

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver   
Acting Executive Director

ESTIMATED TIME 3 HOURS
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DATE: September 26, 2000

SUBJECT: Multi-species CDQ Program

ACTION REQUIRED

- (a) Review and comment on the State of Alaska's percentage allocation recommendations for selected species for the 2000 CDQ fisheries.
- (b) Initial review to revise the administrative regulations for the CDQ Program.

BACKGROUND

(a) State of Alaska's recommendations for the 2001 CDQ fisheries

The State of Alaska is forwarding to the Council its recommendations for CDQ group allocation percentages for the 2001 and 2002 groundfish fisheries. The State recommendations will be provided during the meeting. This is the first full allocation cycle for all species (groundfish and prohibited species, crab, and halibut) under the multi-species CDQ program. This consultation is required under NMFS regulations before the State may submit its recommendations to NMFS for approval and implementation.

(b) Initial review

The Council will consider an initial analysis of revisions to the administrative regulations for the Community Development Quota Program that have been proposed by the State of Alaska. The revisions would allow the CDQ groups to make some management and economic development decisions without prior review and approval by the State of Alaska and NMFS. In addition, the revisions would clarify whether the State and NMFS have oversight authority over decisions made by businesses in which the CDQ groups are majority owners. The initial review draft of the analysis was mailed to you on September 13. The alternatives are listed below. The CDQ Implementation Committee review the draft analysis at its September 22 meeting. The committee's recommendations are attached.

Alternative 1: Status quo. Do not revise the CDQ Program administrative regulations.

Alternative 2: Implement revisions to the CDQ Program administrative regulations based on the State of Alaska's proposal.

Alternative 3: Implement some of the revisions to the CDQ Program administrative regulations proposed by the State of Alaska, but clarify that oversight of the CDQ Program by the State of Alaska and NMFS *does not extend to* the activities of businesses that the CDQ groups own.

**CDQ Implementation Committee**  
**September 22, 2000**  
**Minutes**

The committee convened at approximately 9 am. Committee members Larry Cotter, Paul Peyton, Laird Jones, Bryce Edgmon, Bill Quinlivan (for Ed Glotfelty), and Sally Bibb were in attendance. Eugene Asicksik and Morgan Crow were invited to the committee table for the meeting. CBSFA was also invited to the table. Jane DiCosimo, Jeff Bush, and Greg Cashen were agency representatives. Nine members of the public also attended.

The committee appointed Larry Cotter as acting chairman in the absence of Chairman CAPT Vince O'Shea. The committee reiterated its previous recommendations to revise the membership of the committee to include a representative of each CDQ group to the committee and to have agency personnel act as support to the committee and not be members.

Sally Bibb presented the initial review draft of the analysis of the State's proposal to revise the administrative regulations for the CDQ program. The committee identified a number of areas that could be expanded in the analysis.

1. The following terms should be defined:
  - investment
  - expenditure
  - CDQ project (still awaiting a definition from NOAA General Counsel)
  - ownership
2. Use of the term "expenditure" should be removed from the analysis and it should refer only to "investments", which is consistent with the State's proposal.
3. Morgen Crow said that an explanation of how the alternatives will affect the CDQ groups and the businesses they own is not in the document. Further explanation and analysis is necessary for the CDQ groups to understand the implications of the alternatives. The analysis should better describe the management structures of the businesses that the CDQ groups own. Basing the current analysis on percentage ownership ( $\geq 50\%$  ownership versus  $< 50\%$  ownership) may not be best criteria because it does not always determine who controls the business. Jeff Bush said that the State understood the point and had struggled with the same issue in developing their proposal. They are proposing the 50% threshold because it is easily calculated and understood. The State is open to other suggestions for defining "controlling interest" and suggested that the CDQ groups propose other alternatives that could be analyzed.
4. Two additional suboptions were suggested. First, allow mature (i.e., self-sufficient) companies to make investments without having to obtain approval as a substantial amendment to the CDP. Second, use a percentage of a company's net worth or percentage of sales instead of using a fixed investment amount of \$250,000 or \$1 million to trigger the substantial amendment requirement.
5. Paul Peyton recommended that the analysis include some examples of the impact of the alternatives on different sizes of CDQ investments (for example a large fishing company, a 65' longline catcher vessel, and a small shoreplant). He was concerned that the 50% ownership threshold and the \$1 million threshold for substantial amendments would affect different sizes of businesses differently. The committee recognized that implementation would likely not occur prior to 2002 and recommended that the CDQ groups work with the State to provide the examples for additional analyses for possibly scheduling final

action in April 2001. Paul Peyton and Larry Cotter offered to prepare a strawman for discussion and the CDQ groups will meet with State and NMFS staff to provide the additional material for analysis.

6. Eugene Asicksik stated that it is frustrating that the proposed regulatory changes are proceeding without the requested legal definition of a CDQ project from NOAA General Counsel. He recommended that the public process be extended until a 'CDQ project' is defined.

Sally reviewed the list of requests for analysis which include the following:

Changing the CDQ trawl season start date from January 20 to January 1

Revising the halibut CDQ trip limit in 4E and allowing the catch of 4D halibut CDQ in 4E

Quota management alternatives (overage/underage provisions, pooling, removing CDQ species)

No work currently is being done on any of these analyses because the revisions to the CDQ administrative regulations are the top priority. Once time is available for additional analysis, the CDQ groups and Council will be consulted about priorities.

The committee adjourned at 11 am.

# Alaska Department of Community and Economic Development

## Office of the Commissioner

P.O. Box 110800, Juneau, AK 99811-0800

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September 29, 2000

Mr. David Benton, Chair  
North Pacific Fisheries Management Council  
605 West 4<sup>th</sup> Avenue, Suite 306  
Anchorage, Alaska 99501

RE: 2001-2002 Multi-Species and Associated CDQ Allocations

Dear Mr. Chairman:

The State of Alaska received six Community Development Plan (CDP) applications for the multi-species and associated bycatch Community Development Quota (CDQ) for the 2001-2002 allocation cycle. The allocations are to the six regional organizations or CDQ groups, representing 65 eligible communities bordering the Bering Sea. Through the combined efforts of the CDQ groups, private industry partners, State of Alaska, National Marine Fisheries Service and the North Pacific Fisheries Management Council (NPFMC) the success of the CDQ program has exceeded all initial expectations.

Prior to the formation of the CDQ program, adjacent western Alaska communities captured virtually none of the value of the Bering Sea groundfish resource. Since the program began in 1992, fishery revenues of over \$200 million have been directed towards investments relating on behalf of the eligible communities. The CDQ program has led to over \$45 million in wages, education and training benefits. CDQ groups have invested in in-region seafood infrastructure projects and fish processing investments. The aggregate asset value of the six CDQ groups in 2000 was in excess of \$135 million.

The CDQ program has provided benefits beyond the boundaries of the 65 eligible communities. Residents from non-CDQ communities have participated in education and training programs and have also been a source of employment for CDQ industry partners. CDQ industry partners also benefit from an increase in access to fisheries quota beyond the open access fishery. CDQ group investments into harbor-related improvements have provided benefits to participant's industry-wide.

The CDQ communities through the respective CDQ group boards of directors, submit CDP's to the state that are designed to assist the CDQ groups in becoming successful participants in the North Pacific fishing industry, thereby improving the social and economic conditions specific to their regions.

It is the responsibility of the State of Alaska CDQ Team (Team) to provide assistance and oversight responsibilities for the program to ensure that CDQ resources are being effectively utilized while providing maximum benefits to western Alaska residents. The Team carries out this responsibility in its review of the CDP applications, the quarterly and annual reports and independent financial and management audits.

The state has reviewed the CDP applications from the following CDQ groups:

- Aleutian Pribilof Island Development Association (APICDA)
- Bristol Bay Economic Development Corporation (BBEDC)
- Central Bering Sea Fishermen's Association (CBSFA)
- Coastal Villages Region Fund (CVRF)
- Norton Sound Economic Development Corporation (NSEDC)
- Yukon Delta Fisheries Development Association (YDFDA)

Many factors are carefully considered during the allocation process. Criteria in state and federal regulations are followed in conjunction with input from a public hearing and private interviews with CDQ groups and their industry partners. The criteria in state regulations used to evaluate CDP applications are included as an attachment to this letter. CDP applications are due to the state by August 1. The state has 15 days to provide an initial evaluation of a proposed CDP. The applicant must, in turn, submit any additional information within 10 days after being notified by the CDQ Team.

After consultation with the CDQ groups the state established a two-year allocation cycle for the period of 2001-2002. The allocation will involve all groundfish, halibut and crab species. The multi-species allocations percentages are derived from the historical harvests made by the CDQ groups. Several allocation cycles have taken place since the beginning of the CDQ program in 1992. The initial multi-species allocation took place in 1998 and was followed by a pollock and associated bycatch allocation in 1999.

