



Audit Team, Eastern Canada Offshore Lobster Fishery
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April 28, 2019

RE: 4th Surveillance Audit of Eastern Canada Offshore Lobster Fishery

Thank you for the opportunity to submit our written comments, following our site visit with the Surveillance Audit team on April 11th, 2019. Our concerns about possible illegal fishing practice raised with the assessment team in both the 2016 and 2017 ECOLF audits have been borne out with the September 2018 conviction of CS Manpar (of Clearwater Seafoods Partnership Ltd) the ECOLF licence holder, for 'gross violation' of the Atlantic Fisheries Regulations.

As we noted in our February 2019 letter requesting an expedited audit for the Offshore Lobster Fishery, we believe this conviction and the related evidence of long-term non-compliance and mischaracterization of the fishery by the client during the certification period warrants a change to scoring and suspension of certificate. The primary scoring concerns that we believe should result in suspension are under PI 3.2.3 and we present details below for the assessment team. This is followed by new information that should be factored in when revisiting scoring for other PIs. The weight of evidence shows a history of the client not being fully transparent about the fishery throughout the certification process. Therefore, assurances by the client alone should not be considered sufficient evidence now of changes to the fishery's practices. Monitoring and reporting evidence over a season at least that provides hard data to prove the fishery is now compliant with the law should be required before the certificate is reinstated.

Monitoring, Compliance, and Surveillance PI 3.2.3

3.2.3 a and b

While there are MCS measures in place for this fishery, it is not clear that the system has been effective as required for the 60 score, nor that it has been consistently enforced as required for the 100 score for 3.2.3 a. The sanctions applied to the client for non-compliance charges are unlikely to be sufficient enough to be effective deterrence as required by the 80SG for 3.2.3b. Public information released during the trial of Clearwater Seafoods Partnership Ltd raises significant concerns about the MCS system for this fishery.

The ECOLF management was convicted for violations under the Gear Tending Regulation (Section 15.3), also known as the 72 Hour Rule, of the Atlantic Fisheries Regulations requiring gear be tended every 72 hours. It appears, that DFO did not enforce this effectively for many years in this fishery. In 2016, we noticed an apparent exemption for the fishery to this rule written in their 2014 Integrated Fishery Management Plan (IFMP). Such an exemption to the regulation requires a public consultation period, which we were sure had never happened. Upon raising this concern with DFO management, they have subsequently removed the sentence in question and clarified that the fishery never had an official exemption. The client has stated publicly they believed they had an understanding between themselves and the regulator that they were exempt from this rule. On the contrary, the client was eventually charged with violating the 72 Hour Rule showing there was no exemption given. Court documents show several warnings were given to the client for this violation before charges were laid.

While the fishery was convicted eventually, the history of the situation raises concerns for us that the regulator was not enforcing the law effectively or consistently for some years for this fishery before the conviction. It raises concerns that some fleets may have been managed under non-transparent 'special rules' by the previous DFO administrations. The regulator should provide assurance to the CAB that this fishery will be managed under the same rules as others going forward.

In terms of effective deterrence of the MSC system, the fine given to the client for the violation was 30 000 CAD. This fine does not seem to be a deterrent for a fishery that is worth over 10 million CAD annually. The crown prosecutor notes in the trial that fines have a corporate tax advantage, so keeping it relatively low was strategic due to the corporate ownership set up of this fishery. If this is the case under the Canadian tax code, it has serious implications for the MSC system of DFO and its ability to deter illegal fishing within our corporate fleets such as this one. It is also common for violations involving gear tending or out of area/season fishing to also merit gear seizure.

As a comparison, we note that a recent 72 Hour Rule violation charge on an inshore lobster vessel (December 17, 2018) came with a fine of \$1500 and the seizure of traps valued at \$5000, a fairly significant penalty for an inshore boat.¹ There seems to have been no seizure of traps in the case of Clearwater.

We commend DFO for monitoring and building a case over four years documenting gross violation by the offshore lobster fishery and achieving a conviction. However, there needs to be evidence provided to the CAB that the system has been effective at deterring continued violation of the 72 Hour Rule by this fleet and that there will be consistent enforcement of the rule through DFO's MCS system.

