FCM and the requirement of reasonableness. In order to demonstrate that the certification body acted unreasonably, some indication must be given of what a reasonable certification body should have done. Apart from saying that the certification body should have established separate PISGs for each aspect of the management strategies, the objectors have not provided any evidence to assert how these categories should have been broken down, or as to the effect on the scoring if they had been broken down in the manner suggested. In the absence of any such evidence it is impossible for me to say that the

certification body exercised its discretion in a manner that was manifestly unreasonable, or that any error had a material impact on the outcome of the Determination.

#### **CONCLUSION AND DECISION**

67. Having heard arguments from all parties, supported by written submissions and supporting documentation, I find that the grounds for objection are not made out and there is no basis to remand the Determination to the certification body for further consideration.

68. Subject to the issues raised in this document in relation to performance indicators 1.1.5.1, 2.1.4.2 and 2.1.5.2., I confirm the Final Report and Determination issued by TAVEL Certification Inc. on 19 May 2009.



**Michael Lodge**  
**MSC Independent Adjudicator**

**2 October 2009**