The state CDQ Team's recommended 2001-2002 primary target species allocation are as follows:

CDQ groups	Pollock	Pacific Cod	Bristol Bay King Crab	Halibut – 4B, 4C, 4D & 4E
APICDA	14%	16%	18%	4B – 100% 4C – 10%
BBEDC	21%	20%	18%	4D – 26%, 4E – 30%
CBSFA	4%	10%	10%	4C – 90%
CVRF	24%	17%	18%	4D – 24% 4E – 70%
NSEDC	23%	18%	18%	4D – 30%
YDFDA	14%	19%	18%	4D – 20%

Page Three  
Mr. David Benton  
September 29, 2000

The state would like to take this opportunity to thank the NPFMC for its continued support of the CDQ program. We hope that our continued oversight of the program will maximize benefits to the CDQ regions and all participants in the North Pacific fishing industry.

Sincerely,



Jeffrey Bush  
Deputy Commissioner

Attachments

Governor Knowles  
NPFMC members  
Clarence Pautzke, Executive Director, NPFMC  
Commissioner Frank Rue, Alaska Department of Fish & Game  
CDQ Groups  
CDQ Team

2001 -- 2002 CDQ Multi-Species Quota Allocation Recommendations  
By Species and Group

	APICDA Allocations	BBEDC Allocations	CBSFA Allocations	CVRF Allocations	NSEDC Allocations	YDFDA Allocations	TOTAL
<b>Halibut</b>							
4B	100%	0%	0%	0%	0%	0%	100%
4C	10%	0%	90%	0%	0%	0%	100%
4D	0%	26%	0%	24%	30%	20%	100%
4E	0%	30%	0%	70%	0%	0%	100%
<b>Crab</b>							
Bristol Bay Red King	18%	18%	10%	18%	18%	18%	100%
Norton Sound Red King	0%	0%	0%	0%	50%	50%	100%
Pribilof Red & Blue King	0%	0%	100%	0%	0%	0%	100%
St. Matthew Blue King	50%	12%	0%	12%	14%	12%	100%
Bering Sea C. Opilio Tanner	10%	19%	19%	17%	18%	17%	100%
Bering Sea C. Bairdi Tanner	10%	19%	19%	17%	18%	17%	100%
<b>Sablefish &amp; Turbot</b>							
Sablefish, Hook & Line - AI	15%	20%	0%	30%	20%	15%	100%
Turbot - AI	16%	20%	5%	21%	20%	18%	100%
Sablefish, Hook & Line - BS	15%	22%	18%	0%	20%	25%	100%
Turbot - BS	20%	22%	7%	15%	15%	21%	100%
<b>Pacific Cod</b>	16%	20%	10%	17%	18%	19%	100%
<b>Pollock</b>							
Bering Sea / AI/Bogoslof	14%	21%	4%	24%	23%	14%	100%
<b>Atka mackerel:</b>							
Eastern	30%	15%	8%	15%	14%	18%	100%
Central	30%	15%	8%	15%	14%	18%	100%
Western	30%	15%	8%	15%	14%	18%	100%
<b>Yellowfin sole</b>	28%	24%	8%	6%	7%	27%	100%
<b>Flatfish:</b>							
Other Flats	25%	23%	9%	10%	10%	23%	100%
Rocksole	24%	23%	8%	11%	11%	23%	100%
Flathead	20%	20%	10%	15%	15%	20%	100%
Other Species	18%	20%	10%	16%	16%	20%	100%
<b>Ocean Rockfish</b>							
O. Rockfish - BS	25%	21%	7%	12%	13%	22%	100%
O. Rockfish - AI	23%	17%	7%	18%	17%	18%	100%
Arrowtooth	24%	22%	9%	11%	10%	24%	100%
<b>Pacific Ocean Perch Complex</b>							
True POP - BS	18%	21%	7%	18%	18%	18%	100%
Other POP - BS	23%	18%	8%	16%	16%	19%	100%
<b>True POP - AI:</b>							
Eastern	30%	15%	8%	15%	14%	18%	100%
Central	30%	15%	8%	15%	14%	18%	100%
Western	30%	15%	8%	15%	14%	18%	100%
Sharp/Northern - AI	30%	15%	8%	15%	14%	18%	100%
Short/Rougheye - AI	22%	18%	7%	18%	17%	18%	100%
Sablefish, Trawl - AI	24%	23%	9%	10%	10%	24%	100%
Sablefish, Trawl - BS	17%	20%	10%	17%	18%	18%	100%
<b>Prohibited Species Quota</b>							
Halibut (mt)	22%	22%	9%	12%	12%	23%	100%
Chinook salmon (#)	15%	21%	4%	23%	23%	14%	100%
Other salmon (#)	15%	21%	5%	23%	22%	14%	100%
Opilio (#)	24%	22%	9%	11%	10%	24%	100%
C. Bairdi - Zone 1 (#)	26%	24%	8%	8%	8%	26%	100%
C. Bairdi - Zone 2 (#)	23%	22%	9%	12%	11%	23%	100%
Red King Crab (#)	29%	23%	8%	7%	7%	26%	100%

# Attachment 1

## FACTORS FOR CONSIDERATION IN CDP APPLICATION

In reviewing the CDP applications, the state is to consider the following factors.

- CDPs provides specific and measurable benefits to each community participating in the CDP.
- A proposed CDP has the support of all participating communities.
- The CDQ group, to the greatest extent possible, has promoted conservation-based fisheries by taking actions that will minimize bycatch, provide for full retention and increased utilization of the fishery resource, and minimize impact to essential fish habitats.
- The number of participating eligible communities, the population of each community and the economic conditions in each community.
- The size of the allocation requested by the applicant and the proper allocation necessary to achieve the milestones and objectives stated in the proposed CDP.
- The degree, if any, to which each CDQ project is expected to develop a self-sustaining local fisheries economy, and the proposed schedule for transition from reliance on an allocation to economic self-sufficiency.
- The degree, if any, to which each CDQ project is expected to generate capital or equity in the local fisheries economy or infrastructure; or investment in commercial fishing or fish processing operations.
- The applicant's contractual relationship with joint venture partners and the managing organization.
- The applicant's and the applicant's harvesting and processing partners', if any, involvement and diversity in all facets of harvesting and processing.
- The coordination or cooperation with other applicants or CDQ groups on CDQ projects.
- The experience of the applicant's industry partners, if any.
- The applicant's CDQ projects for employment, education, and training that provide career track opportunities.
- The benefits, if any, to the state's economy or to the economy of communities that are not eligible to participate in the CDQ program.
- A demonstration that the applicant has a formal, effective administrative process that sets out sound business principles and examples of due diligence that the applicant will exercise.
- The development, if any, of innovative products and processing techniques as well as innovation in harvesting gear for conservation and maximum utilization of the fishery resource.
- The applicant's ability to maintain control over each of its allocations.
- The capital or equity to be generated by the applicant's CDQ projects for fisheries-related business investment.
- The past performance of the applicant and the applicant's industry partners, as appropriate.
- The applicant's transition plan, including the objectives set out in the milestone table.
- The inclusion in the proposed CDP of realistic measurable milestones for determining progress.
- The degree of participating community input in developing the proposed CDP.
- The likely effectiveness of the outreach project.



Attachment 1  
FACTORS FOR CONSIDERATION IN CDP APPLICATION

- Comments provided by other agencies, organizations, and the public.

ONE HUNDRED SIXTY CONGRESS

DON YOUNG, ALASKA, CHAIRMAN  
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# U.S. House of Representatives

## Committee on Resources

Washington, DC 20515

September 28, 2000

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LYOTO A. JONES  
CHIEF OF STAFF

ELIZABETH MCCORMACK  
CHIEF COUNSEL

JOHN LAWRENCE  
DEMOCRATIC STAFF DIRECTOR

# COPY

The Honorable Tony Knowles  
 Governor  
 State of Alaska  
 P.O. Box 110001  
 Juneau, AK 99811-0001

Dear Governor Knowles:

As the author of the language which formally authorized the Western Alaska Community Development Quota (CDQ) Program in the Magnuson-Stevens Fishery Conservation and Management Act, I have followed the growth and success of the CDQ program with great interest.

While the program has matured, I have carefully monitored the progress of the CDQ communities as many have become increasingly integrated into the commercial fisheries of the Bering Sea. As the integration has occurred, it has become apparent that if the communities are to continue to invest in fishing opportunities in the Bering Sea, constraints on their ability to make timely business decisions may cost them, and may have already cost them, opportunities. I am concerned that the constraints placed on the fledgling program by the State of Alaska to ensure compliance with the original intent of the program have not kept pace with the program's growth.

Two issues in particular have constrained the communities' ability to exercise control over their own financial futures. The first is the frequency of the review and allocation of fishing quotas among the CDQ groups under the overall CDQ allocation. The uncertainty surrounding an annual or biennial allocation to each CDQ group prevents them from making long-term business decisions and is counterproductive to the goals and intent of the original program.

The second constraint on the CDQ groups' future success is the review and required concurrence by the State of Alaska for any investment, even the investment of profits of already approved CDQ projects. I am unclear where the State of Alaska believes this authority is granted to the State and, in addition, question whether this makes sense for the future of the CDQ program.

- 2 -

Because the State believes oversight authority and regulatory approval of all investments by CDQ groups rest with the State, I have drafted a discussion draft of legislation to clarify the roles of the Federal government and the State government. I have attached this draft legislation for your information and comment. I would appreciate your views on this legislation and would appreciate your participation in hearings on the status and oversight of the CDQ program which I hope to schedule in the near future.