With the current lack of evidence of effective and ongoing enforcement for this fishery, a pass is not warranted for 3.2.3a

¹ <http://www.dfo-mpo.gc.ca/media/charges-inculpations/mar-eng.htm?fbclid=IwAR1Fx4pOITw9zmmmZhxxh0MVLOK7uFLqR2sdLPV1mFnHv4kru9eU1FRv1waQ>

3.2.3 c

The requirement for passing SG 60 under 3.2.3c is:

Fishers are generally thought to comply with the management system for the fishery under assessment, including, when required, providing information of importance to the effective management of the fishery.

The weight of evidence shows that the fishery has been out of compliance with the Atlantic Fisheries Regulations for the duration of their certificate. Equally concerning for MSC certification scoring is a record of the client not providing full information to the CAB about the fishery operation during previous assessments and audits nor being proactive to alert the CAB of the recent conviction.

Documents available through the court transcript show the company has been in flagrant violation of the gear tending rules at least since 2014 when DFO Compliance and Protection officers (C&P) start documentation for the case. It appears that the normal practice of the company was to leave their thousands of traps out in the ocean all the time while only hauling them and resetting when they wanted to land lobster. The traps were left for months at a time. It is not clear whether the trap top hatches were open, 'not fishing', or just left in a normal state. It does not appear that they were double hauling the traps to reset them when they did haul, so it is safe to assume that most of the thousands of traps were closed and fishing when left at sea. Even if a portion of their thousands of traps were left with open hatch, 'storing' they call it, this is still a gross violation of the Gear Tending Regulation. Examples of trap soak times presented in the case by C&P officers demonstrating this practice over a long period of time:

2014 – boat was in dry dock for 68 days, all of their 8500 traps not hauled

2014 – 2016 – one string (trawl) of 100 traps noted as an example was not hauled 25% of trips, left in the water 25 days or more some trips

May 2015 – Jan 2016 – on average 48% of 100 trap trawls are not hauled every trip; 1400 traps were never hauled during this period. Some trawls are left up to 150 days, a subset left from 20-30 days at a time, the average haul time for the 52% that are actually hauled out was between 5-15 days.

September 11-29, 2017 – no fishing detected by C&P (18 days) at dock

October 3 – Nov 4, 2017 – no fishing, Randall Domineaux being used by University of Maine for scallop survey

The fishing practice of Clearwater documented in the C&P records is long standing. This is not a few violations of the gear tending rule due to weather or boat repair needs. It is clearly the norm for the way the fishery has operated. There is no reason to believe that the years documented by C&P are anomalies. When news broke in January 2019 of the conviction of Clearwater for the Gear Tending violations, the company spokespeople and president publicly stated this was just the way they fished and they did not see any negative conservation impacts of it. Their concern was not whether they were following the law, but that the law was not suited to them. Even if the law may be amended in the future, it is important for fisheries to follow current regulations. There are many regulations that fleets do not agree with, however, it would be unmanageable if all fleets were allowed to ignore rules with impunity as Clearwater did for so long. It is important to note that the violation was not just for an incident here and there due to circumstances beyond the client's control, nor was it to allow a

bit of flexibility in the regulation. They were charged with 'gross violation' due to long term repeated violations and ignoring warnings of DFO enforcement.

Warnings not heeded

The court documents show that after monitoring and analysis, DFO C&P officers presented the evidence to Clearwater management and DFO managers on June 3, 2016 and issued a verbal warning at this time for the company to tend their gear and stop any 'storing of traps' as a fishing practice. A written warning to Clearwater management followed on August 16, 2016. The company management did not heed the warnings or pass the information on to their captains and were eventually charged for two violations of the Gear Tending Rule in late 2017.

The company was not forthcoming with information about their continued fishing practice required for effective management of the fishery and seems to have ignored official enforcement warnings.

Information for MSC Certification

It is also concerning and relevant to the scoring of this PI that the client has not represented their fishing practice transparently to the CAB throughout the MSC assessment and audit processes. The assessment report of the fishery indicates that traps are soaked on average for 4-5 days before being hauled.

In our stakeholders comment in 2016 and 2017, we pointed out to the CAB that this was in violation of the 72 hour rule and that the fishery did not have an exemption to do this. It appears the assessment team took the client on their word that they were not expected to follow this law.

Further, in the 2017 response to our concerns, the audit report notes, "The client confirmed they do not store traps on the sea bed and that gear is tended." In fact, at that very time, we now know through the court documents that the company had been leaving their traps untended and that their boat was being used as a research vessel in Maine, rather than fishing. This is deliberately ignoring the law. This information was not forthcoming from the client.

