



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

B2 Request for Recusal
June 2015
Department of Fish and Game

OFFICE OF THE COMMISSIONER
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May 22, 2015

Ms. Mary Beth Ward
NOAA Office of the General Counsel
Herbert C. Hoover Building
14th and Constitution Ave. NW
Washington, DC. 20230

Re: Request for review of recusal determinations pursuant to 50 CFR § 600.235(g)

Dear Ms. Ward:

I write pursuant to 50 CFR § 600.235(g) to request review of the May 12, 2015, recusal determinations by the Alaska Section of the NOAA Office of General Counsel. The Alaska Section determined that North Pacific Fishery Management Council (NPFMC) members David Long and Simon Kinneen are recused from voting on a motion to revise Bering Sea/Aleutian Islands (BSAI) halibut prohibited species catch (PSC) limits. Because that motion is to be heard at the NPFMC meeting that begins on June 1, 2015, I respectfully request that your review of the recusal determinations be expedited and completed prior to June 1.

The upcoming Council decisions

The motion made at the February 2015 NPFMC meeting identifies two alternatives concerning halibut PSC limits.¹ The first alternative is to take no action concerning PSC limits.² The second alternative is to act on one or more of six options.³ Each option if adopted would reduce PSC limits in a single fishery sector. The sectors for which PSC limits may be reduced under the second alternative are: (1) the Amendment 80 sector; (2) the BSAI Trawl Limited Access sector; (3) the Pacific cod hook and line catcher processor sector; (4) other non-trawl sectors; (5) the Pacific cod hook and line catcher vessel sector; and (6) the CDQ sector.⁴ The alternative states that "more than one option can be selected."⁵

¹ See *Public Review Draft, Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis for a Proposed Amendment to the Fishery Management Plan for Groundfish of the Bering Sea/Aleutian Islands Management Area, Revise Bering Sea/Aleutian Islands Halibut Prohibited Species Catch Limits, May 2015* (hereinafter, *Public Review Draft*) at 19-20 (found at <http://npfmc.legistar.com/gateway.aspx?M=F&ID=6c28665b-3a66-4ac4-a129-52538c138edf.pdf>).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Given the structure of the second alternative, the Council will consider whether to adopt each option, and if so, the degree of PSC reduction that should be adopted for each sector represented by the option. Each option allows the Council to make a decision for an individual sector. It is very likely that Council members will vote on individual options throughout the deliberations.

The Alaska Section's recusal determinations

The Alaska Section determined that the “fishery affected by the Council’s decision is the entire BSAI groundfish fishery except for those fisheries that are exempt from halibut PSC limits (i.e., pot and jig groundfish fisheries) and those fisheries specifically excluded by the Council (i.e., the sablefish fixed gear fishery).”⁶ Accordingly, the Alaska Section considered each “Council member’s aggregate percentage of harvest of those species with those gear types” in considering whether the member should be recused from voting on the Council decision.⁷ The Alaska Section determined that a “[r]ecusal analysis by individual sector would not be consistent with the action being considered by the Council or the structure of Alternative 2 because the only action alternative includes all of the specified sectors.”⁸ The Alaska Section suggested that the Council combined the options into one alternative “to provide the Council with maximum flexibility to adopt halibut PSC limit reductions for one or more identified sectors in relation to halibut PSC reductions for other identified sectors.”⁹

Under the Magnuson-Stevens Act, the non-agency voting members of each Regional Fishery Management Council are appointed by the Secretary on the basis of their knowledge of fishery resources through experience, scientific expertise, or training, and to “ensure a fair and balanced apportionment ... in the commercial and recreational fisheries under the jurisdiction of the Council.” 16 USC §§ 1852(b)(2)(A) & (B). The Act also requires that of the eleven voting members of the NPFMC, five of the members must be appointed from the State of Alaska (six, including the ADFG commissioner). *Id.* § 1852(a)(1)(G) & (b)(1)(A). Because recusal determinations can deprive the Council of the knowledge of members appointed by the Secretary, and upset the fair and balanced apportionment required by the Act, the regulations governing recusal should be strictly construed in favor of allowing the maximum number of members to participate in Council decisions. For this reason, I disagree with NOAA’s decision to attribute to a member all of the harvesting, marketing, or processing of a fishery by a company in which the member has only a small interest. Furthermore, where (as here) recusal determinations would deprive the Council of two of the six Alaska voting members required by the Act, the determinations should be carefully reviewed.¹⁰

As explained below, the Alaska Section’s recusal determinations are arbitrary for the following reasons: (1) in making its recusal determinations the Alaska Section considered the interest of members in the

⁶ *Recusal Examination for the June 2015 North Pacific Fishery Management Council decision concerning BSAI Halibut Prohibited Species Catch Limits* at 4.

⁷ *Id.* at 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ The consequences of recusing a Council member are more severe than, for example, when a judge decides to recuse. Recused judges are replaced. When NOAA determines that a Council member must be recused, for that Council decision the public is forever denied the vote of a knowledgeable Council member appointed by the Secretary, forever denied the vote of a fair and balanced apportionment of Council members required by the Act, and (in this case) forever denied the vote of all six Alaska members required by the Act.

pollock fishery, even though NOAA repeatedly emphasized that “the options have no direct effect on the pollock fishery”; and (2) the Alaska Section’s decision to consider each member’s interest in the aggregate of all sectors in the BSAI groundfish fishery, rather than conducting a recusal analysis by individual sector, leads to arbitrary results.