Sincerely,



DON YOUNG  
Congressman for all Alaska

DY:dwm

Enclosure

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[Discussion Draft]

H.L.C.

[DISCUSSION DRAFT]

106TH CONGRESS  
2D SESSION

H. R. \_\_\_\_\_

IN THE HOUSE OF REPRESENTATIVES

Mr. YOUNG of Alaska introduced the following bill; which was referred to the  
Committee on \_\_\_\_\_

A BILL

To improve implementation of the western Alaska community  
development quota program, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Western Alaska Com-  
5 munity Development Quota Program Implementation Im-  
6 provement Act of 2000".

September 29, 2000 (4:42 PM)  
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Discussion Draft

H.L.C.

1 SEC. 2. ESTABLISHMENT AND IMPLEMENTATION OF THE  
2 PROGRAM.

3 Section 805(i) of the Magnuson-Stevens Fishery Con-  
4 servation and Management Act (16 U.S.C. 1855(i)) is  
5 amended to read as follows:

6 "(i) ALASKA AND WESTERN PACIFIC COMMUNITY  
7 DEVELOPMENT PROGRAM.—

8 "(1) ESTABLISHMENT.—The North Pacific  
9 Council and the Secretary shall establish a western  
10 Alaska community development quota program—

11 "(A) to afford eligible communities a fair  
12 and equitable opportunity to participate in Ber-  
13 ing Sea fisheries; and

14 "(B) to assist eligible communities to  
15 achieve sustainable long-term diversified local  
16 economic development.

17 "(2) ALLOCATION OF PERCENTAGES OF BERING  
18 SEA DIRECTED FISHERIES.—The Secretary shall al-  
19 locate the following percentages of the total allow-  
20 able catches and guideline harvest levels of Bering  
21 Sea directed fisheries as directed fishing allowances  
22 to the western Alaska community development quota  
23 program:

24 "(A) No less than 10 percent of the total  
25 allowable catch of the Bering Sea directed pol-  
26 lock fishery:

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[Discussion Draft]

ELC.

1           “(B) No less than 7.5 percent of the total  
 2 allowable catch of all other Bering Sea directed  
 3 groundfish fisheries.

4           “(C) No less than 7.5 percent of the guide-  
 5 line harvest level of each Bering Sea directed  
 6 crab fishery.

7           “(3) ELIGIBILITY TO PARTICIPATE.—To be eli-  
 8 gible to participate in the western Alaska community  
 9 development quota program, a community must—

10           “(A) be located—

11           “(i) within 50 nautical miles from the  
 12 baseline from which the breadth of the ter-  
 13 ritorial sea is measured along the Bering  
 14 Sea coast from the Bering Strait to the  
 15 westernmost of the Aleutian Islands; or

16           “(ii) on an island within the Bering  
 17 Sea;

18           “(B) not be located on the Gulf of Alaska  
 19 coast of the north Pacific Ocean;

20           “(C) be certified by the Secretary of the  
 21 Interior pursuant to section 11 of the Alaska  
 22 Native Claims Settlement Act (48 U.S.C. 1610)  
 23 to be a Native village;

24           “(D) consist of residents who conduct  
 25 more than one-half of their current commercial



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(Discussion Draft)

R.L.C.

1 and subsistence fishing effort in the waters of  
 2 the Bering Sea or waters surrounding the Aleu-  
 3 tian Islands;

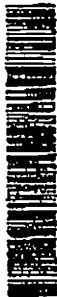
4 "(E) not have previously developed har-  
 5 vesting or processing capability sufficient to  
 6 support substantial participation in the ground-  
 7 fish fisheries of the Bering Sea, unless the com-  
 8 munity demonstrates that its participation in  
 9 the western Alaska community development  
 10 program is the only way for the community to  
 11 realize a return from previous investments in  
 12 harvesting or processing capability; and

13 "(F) be a member of a CDQ group.

14 "(4) AUTHORITY TO HARVEST.—(A) The Sec-  
 15 retary may authorize a CDQ group to harvest a  
 16 share of the percentage of the total allowable catch  
 17 or guideline harvest level of a Bering Sea directed  
 18 fishery allocated under paragraph (2) if the CDQ  
 19 group submits a community development plan to the  
 20 Secretary in accordance with this paragraph.

21 "(B) A community development plan shall—

22 "(i) request a share of the percentage  
 23 of the total allowable catch or guideline  
 24 harvest level of the fishery that the CDQ  
 25 group that submits the plan desires to har-



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[Discussion Draft]

R.L.C.

1 vest annually during the effective period of  
2 the plan; and

3 "(ii) describe all CDQ projects in  
4 which the CDQ group that submits the  
5 plan intends to participate during the 36-  
6 month duration of the plan.

7 "(C) The Secretary shall timely approve or dis-  
8 approve each community development plan sub-  
9 mitted under this paragraph. If approved, a commu-  
10 nity development plan shall be effective for 36  
11 months

12 "(D) In approving a community development  
13 plan, the Secretary shall specify the share of the  
14 total allowable catch or guideline harvest level that  
15 the CDQ group is authorized to harvest annually  
16 under the plan, in accordance with paragraph (5).

17 "(5) SPECIFICATION OF HARVEST SHARES.—

18 (A) If the total of the harvest shares requested pur-  
19 suant to paragraph (4)(B)(i) for a fishery is greater  
20 than the percentage of the total allowable catch or  
21 guideline harvest level for the fishery allocated under  
22 paragraph (2) to the western Alaska community de-  
23 velopment quota program, the Secretary shall au-  
24 thorize each CDQ group requesting a harvest share  
25 to harvest annually the share of the percentage of



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[Discussion Draft]

H.L.C.

1 the total allowable catch or guideline harvest level of  
2 the fishery that the Secretary determines is appro-  
3 priate.

4 "(B) In determining harvest shares under sub-  
5 paragraph (A), the Secretary may consider the fol-  
6 lowing criteria:

7 "(i) The number of communities that are  
8 members of each CDQ group requesting a har-  
9 vest share and the total number of persons who  
10 are residents of those communities.

*Population*

11 "(ii) The extent to which each such CDQ  
12 group—

13 "(I) during its past participation in  
14 the western Alaska community develop-  
15 ment quota program, implemented the  
16 CDQ projects described in its approved  
17 community development plans in a manner  
18 that was consistent with sound business  
19 practices; and

20 "(II) complied with applicable Federal  
21 and State environmental and other stat-  
22 utes and regulations when participating in  
23 Bering Sea fisheries.

24 "(C) If the Secretary authorizes a CDQ group  
25 to harvest a share of a fishery that is less than the



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1 harvest share requested in the community develop-  
 2 ment plan submitted by the CDQ group, the Sec-  
 3 retary shall give the CDQ group an opportunity to  
 4 amend the plan to reflect the reduction in harvest  
 5 share authorized by the Secretary.

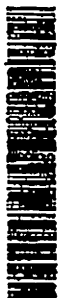
6 "(6) PARTICIPATION BY STATE OF ALASKA.—

7 (A) The Secretary may allow the State of Alaska to  
 8 participate in the implementation of the western  
 9 Alaska community development quota program.

10 "(B) If the State of Alaska participates, the  
 11 Secretary may require CDQ groups to submit a copy  
 12 of their community development plans to the Gov-  
 13 ernor of Alaska.

14 "(C) If the State of Alaska is participating in  
 15 the implementation of the western Alaska commu-  
 16 nity development quota program and the total of the  
 17 harvest shares requested pursuant to paragraph  
 18 (4)(B)(i) for a fishery is greater than the percentage  
 19 of the total allowable catch or guideline harvest level  
 20 for the fishery allocated under paragraph (2) to the  
 21 western Alaska community development quota pro-  
 22 gram, the Secretary may direct the Governor of  
 23 Alaska—

24 "(i) to consult with the CDQ groups;



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1           “(li) to consult with the North Pacific  
2           Fishery Management Council regarding the  
3           plans; and

4           “(iii) to timely submit the Governor's rec-  
5           ommendations regarding the approval of the  
6           plans by the Secretary.

7           “(D) The Governor shall base any recommenda-  
8           tions under subparagraph (C)(iii) on the criteria list-  
9           ed in paragraph (5)(B), and shall indicate, in writ-  
10          ing, to the Secretary and to each CDQ group the ra-  
11          tionale, and the factual basis for the rationale, for  
12          any recommendation regarding the Secretary's ap-  
13          proval of a CDQ group's community development  
14          plan.

15          “(7) REPORTS.—(A) On March 1 of each cal-  
16          endar year each CDQ group shall submit a report  
17          regarding its approved community development  
18          plans then in effect to the Secretary, and to the  
19          Governor of Alaska if the State of Alaska is partici-  
20          pating under paragraph (6).

21          “(B) Each report shall describe the following:

22               “(i) The CDQ group's implementation dur-  
23               ing the previous calendar year of the CDQ  
24               projects described in the group's community de-  
25               velopment plans, and any modifications to a

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1 project that the group may have made since the  
2 last report.

3 "(i) In summary form, the financial per-  
4 formance during the previous calendar year of  
5 each subsidiary, joint venture, partnership, or  
6 other entity in which the CDQ group owns an  
7 equity interest, and all other non-CDQ project-  
8 related activities in which the group engaged.