In response to our concerns raised about discards of dead, injured and weak lobsters along with other species, the CAB did not offer further rationale or evidence of levels. Again, due to the court documents, we now know that the C&P officers had presented their analysis to the client a year before showing data collected from inspection at sea that these discards per string were much higher than cited observer reports and studies have shown. C&P note that lobster mortalities are not taken off the TAC. This information was not presented to the CAB by the client.

The same 2016 C&P presentation to the client and DFO management showed a number of log book discrepancies. The assessment report states that there have been no systematic misreporting in log books. This information was not presented by the client to the CAB.

It also continues to be unclear how many traps are out in the water in this fishery. Previous licence conditions had a 5000 trap limit per boat engaged in the fishery. The company has consolidated the fishery from 8 boats to 1 boat over the last decade and now has a TAC instead of trap limit control. Despite our repeated requests to DFO, they have not been able to confirm the number of traps fished. Numbers in documents and statements made by the company range from over 10 000 to 5200. It is also not clear that all their traps are tagged and, therefore, accounted for. The 2016 C&P report recommended restating a trap limit per vessel 'to ensure responsible fishing is adhered to.'

Finally, in the August 2018 surveillance audit report under Compliance, it states "CSLP confirmed that there were no regulatory infringements reported for the offshore lobster fishery in 2017." The client

charge for violations reported by C&P in late 2017 was brought to the court on May 3, 2018 and the first hearing was on July 12, 2018 just after the surveillance audit was conducted on June 25, 2018. While the charges were still going through the court at the time of the audit, it seems that the client should have been forthright with the CAB that they were being charged with a serious violation of fishing law. The client eventually pled guilty to the charge and was sentenced on September 9, 2018.

The weight of evidence indicates that this fishery has not “generally thought to comply with the management system for the fishery under assessment, including, when required, providing information of importance to the effective management of the fishery,” **and, therefore, does not pass SG 60 for 3.2.3 c.**

3.2.3 d – Systematic Non-Compliance Scoring

This fishery is now prosecuted by one boat with all licences consolidated on it. In this situation, we believe the scoring of 3.2.3 d must be considered in terms of the continuous timeline of non-compliance over many years. The evidence, as detailed above and in public court documents, is sufficient to show systematic non-compliance with the law by the client. Clear evidence over a fishing season documenting changes to fishing practice, traps hauled within 72 hours, and full information provided to the CAB should be required before a re-instatement of the certificate.

2.1.2, 2.1.3, 2.1.4 – Retained Species Scoring

The bait used by this fishery should be re-evaluated in the scoring. The assessment report states that the fishery used bait from 4VWX herring fishery. The 2018 stock assessment for herring 4VWX shows a continued declining trend in the spawning biomass. For SWNS/BoF Herring spawning component (German Bank and Scots Bay):

The three-year moving average decreased by about 8% in 2017 to be at the LRP for the first time since 2011. Stock biomass and the TAC have been relatively stable at a low level in recent years from (2011 to 2016). The consensus of the meeting was that further management measures that reduce exploitation are required to support stock rebuilding.²

The Gulf of St Lawrence herring stock is also in a depleted state with quota cuts expected again for this coming fishing season.

Most lobster boats in the area also use Atlantic mackerel for bait. The 2019 assessment of Atlantic mackerel has shown the biomass continues to be in the critical zone, the recruitment is at its lowest level in the time series, and the age structure is truncated with 75% of the population made up of a single age class (2015). A TAC of zero is the only option with a more than 60% chance of starting recovery.

Evidence of the origin of the herring or mackerel used for bait in the fishery should be provided to the assessment team and, if it is coming from a depleted spawning stock, alternative bait should be used. Even a small percentage of the take used by this fishery is adding to the cumulative impact of the fishing pressure on the stocks and the pressure to keep the quotas higher than science recommends.

² <https://waves-vagues.dfo-mpo.gc.ca/Library/40760078.pdf>

2.2.1 and 2.2.2 - Bycatch Scoring

We have submitted for previous audits our concerns about bycatch in this fishery being underestimated or underreported. The long soak times shown in the court information confirms our concerns particularly for bycatch of finfish in the area that are a species-at-risk, such as Atlantic cod, white hake, and cusk. The scoring for the impact on cod and white hake uses old quota information from 2012. Due to the continued decline of both of these species in the area that the offshore lobster fleet fishes, the quotas have been cut considerably. The amount used by ECOLF fishery for bait is now a more significant percentage of the smaller quota.