The Alaska Section should not have considered the interest of members in the pollock fishery

For a Council member to be recused from voting on a Council decision, there must be a “*close causal link*” between the decision and an expected and substantially disproportionate benefit to the [member’s] financial interest.” 50 CFR § 600.235(c)(2) (emphasis added). Here, as NOAA repeatedly emphasized, the Council decision will have “no direct effect” on the pollock fishery.¹¹ Accordingly, it was error for the Alaska Section in its recusal determinations to consider the members’ interests in the pollock fishery.

This issue was raised by Mr. Kinneen to the Alaska Section in an e-mail dated May 14, 2015. In response, the Alaska Section argued that it was appropriate to include pollock harvests in its analysis for three reasons, none of which have merit. First, the Alaska Section argued that pollock harvests should be included because “the Council did not specifically exclude the pollock fishery from the action as it did with other fisheries.” But that is irrelevant—the question the Alaska Section was obliged to answer is whether there is a “close causal link” between the decision and the pollock fishery, and NOAA has already provided the answer: the decision will have “no direct effect.” The Alaska Section’s second point, that a non-constraining halibut PSC limit is established for the pollock fishery, is also irrelevant. Finally, the Alaska Section’s argument that the PSC limit for the pollock fishery will directly affect *other* fisheries is irrelevant.

The Alaska Section concluded that it re-did the recusal analysis, excluded pollock harvest data, and found that “the recusal determinations remain the same.” I am unaware of how this conclusion was reached as the information and approach was not shared, and I am surprised the determinations were not affected. Because this is an important issue that may arise in the future, I respectfully ask that the recusal determinations be formally re-done without considering members’ interest in the pollock fishery, and provided to the Council members.

The Alaska Section should not have considered each members’ interest in the aggregate of the BSAI groundfish fishery, and instead should have conducted a recusal analysis by individual sector

Federal regulations at 50 § CFR 600.235(c)(3) define “expected and substantially disproportionate benefit,” which triggers a recusal, as “a quantifiable positive or negative impact with regard to a matter likely to affect a fishery or sector of the fishery in which the affected individual has a significant interest.” These regulations recognize that the 10-percent threshold for determining a disqualifying benefit should be determined based on the sector of the fishery in question. Because the Council will

¹¹ Public Review Draft at 20 n.2 (“Note that neither the BSAI pollock fishery nor the BSAI trawl limited access Atka mackerel fishery is constrained by the current cap, nor are there options in the analysis to introduce such constraints. As a result, reduced PSC limits would not affect them directly.”); 25 (“In the analysis, therefore, the options have no direct effect on the (non-CDQ) pollock fishery.”); 379 (“[T]he pollock fishery is exempt from closure due to attainment of the PSC limit for pollock, and therefore the options have no direct effect on the pollock fishery itself.”).

make individual decisions on sectors of fisheries under the various options, the recusal analysis should have been conducted by individual fishery sector.

By not conducting the recusal analysis by individual fishery sector, the Alaska Section's recusal determinations will predictably lead to arbitrary results. For example, a member whose interest in a particular fishery sector exceeds the greater than 10-percent threshold for recusal, will nevertheless be permitted to vote on an option that affects that sector, so long as the member does not have a greater than 10-percent interest in the aggregate of all of the sectors potentially affected. This will be the case even if the Council chooses to take up only the particular option for which the member would otherwise be recused under an individual analysis (the second alternative makes clear that the Council may not take up all of the options). However, a member whose interest does not exceed the greater than 10-percent threshold for recusal in a fishery sector, will nevertheless be recused from voting on an option that affects that sector, if the member has a greater than 10-percent interest in the aggregate of all of the sectors potentially affected. That member would be recused from voting even if the Council only takes up an option affecting a sector in which the member may have no interest whatsoever. This is clearly arbitrary.

The Alaska Section appeared to defend taking an aggregate approach on the ground that the Council structured the second alternative to include all of the options. But the structure of the alternative—which the Council determined—should not decide the recusal determination—which is a decision reserved for NOAA General Counsel. Determining recusals by individual sectors of fisheries, as required by 50 § CFR 600.235(c)(3), rather than the Alaska Section's aggregate approach, will avoid the arbitrary results described above.

For all of these reasons, I respectfully request review by the NOAA Office of General Counsel of these recusal determinations.

Respectfully,



Sam Cotten
Commissioner

cc: Dan Hull, Chairman, NPFMC Member
Bill Tweit, Vice Chair, NPFMC Member
Jim Balsiger, NPFMC Member
Craig Cross, NPFMC Member
Ed Dersham, NPFMC Member
Kenny Down, NPFMC Member
Duncan Fields, NPFMC Member
Roy Hyder, NPFMC Member
Simon Kinneen, NPFMC Member
David Long, NPFMC Member
Seth Beausang, Attorney, Department of Law, State of Alaska