9 "(iii) The CDQ group's budget for the cur-  
10 rent calendar year.

11 "(C) Financial and strategic business informa-  
12 tion contained in reports under this paragraph shall  
13 be considered confidential. The Secretary, and the  
14 Governor of Alaska if the State of Alaska is partici-  
15 pating in the Secretary's implementation of the  
16 western Alaska community development quota  
17 program—

18 "(i) shall not make such information avail-  
19 able to the public; and

20 "(ii) may not use such information for any  
21 purpose other than evaluating the financial sta-  
22 tus and performance of the CDQ group that  
23 submitted the information.

24 "(8) DEFINITIONS.—For the purposes of this  
25 subsection:



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“(A) The term ‘CDQ group’ means a non-profit or for-profit corporation or other entity whose membership is exclusively composed of one or more communities that satisfy the criteria described in paragraph (3)(A) through (E).

“(B) The term ‘community development plan’ means a plan that describes—

“(i) how a CDQ group intends to harvest its requested share of the percentage of the total allowable catch or guideline harvest level of a directed Bering Sea fishery that the Secretary has allocated to the western Alaska community development quota program; and

“(ii) how the group intends to use the harvest opportunity and the revenue derived therefrom to assist communities that are members of the group to achieve sustainable long term local economic development.

“(C)(i) Subject to clause (ii), the term ‘CDQ project’ means a program or activity that is administered or initiated by a CDQ group and that is funded by revenue the CDQ group



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1 derives or accrues during the duration of a  
 2 community development plan approved by the  
 3 Secretary from harvesting the fishery covered  
 4 by the plan.

5           “(ii) Such term does not include a program  
 6 or activity administered or initiated by a sub-  
 7 sidiary, joint venture, partnership, or other en-  
 8 tity in which a CDQ group owns an equity in-  
 9 terest, if the program or activity is funded by  
 10 the assets of the subsidiary, joint venture, part-  
 11 nership, or other entity, rather than by the as-  
 12 sets of the CDQ group.

13           “(9) REGULATIONS.—The Secretary may pro-  
 14 mulgate such regulations as are reasonable and nec-  
 15 essary to enable the Secretary to implement this  
 16 subsection”.



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UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration

Office of General Counsel  
P.O. Box 21109  
Juneau, Alaska 99802-1109

October 2000  
C-5(a)

October 4, 2000

MEMORANDUM FOR: James W. Baltiger  
Administrator, Alaska Region

THROUGH: Lisa L. Lindeman *Lisa L. Lindeman*  
Regional Attorney, Alaska Region

FROM: Lauren M. Smoker *Lauren M. Smoker*  
Staff Attorney, GCAK

SUBJECT: Legal Opinion on the Definition of a CDQ Project

By memorandum dated May 5, 1999, your office requested a legal opinion as to whether Norton Sound Economic Development Corporation's (NSEDC's) ownership of Glacier Fish Company (GFC) constituted a "CDQ project" as defined at 50 C.F.R. 679.2. We have examined the historical development of the CDQ regulations and reviewed the available information on this issue. For the reasons set forth below, we conclude that no clear interpretation emerges from a review and legal analysis of the regulatory language or the history of the development of the CDQ regulations. A review of the regulatory history does not reveal much discussion as to why the current monitoring regulatory scheme is appropriate or how it provides the necessary level of oversight. Therefore, both NSEDC's and the State's interpretations find support and contradiction in the regulatory language; both interpretations have the potential to enhance as well as frustrate the currently stated goals and objectives of the CDQ program. NSEDC's interpretation creates the potential for investment in activities that, while economically sound, may not be commercial fisheries business activities, or for investment in commercial fisheries business activities that may not be regionally-based in contradiction of the stated purpose of the CDQ program at 679.1(e). Conversely, the State's interpretation, appears to extend the reach of the State's monitoring responsibilities beyond what the current regulatory program supports and may have the potential to competitively burden a CDQ group's ability to invest in established regionally-based, fisheries-related businesses, potentially undermining the CDQ program goals of self-sufficiency and economic viability for CDQ groups. It is therefore recommended that the Council, the State, CDQ groups, NMFS, and the public consider this issue and determine how best to resolve these competing interests.



1. Statutory and Regulatory Background of the CDQ Program

In March 1992, the Secretary of Commerce approved an amendment to the Bering Sea and Aleutian Islands Area (BSAI) Fishery Management Plan (FMP) that, among other things, allocated one half of the BSAI pollock reserve, or 7.5% of the total allowable catch (TAC) of pollock, to eligible communities in western Alaska that are located along the Bering Sea coast. See Final Rule implementing Amendment 18 to the BSAI FMP, 57 Fed. Reg. 23321, June 3, 1992. Regulations implementing the Western Alaska Community Development Quota Program were proposed in October 1992. 57 Fed. Reg. 46139; October 7, 1992. The proposed rule contained the following description of the CDQ program:

The CDQ program was proposed to help develop commercial fisheries in western Alaska communities. These communities are isolated and have few natural resources with which to develop their economies. Unemployment rates are high, resulting in substantial social problems. However, these communities are geographically located near the fisheries resources of the Bering Sea, and have the possibility of developing a commercial fishing industry. Although fisheries resources exist adjacent to these communities, the ability to participate in these fisheries is difficult without start-up support. This CDQ program is intended to provide the means to start regional commercial fishing projects that could develop into ongoing commercial fishing industries. . . . The communities could use their CDQ allocation by harvesting the fish with their own vessels and selling or processing the fish, or by entering into partnerships with harvesting vessels that would pay the CDQ communities in return for harvesting the communities' pollock allocation. Because most of the communities lack much of the infrastructure necessary to harvest pollock directly, many communities may initially sell their allocation of CDQ pollock to operators of vessels in the existing pollock fleet. The resulting income could be used to develop a pollock fishing infrastructure, or could be used to develop other BSAI fisheries. The types of fishery projects that could be funded by selling the harvesting of CDQ allocation could be any project that promotes development of the communities' commercial fishing industries. For example, proceeds from the sale of CDQ allocation could be used to develop the harvesting of underutilized species, hook-and-line fisheries, processing capabilities, or basic fishery infrastructure to support the harvest of pollock or other species.

Id., at 46139-40. The following description was provided for a community development plan (CDP):

A CDP would consist of three parts: (1) community development information; (2) business information; and (3) a statement of the managing organization's qualifications. Community development information includes goals, objectives and information concerning the project(s) that will develop the fishing industry in the community(ies). The business information section of a CDP includes information about the catching and harvesting of CDQ pollock, and information about the business aspects of the fisheries



development project(s) of the community(ies). The statement of the managing organization's qualifications includes information to ensure that he (sic) managing organization, whether it is the CDQ applicant of a group contracted by the CDP applicant, is qualified and has the ability to properly manage the harvesting of the CDQ pollock and the fisheries development project(s) of the community(ies).

Id., at 46140. The proposed regulatory text at 675.27(b)(1)(vi) requires that a "description of existing fishery-related infrastructure and how the CDP would use or enhance existing harvesting or processing capabilities, support facilities, and human resources" be included in the CDP. Additionally, 675.27(b)(1)(vii) states that the CDP must describe how the CDP would generate new capital or equity for the applicant's fishing and/or processing operations. Finally, communities would be required to submit annual reports to the Governor of Alaska, showing how the CDP's goals and objectives had been met. Id., at 46140-41. The Governor would review these reports and the status of the project and "determine whether the project is being managed according to the provisions of the original CDP." Id. The preamble stated that the Governor must be notified of and approve substantial amendments to an approved CDP. Id. The final rule implementing the CDQ program was published on November 23, 1992 (57 Fed. Reg. 54936). Although the term "CDQ project" was used in the regulatory text,<sup>1</sup> it was not defined in this rulemaking.

In November 1993, a final rule implementing the sablefish and halibut Individual Fishing Quota Program was issued. 58 Fed. Reg. 59375; November 9, 1993. This rule established a Western Alaska CDQ Program for sablefish and halibut that was similar to the pollock CDQ program but distinct from the pollock CDQ program. Again, although the term "CDQ project" was used in the regulatory text,<sup>2</sup> it was not defined in this rulemaking. In September 1995, the Secretary published a proposed rule to extend the pollock CDQ program for another 3 years (Amendment 38 to the BSAI FMP). 60 Fed. Reg. 48087; September 18, 1995. In this proposed rule, the undefined term "CDP project" enters the regulations.<sup>3</sup> The goals and purpose of the CDQ program are further refined in this rulemaking:

Introductory text is added in section 675.27 to describe the goals and purpose of the CDQ program as follows: to allocate CDQ pollock to eligible Western Alaska communities to provide the means for starting or supporting commercial seafood activities that will result in ongoing regionally based commercial seafood or related businesses. This statement is a distillation of previous CDQ proposed and final rules that describe the goals and

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<sup>1</sup>See 50 CFR 675.27(b)(2)(iii), (d)(5)(iii), (d)(6)(ii) and (e)(1).

<sup>2</sup>See 50 CFR 676.24(d)(2)(iii), (f)(5)(iii), (f)(6)(ii), (j)(2), and (j)(5).