As well, the estimates of how much by weight of total catch of these species are compared to lobster in the offshore fishery may be considerably underestimated because of the failure to consider the actual soak times this fishery has been leaving traps for. Lobster can eat a lot of finfish over the 5 days – upwards of 60/70 days traps have been consistently left. Therefore, observer and log book records would not reflect accurately the mortality rates.

The C&P report from court records show spot checks of trawl strings with numbers of groundfish over a 13-day soak period that seems to be higher than shown by the bycatch study and observer coverage cited for scoring the PI. The impact on these species-at-risk may be much higher than reflected under an assumption of 3-4 day soak times.

Since the fishery has not been following gear tending rules, which would ensure a more accurate recording of species-at-risk taken and offer signals for management as well, it cannot be said that there are currently sufficient measures in place to ensure the fishery is not hindering the recovery of cod, white hake, and cusk.

2.2.3 – Information on Bycatch Scoring

The fishery scores 100 for this PI based on the rationale that ‘the information available on bycatch is as accurate and verifiable, in particular because the ECOLF is prosecuted by a single vessel.’ In fact, that is not the case given the underreporting, misreporting, and underestimation of bycatch noted in the C&P analysis presented in the court proceedings.

We also note that while the goal of the observer coverage if measured by trip is 6 trips per year or 15%, the coverage, if measured by catch, is very low at 2.4%. This is concerning given the numbers of bycatch and discards shown by the C&P monitoring information is significant per trawl.

The information available for bycatch in the current configuration of the fishery using extremely long soak times and ‘storing traps’ is not enough to detect risk to the bycatch species and pass the SG80.

1.2.3 Information to Support Harvest Strategy

As for the bycatch species, the confirmation that the fishery has been fishing with extremely long soak times, not tending traps, and with misreporting noted by C&P also increases the concern about accurate information of discards of weak, injured, and dead lobsters. The fishery is not required to report these, nor parts of lobsters that would have been cannibalized more frequently with longer soak times. Therefore, the full mortality is not being taken into account by the assessment nor by the harvest management plan.

The client's claim that they were tending their traps properly and, therefore, reporting their lobster catch accurately is not correct. The MSC assessment report relies on studies showing 11-17% lobster discarded in this fishery. The information does not state whether these are live lobsters or dead or parts of lobsters.

The client has also claimed in the media that their practice of 'storing traps' had the traps open and unbaited – 'not fishing' and, therefore, the traps would not be impacting lobster or other fish. In fact, the C&P report shows that in one monitoring trip 34 trawls that were supposedly 'not fishing' were hauled for spot check and those traps had 15000 lbs of lobster in them. Given the thousands of traps left over many years that C&P show are hauled only 48% of the time – that would mean a far higher number of lobster than previously estimated are actually being caught in these 'stored traps'. It is unclear if these lobsters are reported as harvest or discarded.

Further, spot checks by C&P showed that dead and weak lobster and parts of lobsters represented an extra 25% of the weight of total catch. This is not counted as harvest in log books. These amounts do not match the study data used in the assessment report for scoring nor are these mortalities reported by the fishery.

While the population of lobster are healthy, the underreporting of full mortality of lobster due to illegal fishing practices over the years by the client is a concern and indication that the client has not represented the information from the fishery fully. It is very wasteful practice for a fishery looking to achieve a sustainability certificate from MSC.

The DFO manager of the fishery gave an impact statement during the sentencing of CSPL stating:

"the conservation concerns associated with the retention of lobster and other bycatch in untended traps left and in addition to the predation and spoilage of any catch left by any traps the increase potential for gear loss and gear conflict. All of these issues are still at play even if the traps are left unbaited and with the escape panels removed." (from court proceedings).

This underreporting of target species mortality is a concern for accuracy of information to support a sustainable harvest strategy that is not wasteful of marine life and warrants a score of less than SG 80.

2.3.1 – ETP Species Scoring

The long term illegal soak times documented in this fishery over the course of the certificate period impacts accuracy of reporting of lost gear and entanglements of North Atlantic right whales (NARW) and leatherback sea turtles, both listed as endangered under Canada's Species at Risk Act. Under SARA, no harm at all is allowed to a listed species. The national limit is zero and any risk a fishery may pose to that limit is supposed to be assessed for a harm permit. We do not believe this fishery has been granted SARA harm permits for NARW.