<sup>3</sup>The undefined term "CDP project" continues in the current CDQ regulations governing CDP monitoring at 50 C.F.R. 679.30(g)(ii).

purpose of the CDQ program and is proposed to be added to these regulations to state precisely the purpose and goals of this program.

Id., at 48091. The preamble to the proposed rule also states that:

. . . a CDP does not have goals and objectives that are separate from those of the CDQ program. Therefore, [the CDP section dealing with community development information] is replaced with a more correct statement. Specifically, CDPs are project-based documents, and should include a description of the CDP projects that are proposed to be funded by the pollock allocation and how the CDP projects satisfy the goals and objectives of the CDQ program.

Id. The final rule implementing Amendment 38 contains the following comment and response:

Comment 8: The focus of the CDQ program needs to remain on long-term development projects, not on short-term projects such as job creation. The CDQ regulations need to be more clear in describing the types of CDQ projects that would be acceptable. The CDQ regulations should direct a portion of CDQ resources to be used to construct and maintain public infrastructure in CDQ communities.

Response: Job creation is part of some CDPs and is usually associated with training and job creation in commercial fisheries. Training and job creation in commercial fisheries will increase the number of skilled fishermen. This will enable CDQ communities to become more self-sufficient in regional fisheries related development, which is a valid long-term goal of the CDQ program. The CDQ regulations allow the CDQ group's board of directors, along with their constituents, to choose their own CDQ projects because each CDQ group is more familiar with the needs of its communities and would be the best judge of whether a project would succeed or fail due to the local conditions. Additionally, by choosing their own projects and succeeding or failing on their own business skills, the CDQ groups can best learn the skills for developing a viable business. This will assist the CDQ groups in becoming self-sufficient in the future. Viable, on-going businesses are a long-term goal of the CDQ program.

60 Fed. Reg. 63654, 63656; December 12, 1995. Once again, the term "CDQ project" was not defined in this rulemaking.

In 1996, the Magnuson-Stevens Act was amended and statutory language regarding the Western Alaska CDQ program was added. These amendments addressed the percentage of fish to be allocated to the CDQ program, the eligibility criteria for communities, and certain restrictions on changes to the CDQ program during the next four years.<sup>4</sup> The legislative history contains the same goals and objectives for the CDQ program as those stated during its regulatory

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<sup>4</sup>See 16 U.S.C. 1855(i)(1).

development. Neither the statutory language or the legislative history addressed the more detailed aspects of the CDQ program or define the term "CDQ project."

A definition of the term "CDQ project" first appears in the proposed rule for the Multispecies CDQ program in 1997. 62 Fed. Reg. 43866; August 15, 1997. "CDQ project" is defined as "any program that is funded by a CDQ group's assets for the economic or social development of a community or group of communities that are participating in a CDQ group, including but not limited to, infrastructure development, CDQ investments, employment and training programs, and CDP administration." Id., at 43883. The preamble for the proposed rule also contains the following statements:

The proposed MS CDQ program would be a Federal program in which the fishing privileges for CDQ are temporarily allocated by NMFS to the CDQ groups. In return, the CDQ groups would be responsible for managing the CDQ harvesting and the CDQ projects as outlined in the CDPs on behalf of the member communities. NMFS would have no obligation to allocate future CDQ or PSQ based on past allocations, and CDQ and PSQ fishing privileges would expire with the expiration of a CDP. NMFS would base its awards of CDQ and PSQ allocations to the CDQ groups on the merits of the proposed CDPs. Id., at 43874.

Therefore, a CDQ group would have a fiduciary responsibility to manage its CDQ allocations, CDQ projects and assets in the best interests of the participating CDQ community(ies). Id.

The CDP would provide information to the state and NMFS about the eligible communities, the managing organization, the CDQ projects, the requested allocation of CDQ and PSQ species, the harvesting and processing partners, and how the CDQ group would account for CDQ and PSQ catches by these partners. For each allocation request, section 679.30(a)(4) would require that the CDP identify the primary target fisheries by species and gear type, percentage of the target species requested, and the percentage of CDQ and PSQ species needed as bycatch in these fisheries. Id.

The CDQ program is described as follows at section 679.1(e): "The goals and purpose of the CDQ program are to allocate CDQ to eligible Western Alaska communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally-based, fisheries-related economy." Id., at 43882. The term "CDP" is defined as "a business plan for the economic and social development of a specific Western Alaska community or group of communities under the CDQ program at 679.30." Id., at 43883.

The Multispecies CDQ amendments<sup>5</sup> were approved by the Secretary on September 12, 1997, and the final rule implementing the program was published in the Federal Register on June 4, 1998 (63 Fed. Reg. 30381). The final rule for the Multispecies CDQ program contains the following comment and response:

Comment 9: The proposed CDQ regulations require a transition plan that includes a schedule for transition from reliance on quota allocations to self sufficiency in fisheries for each CDQ project. A transition plan for each CDQ project would be cumbersome and not very meaningful. A better transition plan would be one that estimates the impact on all CDQ group activities and the long-term revenue stream in the event that CDQ allocations cease.

Response: NMFS concurs. The regulations at 679.30(a)(6)(i) are changed to define a transition plan as an overall schedule for transition from reliance on CDQ allocations to self-sufficiency in fisheries, based on the CDQ group's long-term revenue stream without CDQs.

Id., at 30383. The definitions of "CDP" and "CDQ project" that were published in the final rule on June 4, 1998, are the same as the current definitions.

## 2. Factual background and procedural history of the issue under review

In 1997, NSEDC submitted an amendment to their 1996-98 pollock CDP to include the acquisition of an ownership interest in GFC. NSEDC Amendment 97-2P to the Bering Strait Region CDP for the Pollock CDQ Program, submitted to the State of Alaska on June 19, 1997. At that time, this investment was recognized by NSEDC, the State, and NMFS as a CDQ project. NSEDC completed their purchase of an ownership interest in GFC in December 1997. NSEDC's 2000 proposed CDP, page 1. According to the terms of the purchase agreement, NSEDC owns a 50% membership interest in GFC; Erik Breivik and John Bundy, through their wholly owned companies, own the remaining 50% membership interest in GFC. Id. According to a letter from Mr. Ralph Duerre, of Burr, Pease & Kurtz, to Mr. Eugene Asicksik, NSEDC, dated October 20, 1998, GFC is managed by Mr. Breivik and Mr. Bundy in accordance with a management agreement. Under this agreement, Mr. Breivik and Mr. Bundy generally have the authority to make capital expenditures of less than \$500,000, but Mr. Breivik and Mr. Bundy must receive 66% approval of the members of GFC before making any capital expenditure in excess of \$500,000.

During the pollock CDP application cycle for the 1999 fishing year, NSEDC did not list GFC as a CDQ project in their proposed pollock CDP. When asked by the State to include GFC in their proposed 1999 pollock CDP, NSEDC responded as follows:

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<sup>5</sup>Amendment 39 to the BSAI FMP and Amendment 5 to the FMP for Commercial King and Tanner Crab Fisheries in the BSAI.

The state is also requiring that all items listed in the section entitled "Other Income Producing Investments" be changed to be represented as CDQ projects. This would represent a change from our prior practice in approved CDPs, and our reading of the federal regulations,[footnote omitted] which recognize a distinction between activities *being* funded from CDQ proceeds and other activities related to NSEDC not being funded with CDQ proceeds. NSEDC disagrees with [the State's] interpretation of the definition of CDQ projects. With respect to GFC, the CDQ project was the process and funding of NSEDC's investment, which occurred as part of the 1996-98 pollock CDP. . . . [NSEDC provides] detailed information regarding Glacier Fish Company and any of our other subsidiaries or income-producing investment activities. To the extent that CDQ proceeds are used, the information is supplied as part of the description of CDQ projects, and otherwise the information is supplied as part of the description of other subsidiaries and investment activities.

Letter dated October 20, 1998, to Glenn Haight, CDQ Manager, Alaska Department of Community and Regional Affairs, from Eugene Asicksik, President, NSEDC. According to a letter dated October 27, 1998 from Glenn Haight, Alaska DCRA to Eugene Asicksik, NSEDC, the State determined that NSEDC's CDQ investment in GFC was intended for economic development, was funded by its cash reserves, and NSEDC continues to be liable for the debts of GFC. Given this, when NSEDC did not list GFC as a CDQ project in their proposed 1999 CDP, the State advised NSEDC to treat GFC as a CDQ project and to list GFC as such in its CDP. *Id.* The State argued that its key role in the CDQ program is to provide an appropriate level of oversight to ensure that recipients of CDQs are working to meet the mission of the program. The State noted that it has a responsibility to ensure that funds are used by CDQ groups with due discretion towards accomplishing the CDPs and that this responsibility exists before, during, and after those funds are dispersed. The State then explained that it is paramount to the survival and success of the CDQ program that the State establish and maintain a credible oversight management system. In light of this responsibility, the State emphasized the importance of maintaining a strong oversight role in the operations of CDQ investments for the benefit of the CDQ groups.

Despite an additional exchange of letters and meetings,<sup>6</sup> this question remained unresolved, and NSEDC and the State agreed to disagree on this issue. In a November 16, 1998, letter from Lamar Cotten to NSEDC, the State summarized the agreement as follows:

. . . NSEDC agrees to revise their CDP to include GFC in a separate category, called "CDQ Investments." It is understood that NSEDC will continue to submit information and materials to the State as it has under the 1998 program with respect to GFC, including a budget for GFC pursuant to 679.30(g)(2). It is further agreed that there will be no departure from the plan of business of GFC as described in the information already

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<sup>6</sup>A more detailed presentation of the arguments made by NSEDC and the State is provided in section 6 of this opinion.

submitted to the state, including the 1999 CDP and all addenda thereto. If NSEDC does not comply with the terms of this letter, its CDP and addenda, or any changes the state finds necessary and appropriate after its comprehensive review process, the state may recommend the termination of NSEDC's 1999 pollock allocation CDP.

When the State submitted NSEDC's proposed 1999 pollock CDP to NMFS for approval, the State made the following comments:

There is an outstanding issue with NSEDC and its investment in Glacier Fish Company (GFC) regarding GFC's status as a CDQ project. Given the maturation of the CDQ program, the state will be engaging in a comprehensive review process in coordination with all the CDQ groups to review and if necessary, amend its policies regarding the CDQ program. Until such time as the review process is complete, the state will consider GFC as a CDQ project for purposes of compliance monitoring. Through this measure of oversight, NSEDC's CDP application meets the requirements of Part 50 CFR 679.

Letter dated November 19, 1998, to Steven Pennoyer, NMFS, from Lamar Cotten, Alaska Department of Community and Regional Affairs, re: 1999 Pollock - Multi-Species CDQ Program Recommendations, page 2. In the decision memorandum recommending approval of the 1999 CDPs, NMFS made the following statements:

We believe that NSEDC's ownership of GFC could be defined as a CDQ project because the definition of a CDQ project includes "CDQ investments." However, in reviewing our currently approved CDPs, we have identified other examples of equity ownership by CDQ groups in fishing businesses that are not listed as CDQ projects in the CDP. In these cases, the CDQ group owns less than a 50 percent interest in a fishing vessel. However, NMFS regulations do not specify a percentage ownership level that would distinguish CDQ projects from other types of investments by the CDQ group.

Memorandum for Rolland Schmitt, Assistant Administrator for Fisheries, from Steven Pennoyer, Administrator, Alaska Region, dated December 22, 1998, re: Approval of Amendments to the 1998-2000 Multispecies Community Development Plans for the 1999 Allocations of Pollock and Related Bycatch Species -- Decision Memorandum.

Although it initially appeared as though NSEDC decided to include GFC as a CDQ project in their proposed 2000 CDP application, in a letter to the State dated October 20, 1999, NSEDC reaffirmed their interpretation of CDQ project and made the following statements:

We reaffirm for the year 2000 our willingness to subject any substantial investments made by NSEDC through GFC, either in the form of a capital contribution by NSEDC or a guarantee of additional debt by NSEDC, to the provisions of 6 AAC 93. This does not apply to investments made by GFC which do not require NSEDC's cash or credit.

Again, NSEDC and the State agreed to disagree on this issue. When the State submitted NSEDC's proposed 2000 pollock CDP to the Secretary for approval, the State made the following comments:

The reason we withheld NSEDC's allocation was due to an incomplete CDP application. There has been a long-standing issue regarding the legal definition of a CDQ project. Following discussions this week, it was agreed that NSEDC would accept the state's interpretation of a CDQ project until NOAA General Counsel issued its opinion in the matter.

Letter dated November 5, 1999, to Steven Pennoyer, NMFS, from Jeffery Bush, Alaska Department of Community and Regional Affairs, re: 2000 Pollock and Associated Bycatch Allocation Recommendations -- CDQ Program, page 1.<sup>7</sup> NMFS approved the 2000 CDQ pollock and bycatch allocation recommendations of the State.

### 3. Rules of Statutory and Regulatory Construction and Interpretation

When there is a question concerning the interpretation of a statute or regulation, several principles of law are applied and considered in order to interpret the statute's or regulation's meaning. These principles are known as the rules of statutory construction. One of the guiding principles of statutory and regulatory interpretation asserts that when the language of the statute or regulation is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the statute to give it meaning. Sutherland, Statutes and Statutory Construction, section 46:01. This is known as the plain meaning rule. Only statutes or regulations that are of doubtful meaning are subject to the process of statutory interpretation.

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<sup>7</sup>NSEDC took exception with the State's characterization of their discussions referenced in the recommendation letter. According to a letter dated November 11, 1999, from Eugene Asicksik to Jeffery Bush, "NSEDC agreed specifically and only to the removal of the cover letter [used to transmit NSEDC's amendments to their CDP] and to revisit the issue with the state after the ruling from NOAA General Counsel. NSEDC also verified that the CDP, inclusive of the preliminary note, was accepted and would be transmitted." The "preliminary note" referenced above stated the following: "At the request of the CDQ team, NSEDC is again including its description of Glacier Fish Company (GFC) on a CDQ project form. Again, because this investment is an outstanding example of the success of the CDQ program, we appreciate the opportunity to describe it. The CDQ team has, in its letter of September 1, 1999, informed NSEDC that the state has categorized Glacier Fish Company as a "core project" and has requested that NSEDC revise the form on which NSEDC has described GFC to include that label. NSEDC does not understand the implications for regulatory oversight in labeling an activity "core" or "non core." Therefore, in complying with the state's request, NSEDC reserves its rights regarding the independent legal status of GFC under law and the operating and management agreements. GFC and its other owners are aware of this action taken by NSEDC and have consented to the action subject to the reservation expressed herein. Neither GFC nor its owners intend to waive or in any way diminish any of GFC's rights to conduct itself as a private business."

Ambiguity exists when a statute or regulation is capable of being understood by reasonably well-informed persons in two or more different senses. *Id.*, section 46:04. An assertion of ambiguity must show either that some other section of the regulatory program expands or restricts the provision's meaning (i.e. that the plain meaning of the provision is repugnant to the general purview of the act) or that the provision considered *in pari materia*<sup>8</sup> with other provisions of the regulatory program, or with the legislative history of the subject matter, imports a different meaning.

Once ambiguity is established, intrinsic and extrinsic aids to interpretation are applied under the rules of statutory construction. It is commonly understood that definitions establish meaning where the terms appear in the regulations. *Id.*, section 47:07. However, if there is ambiguity in a definition, one may look at legislative history to determine what was intended. If the legislative intent may be readily discerned from reading the statute, recourse to a dictionary is unnecessary. *Id.*, section 47:27. And, the intent of the legislature is to be followed even if the dictionary definition of a word varies from the legislative intent. But, if terms within the definition are undefined and legislative intent is absent, the word will be assumed to have its ordinary and popularly understood meaning and the use of dictionary definitions to interpret undefined regulatory terms is appropriate. Additionally, a term whose statutory or regulatory definition declares what it "includes" is more susceptible to extension of meaning by construction than where the definition declares what a term "means." *Id.*, section 47:07.

Usually words of a statute must be construed in accordance with their ordinary and common meaning unless they have acquired a special meaning or unless a definite meaning is apparent or indicated by the context of the words. *Id.*, section 47:27. A special meaning will not be adopted if the legislature intended that the general meaning apply, or if the special meaning is contrary to the implications of context or the subject matter. The general meaning is also preferred (1) if the special meaning would defeat the object of the law, or is contrary to a reasonable operation of the statute, a definition within the statute, a general interpretation statute, or other statutes relating to the same subject, or (2) if the proposed construction would involve a contradiction between different parts of the statute, or different statutes, is absurd or harsh, or repugnant to acknowledged principles of national policy. Where the word of common usage has more than one meaning, the one which will best attain the purpose of the legislature should be adopted in construing the statute. *Id.*

For example, absent legislative intent to the contrary, or other evidence of a different meaning, legal or commercial terms in a statute are presumed to have been used in their legal or commercial sense. *Id.*, sections 47:30 and 47:31. A term which has been judicially interpreted may be considered as a legal term, a common law term, a term with meaning in the jurisprudence of the country or a term possessing a meaning in law. If a term has both a common meaning and

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<sup>8</sup>*In pari materia* is defined in Black's Law Dictionary as "upon the same matter or subject. Statutes *in pari materia* are to be construed together. 'Statutes *in pari materia*' are those relating to the same person or thing or having a common purpose."



a commercial or trade meaning, the common meaning will prevail until the commercial or trade meaning is proved, or a different legislative intent is established. In order for an alleged trade or commercial meaning to prevail, it must appear that such commercial meaning is the result of established usage in commerce and trade. It must also appear that at the time of the passage of the act, such usage was definite, uniform, and general, and not partial, local, or personal.

Finally, as evidenced from the above, statutory construction also holds that a statute or regulatory program is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Id., section 46:05. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole and it is improper to confine interpretation to the one section to be construed.