The main rationale presented in the assessment report for high scores under ETP species indicators are 1) that both NARW and leatherbacks forage in the area primarily during the summer when 'the ECOLF fishery does not operate' and 2) that there is 'no evidence of mis-reporting of any required data in the ECOLF, including regarding ETP species.'

This is a mischaracterization of the fishery. The fishery is a year-round fishery. The C&P report analyzing trap hauls throughout the 2015 season shows no break in fishing through the year. There are traps being hauled throughout the summer months. There is no reason to believe this has changed. With the prosecution of the fishery for leaving their traps untended, we know that the fishery consistently

left thousands of traps in the water throughout the year, never bringing them to land even when not actively fishing – the gear and lines would be in the water throughout the year posing a risk of entanglement.

The impact of this is compounded by the lack of gear tending, which could reduce the reporting accuracy for entanglements and gear loss.

The second rationale should also be questioned. As noted above, the C&P report in public court documents notes that there are numerous misreporting incidents in the ECOLF log books over the years.

Also, according to raw observer notes obtained through freedom of information for this fishery over 2014-2016, there was an entanglement of a humpback whale. This is not in the assessment report, which notes there have never been marine mammals reported as entangled in this fishery. The observer company will be able to provide the data for this entanglement.

The strings of gear fished by ECOLF are heavy when compared with the inshore lobster or even snow crab gear, which is one reason researchers believe the whales struggle to shed gear when entangled. They are dragged down by it and drown.

We know that the NARW population shows evidence of entanglement in over 83% of whales. We also know that most entanglement deaths are never observed. Once a whale is not spotted for 6 consecutive years they are considered dead by the New England Aquarium based NARW Consortium. The fact that no NARW has even been found entangled in gear that can be directly traced to the ECOLF fishery is not sufficient evidence that the fishery is within national protection limits and not hindering recovery.

Moreover, there are certainly risks of indirect harm to these species with sublethal impacts on the health of individual whales and sea turtles post- entanglement well documented and a growing literature on the possible population level effects of entanglement of female right whales due to reduction of their reproductive health.

The lead right whale scientist at DFO makes a statement during the court sentencing of CSPL that “highlights the entanglement risk that untended gear can pose to a number of whale species designated under the species-at-risk act and in particular the North Atlantic right whale. This risk of entanglement is created by ground lines used in the trawls at issue” (from court proceedings).

The fact that the client has told the assessment team that they are not fishing during the summer when, in fact, their gear is in the water year round, is a serious concern for the overall credibility of this certificate and should impact scoring in many PIs. For ETP scoring along with the information above, it should lower the score for 2.2.1, 2.2.2, and 2.2.3.

3.2.4 – Research Scoring

Throughout the last two surveillance audits, the client has referred to a study they undertook on soak times stating it shows no increase of bycatch as soak times increase. This finding does not align with the analysis that is shown by the C&P report of the fishery practices. We have repeatedly asked for access to this study, but have been told it is proprietary and cannot be published. If the study findings cannot be shared openly and peer reviewed, it should not be used as a basis for scoring rationale in the MSC assessment process. More importantly, for the transparency of our fisheries management decision making it should not be used to inform a change to the Gear Tending regulations of the

Atlantic Fisheries Regulations. The client now has applied to undertake a second phase of the study that would be on the water data collection. This could then be used to inform changes to this section of the Fisheries Regs that would have wide spread implications in Atlantic Canadian fisheries. That the study would be undertaken by Clearwater raises the question of how the one boat that is supposed to be tending their gear in ECOLF within 72 hours could also be undertaking a controlled study on soak times.

We have requested to the client and DFO that this phase of the study methodology should be open for peer review before the study is permitted. In order to ensure transparency, this is critical. Data that will be collected in public waters and inform decisions of extraction of public resources needs to be transparent and not controlled by the very company that will profit from changes to the rules. To date, the study proposal has not been shared with the ECOLF management committee as would be the norm for other science proposals in fisheries that have multiple licence holders. As a fishery seeking a certification denoting a gold standard of sustainable fishing, they should be required to be transparent with data and information for verification throughout the process.

Thank you for your consideration of this information in the MSC surveillance audit for this fishery certificate. We look forward to the responses in the audit report forthcoming.

Sincerely,



Shannon Arnold
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