#### 4. Analysis

The question posed to GCAK as to whether GFC is a CDQ project under the federal CDQ program regulations stems from the disagreement between NSEDC and the State regarding interpretation of the regulations as they apply to GFC. Given the long-standing disagreement between NSEDC and the State as to the interpretation and application of the definition of CDQ project and both NSEDC's and the State's extensive experience in working with the federal CDQ regulations, it is reasonable to conclude that ambiguity exists within the CDQ program's regulatory framework as to what kind of project is a CDQ project. Therefore, in applying the rules of statutory construction to determine whether GFC is a CDQ project, two issues must be examined. First, given the specific regulations cited by NSEDC and the State, does the regulatory language support either NSEDC's or the State's interpretation of CDQ project? Second, looking at the CDQ regulatory program as a whole, what effect does each interpretation have on the other provisions, including the goals and purpose, of the CDQ program?

#### Analysis of the regulatory language as it applies to defining CDO project

NSEDC puts forth three arguments as to why the regulatory language supports its interpretation of the term CDQ project. First, NSEDC argues that the words used in definition of CDQ project narrowly confine its application to only those projects that will be or are currently being funded, or paid for, by proceeds from a CDQ group's accounts versus the accounts of a business entity that is separate and distinct from a CDQ group during the effective period of the CDP. NSEDC has stated that any future investments made by NSEDC through GFC, either in the form of a capital contribution by NSEDC to GFC or a guarantee of additional debt by NSEDC for GFC, would be subject to the State and Federal regulatory oversight provisions for CDQ projects.<sup>9</sup> Conversely, it is NSEDC's position that GFC business activities that are funded, or paid for, by

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<sup>9</sup>Letter dated October 20, 1999, from Eugene Asicksik, President and CEO of NSEDC, to Jeff Bush, Deputy Commissioner, State of Alaska Department of Regional and Community Affairs.

GFC assets, rather than NSEDC assets, are not CDQ projects as the term CDQ project does not apply to investments made by GFC which no longer require NSEDC's cash or credit.<sup>10</sup>

NSEDC's argument recognizes a distinction between activities currently being funded, or paid for, from NSEDC's proceeds as compared to activities related to NSEDC but not currently being funded with NSEDC's proceeds. "With respect to GFC, the CDQ project was the process and funding of NSEDC's investment, which occurred as part of the 1996-98 pollock CDP."<sup>11</sup> As NSEDC is no longer funding activities undertaken by GFC, GFC is no longer a CDQ project. In addition, NSEDC notes that at the time NSEDC made the decision to purchase GFC, the State indicated that it would not have oversight of the activities of GFC.<sup>12</sup> NSEDC understood from their meetings with the State's Review Team that "the threshold where future plan amendments would be required regarding NSEDC's investment in GFC would be when a GFC activity would cause an increased financial outlay or debt exposure of NSEDC."<sup>13</sup> In addition to the timing argument, NSEDC notes that it and GFC are two legally separate entities -- a CDQ group is a legal entity whose existence is separate and distinct from that of other entities, including entities in which that CDQ group may own an equity interest. Given the definition of CDQ project, a program that is funded by the assets of a legal entity that is not a CDQ group is not a CDQ project.<sup>14</sup> Therefore, business activities funded by GFC are activities that are funded by GFC's assets, not NSEDC's.<sup>15</sup>

Second, NSEDC points out that investments made by a business entity that is separate and distinct from a CDQ group are not necessarily directly for the economic or social development of a community or group of communities participating in a CDQ group as required by the definition of CDQ project. NSEDC states that GFC and its normal business investments are not programs for the economic and social development of a community or group of communities like NSEDC and therefore GFC activities do not meet another criterion of the definition of CDQ project.<sup>16</sup>

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<sup>10</sup>Id.

<sup>11</sup>Letter dated October 20, 1998, from Eugene Asicksik, NSEDC, to Glenn Haight, CDQ Manager, State of Alaska Department of Regional and Community Affairs.

<sup>12</sup>Letter dated November 4, 1998, from Eugene Asicksik, NSEDC, to Governor Tony Knowles.

<sup>13</sup>Id.

<sup>14</sup>Letter with attachment dated April 19, 1999, to Glenn Haight, CDQ Manager, State of Alaska Department of Regional and Community Affairs, from Eugene Asicksik, NSEDC.

<sup>15</sup>Letter dated November 12, 1998, to Sarah Felix, State of Alaska Department of Law, from Don Mitchell.

<sup>16</sup>Letter dated November 11, 1999, to Jeff Bush, Deputy Commissioner, State of Alaska Department of Regional and Community Affairs, from Eugene Asicksik, NSEDC.

Third, concurrent regulatory references to investments other than CDQ projects creates the existence of programs other than CDQ projects. In support of this argument, NSEDC points out that regulations at 679.30(a)(3)(i) and 679.30(g)(2)(ii) make reference to investments in entities or activities that are in addition to CDQ projects, such as divisions, subsidiaries, joint ventures, partnerships, and investment activities. Therefore, contrary to the State's position that all activities under the regulations are CDQ projects, NSEDC argues that there are other entities that are recognized in Federal regulation that are not CDQ projects. Given this distinction, GFC should fall under this non-CDQ project entity.<sup>17</sup> Additionally, NSEDC notes that the existence of projects other than CDQ projects does not undermine the definition of CDQ project (as that relates to projects that will be or are currently funded by a CDQ group's assets).

The State takes a more expansive interpretation of the definition of CDQ project and the duration of its application. The State argues that:

Simply because a CDQ group is not directly funding a project, but rather does so through a wholly- or partly-owned subsidiary, does not mean there is no meaningful involvement by the CDQ group who has an ultimate responsibility to its region residents. Any investment by a CDQ group, or any further investment by a CDQ investment that can be linked to a CDQ group, ultimately has a responsibility to the CDQ program. While minority ownership holdings by CDQ groups may not be able to significantly discourage activities that do not meet the goals of the program, the state will still reserve the right to review the actions of the CDQ group regarding those investments. Please be reminded that NSEDC's involvement in GFC is paid for by CDQ royalties. These expenses include legal and consulting services, board of director time, travel, and in-house monitoring.<sup>18</sup>

In a letter to NSEDC from the State dated October 27, 1998, the State identified its key role in the CDQ program as providing an appropriate level of oversight to ensure that recipients of CDQs are working to meet the mission of the program:

The state has a direct responsibility to the residents of western Alaska, the general public, and various federal agencies to be sure that funds are used with due discretion towards accomplishing the CDPs. This responsibility exists before, during and after those funds are dispersed. It is paramount to the survival and success of the CDQ program, of which NSEDC is an intricate and valuable component, that the state establish and maintain a credible oversight management system. . . . For the benefit of CDQ groups, it is important that the state maintain a strong oversight role in the operations of CDQ investments.

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<sup>17</sup>Letter dated November 11, 1999, from Eugene Asicksik, President and CEO of NSEDC, to Jeff Bush, Deputy Commissioner, State of Alaska Department of Regional and Community Affairs.

<sup>18</sup>Letter dated October 27, 1998, to Eugene Asicksik, NSEDC, from Glenn Haight, CDQ Manager, State of Alaska Department of Regional and Community Affairs.

It is clear that, at a minimum, a CDQ project is a program for the economic or social development of a community or group of communities that is currently being funded or will be funded by a CDQ group's assets, as NSEDC argues. And, the definition provides examples of several kinds of programs, including CDQ investments. However, does CDQ project status continue, as the State argues, regardless of which entity is funding the program so long as there is a link back to a CDQ group? The State has expressed its need to oversee and monitor the expenditures of a CDQ investment such as GFC to ensure that appropriate business decisions are made for the benefit of the CDQ communities in keeping with the stated goals of the CDQ program and the group's CDP, but because there are no percentage ownership requirements in the current regulations, this interpretation, and the monitoring and State approval requirements, would apply to all CDQ group ownership interests, no matter how small or large. Under the current regulatory scheme, the State's monitoring and oversight responsibilities appear to stem from their approval of a CDQ allocation based on the voluntary submission of a CDP application. Throughout the CDQ regulations, there are several references to the limited duration of CDQ allocations, that projects should not be designed with the expectation of CDQ allocations beyond those requested in the proposed CDP, and that a CDP must include a plan and schedule for transition from reliance on CDQ allocations to self-sufficiency, thus giving some support to NSEDC's current funding argument. If a CDQ group does not submit a new CDP application after having received CDQ allocations in past years, would the State be able to continue its monitoring role over CDQ investments that have a link to CDQ groups and are thus CDQ projects? Would the State's oversight responsibilities extend to GFC if NSEDC continued to submit a CDP application but no longer sought a pollock allocation? What if GFC acquired a subsidiary business -- is that business now a CDQ project under the State's linkage argument? Does this interpretation extend the State's monitoring and oversight role indefinitely, even into self-sufficiency? Unfortunately, there is no discussion of any of these issues in the regulations or the regulatory history or any specific consideration of the extent to which State oversight responsibilities apply to CDQ investments, like GFC.

It is also unclear whether the narrow, legal definition of the term "assets" should be applied versus the broader, more general definition of the term "assets."<sup>19</sup> NSEDC argues that the legal definition, recognizing the separation of assets from one entity versus another, should be adopted, but NSEDC's own statements seem to support the more general definition given the role GFC plays in NSEDC's long-range planning and its dependence on a pollock CDQ allocation to meet those goals. During the acquisition of GFC, NSEDC described the expected benefits that would flow to the region from their equity ownership position in GFC:

Investment in the BSAI groundfish industry is the natural progression of the CDQ program. One goal of the CDQ program is to attain self-sufficiency of the groups by

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<sup>19</sup>One dictionary definition of assets states an "asset" is "a useful or valuable quality or thing; a valuable material possession; the entries on a balance sheet showing all properties and claims against others that may be directly or indirectly applied to cover liabilities." Webster's II New Riverside University Dictionary.

successfully investing in the North Pacific seafood industry in projects/investments which do not need a continual infusion of CDQ dollars. Such investments provide the economic engine for all other CDQ programs and therefore, are best judged on the basis of economic return, in the form of royalty payments, new investment, and dividends from operations. Specifically, the investment in Glacier presents a unique opportunity because its current management team will be co-owners, the company's performance as a CDQ partner has been exceptional, and its management style has caused the company to be profitable every year since 1985 and to stay ahead of the changes within the seafood industry.<sup>20</sup>

NSEDC goes on to describe the long-term benefits from GFC as: providing steady economic returns; an expanding source of diversified employment and career opportunities; contributions to responsible management of BSAI fisheries resources; an expanding economic engine for support of other NSEDC programs and investments; and a vehicle for joint ventures and other forms of cooperative efforts with other CDQ groups. *Id.* Even though NSEDC has stated that GFC is to pay NSEDC market value for its CDQ pollock and if GFC does not, NSEDC is free to take its pollock elsewhere for harvest,<sup>21</sup> the pollock CDQ allocation plays a very important role in NSEDC's investment in GFC. NSEDC has stated: "The pollock allocation is extremely significant to NSEDC. Not only does it fund much of our current programs, but it also enhances the value of our investments and reduces the exposure to our guarantee of \$16 million in debt."<sup>22</sup> Finally, NSEDC states in its CDP milestone summary for GFC that the financial and employment milestones for Glacier Fish Company are subject to access to pollock and cod CDQ, at market price, at or above current levels allocated to NSEDC.<sup>23</sup>

Finally, it would appear that the juxtaposition of the terms subsidiary, division, and partnership with the term CDQ project in some sections of the CDQ monitoring regulations creates the existence of projects/investments that are not CDQ projects. Unfortunately, all the referenced terms are undefined by the regulations and their inclusion does not provide much clarity as to what is or is not a CDQ project.

At this level of analysis, support appears to exist in the regulatory text and in GFC's specific fact pattern for both NSEDC's and the State's interpretations of the term "CDQ project." Therefore,

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<sup>20</sup> Attachment to letter dated September 30, 1997, to Julie Anderson, CDQ Manager, State of Alaska Department of Regional and Community Affairs from Eugene Asicksik, NSEDC.

<sup>21</sup> Statement of John Bundy, President, Glacier Fish Company, dated November 12, 1998.

<sup>22</sup> Letter dated August 20, 1999, from Eugene Asicksik to Deborah Sedwick, Commissioner, Alaska Department of Community and Economic Development.

<sup>23</sup> NSEDC 2000 Multi-Species CDQ Application – Pollock, dated August 1999, footnote page 6A.

the next step under the rules of statutory construction must be an examination of each interpretation in the context of the CDQ program as a whole.

Analysis of the entire regulatory regime of the CDQ program as it applies to defining a CDQ project

Two equally important overarching objectives of the current CDQ program can be distilled from the information presented earlier in this memorandum and NSEDC's and the State's arguments. One is that CDQ groups are encouraged to move from reliance on CDQ allocations to self-sufficiency in fisheries. Self-sufficiency appears to be determined based on a CDQ group's long-term revenue stream in the absence of CDQ allocations. Another is that CDQ groups are to invest in commercial fisheries business activities that will result in an economy that is (1) ongoing, (2) regionally-based, and (3) fisheries-related. In order to meet these objectives, the State and Federal governments serve two roles under the current regulations, one to determine the appropriate amount of CDQ allocations to each CDQ group based on their proposed activities, another to monitor the investment and business decisions of CDQ groups so that CDQ groups attain self sufficiency in regionally based and commercial fisheries related business activities.<sup>24</sup> Aside from these broad programmatic goals, there is no discussion within the record for the CDQ program that directly identifies and explains the purposes of government oversight, or the appropriate extent and level of such oversight to meet the identified purposes.

Both NSEDC's and the State's interpretations focus on their ability to achieve the CDQ program goals of investment in ongoing, regionally-based fisheries related businesses and self-sustainability. However, both interpretations come at these goals from different directions. NSEDC has argued that CDQ groups must be able to invest, either wholly or partially, in established, regionally-based, fisheries-related companies, like GFC, as a way to achieving self-sufficiency and participation in the Alaska groundfish fisheries. Established fishing businesses will be more likely to accept a CDQ group as an investor if governmental oversight (and business decision approval authority) is not extended to investment decisions made by separate entities. NSEDC has stated its concern that if the State's interpretation is followed, the CDQ program's goals of self-sufficiency and economic and social success will be jeopardized because State control over the business decisions of these separate entities may inhibit the expansion of CDQ groups into lucrative business arrangements that may greatly benefit the CDQ program goal of developing regionally-based, fisheries-related activities.

If the business activities of Glacier Fish Company were to be made "CDQ projects" that are subject to state approval and control, not only would that fishing company miss opportunities and be competitively burdened but it is unlikely that any fishing company

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<sup>24</sup> Additionally, the Federal government serves a monitoring role in the harvesting activities of CDQ group and their harvesting and processing partners. However, this monitoring role is not at issue in the determination of whether GFC is a CDQ project.

that is participating in the Bering Sea pollock fishery will be interested in allowing NSEDC or any other CDQ group to purchase an equity interest in their company. As a consequence of Congress' enactment of the American Fisheries Act, the purchase of equity interests in existing fishing companies by CDQ groups may be the only way Alaskans will be able to acquire a greater degree of participation in the Bering Sea pollock fishery. Further, such intrusive control would run counter to the preeminent goal of the CDQ program which is to foster self-sufficiency and self-determination for western Alaska.<sup>25</sup>

The State argues that in order to achieve the CDQ program purpose of starting or supporting ongoing, regionally-based, fisheries related economies, the State must be able to not only oversee direct investments and expenditures of CDQ groups, but also be able to monitor the investments made by entities in which the CDQ group is financially linked. In the opinion of the State, the application of NSEDC's interpretation would create a large loophole that could frustrate the State's ability to ensure that decisions are being made to achieve regionally-based, fisheries related economies for participating CDQ communities. For example, if an investment like GFC is not subject to the monitoring processes of the State, including the substantial amendment review and approval process, GFC could make business decisions that, while economically sound, may not result in or support regionally-based, fisheries-related activities. The entity could use its own assets to engage in some business activity (such as the purchase of a fishing vessel for use in foreign waters or a complete conversion into some non-fishing business like cattle ranching) that may make significant amounts of money for the company and ultimately the CDQ group, but would not necessarily be within the goals and objectives of the CDQ program. As mentioned earlier, the State identified its key role in the CDQ program as providing an appropriate level of oversight to ensure that recipients of CDQ allocations are working to meet the mission of the program and that funds are used with due discretion towards accomplishing the CDPs and in keeping with the goals of the CDQ program.

A review of the regulatory history does not reveal much discussion as to why the current monitoring scheme is appropriate or how it provides the necessary level of oversight. The general lack of discussion in the regulatory history as to the appropriate level of State and Federal oversight needed to maintain the CDQ program goals of self-sufficiency and investment in regionally-based, fisheries-related businesses for the benefit of the CDQ communities is evident when trying to determine whether GFC is or is not a CDQ project. More specifically, there is a lack of direction as to the appropriate level and duration of oversight as the CDQ program matures and CDQ groups make investments that take them closer to self-sustainability. There is no language in the record that elevates one interpretation over the other. Both appear to support and at the same time frustrate the objectives of ongoing, regionally-based, fisheries-related development and self-sustainability.

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<sup>25</sup>Letter dated November 11, 1999, from Eugene Asicksik, President and CEO of NSEDC, to Jeff Bush, Deputy Commissioner, State of Alaska Department of Regional and Community Affairs.

5. Conclusion

The existing regulatory language contains ambiguities that are not easily resolved with a review of the regulatory history and no clear interpretation as to whether GFC is or is not a CDQ project emerges. Given the purposes of the CDQ program as currently stated in the historical record and in the regulatory language, it is apparent that the State must be able to continue some level of oversight and monitoring capability to meet the current program goals of CDQ group investment in ongoing, regionally-based, fisheries-related businesses and progression toward self-sustainability. It is equally apparent that the State's oversight role should not be so burdensome that CDQ group investments in such businesses is hindered or that CDQ group self-sustainability and economic viability is undermined. Given the ambiguity in the regulations and the genuine concerns expressed by both the State and NSEDC, the Council, the State, CDQ groups, NMFS, and the public must consider this issue and determine how best to resolve it. An analysis that shows a considered articulation of the purposes of governmental oversight of CDQ investments, a reasonable range of alternatives to achieve those purposes, and a thorough examination of the impacts of each alternative is necessary.

cc: GC – Craig O'Connor  
GCF – Margaret F. Hayes; Samuel Chi