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Recusal Examination for the April 2017 North Pacific Fishery Management Council decisions concerning Fishery Management Plan Amendments for Essential Fish Habitat (Council Agenda C-6)

Summary

At its April 2017 meeting, the North Pacific Fishery Management Council (Council) is scheduled to make a final decision on eight proposed actions (omnibus Essential Fish Habitat (EFH) amendment) to update Fishery Management Plans (FMPs) to incorporate the best scientific information available. Five of the proposed actions are amendments to specific FMPs,¹ and the remaining three proposed actions may require FMP amendments to one or more of the five FMPs. No regulations will be changed as a result of these amendments. This document examines whether any of the seven affected individuals on the Council are recused from voting on the eight proposed actions under the regulations at 50 CFR 600.235. For reasons explained below, Council member **Mr. Kinneen** is recused from voting on a Council decision to amend the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI Groundfish FMP) as a separate action or in combination with the amendments to any or all of the other FMPs. The remaining affected individuals (Council members **Mr. Cross**, **Mr. Down**, **Mr. Hull**, **Mr. Laukitis**, **Mr. Mezirow**, and **Ms Peterson**) are not recused from voting on this Council decision.

Statutory and Regulatory Background

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) and regulations at 50 CFR 600.225 and 600.235 govern the ability of a Council member to participate in and/or vote on a Council decision.

Regulations at 50 CFR 600.225 include the rules of conduct for Council members and employees. Section 600.225(b) states: "Councils are responsible for maintaining high standards of ethical conduct among themselves, their staffs, and their advisory groups. In addition to abiding by the applicable Federal conflict of interest statutes, both members and employees of the Councils must comply with the following standards of conduct." Nine standards are listed. Section 600.225(b)(9)(ii) states: "No Council member may participate personally and substantially as a member through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a particular matter primarily of individual

¹ The FMPs are the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area, the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA Groundfish FMP), the Fishery Management Plan for Bering Sea and Aleutian Islands King and Tanner Crabs, the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone off the Coast of Alaska, and the Fishery Management Plan for Fish Resources of the Arctic Management Area.

concern, such as a contract, in which he or she has a financial interest, even if the interest has been disclosed in accordance with § 600.235.”

Under section 302(j)(7)(A) of the MSA and 50 CFR 600.235(c)(1), “No affected individual may vote on any Council decision that would have a significant and predictable effect on a financial interest disclosed in his/her report filed under paragraph (b) of this section.”

A Council decision will be considered to have a "significant and predictable effect on a financial interest" if there is a close causal link between the decision and an expected and substantially disproportionate benefit to the financial interest in harvesting, processing, lobbying, advocacy, or marketing of any affected individual or the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee, relative to the financial interests of other participants in the same gear type or sector of the fishery. MSA § 302(j)(7)(A); 50 CFR 600.235(c)(2). For fisheries in which individual fishing quotas (IFQs) are assigned, the determining factor is “the percentage of IFQs assigned to the affected individual.” *Id.*

"Expected and substantially disproportionate benefit" is defined at 50 CFR 600.235(c)(3) 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, as indicated by:

- (i) A greater than 10-percent interest in the total harvest of the fishery or sector of the fishery in question;
- (ii) A greater than 10-percent interest in the marketing or processing of the total harvest of the fishery or sector of the fishery in question; or
- (iii) Full or partial ownership of more than 10 percent of the vessels using the same gear type within the fishery or sector of the fishery in question.”

In calculating an affected individual's financial interest in the fishery or sector of the fishery in question, we attribute all harvesting, processing, and marketing activity of a wholly- or partially-owned company, including subsidiary companies, to the affected individual. For Council decisions affecting fisheries in which IFQs are assigned, we attribute all IFQs assigned to wholly- or partially-owned companies, including subsidiary companies, to the affected individual. We have determined that this interpretation of the 10% thresholds is consistent with the provisions of the Magnuson-Stevens Act and the regulations at 50 CFR 600.235(c)(3).²

Under 50 CFR 600.235(e), an affected individual who is recused from voting may participate in Council deliberations relating to the decision, after notifying the Council of the voting recusal

² Letter from Lois J. Schiffer, General Counsel, NOAA Office of General Counsel, to Simon Kinneen, dated April 8, 2015.

and identifying the financial interest that would be affected. The affected individual also may state for the record how he or she would have voted. 50 CFR 600.235(f)(4).

An affected individual who is not recused from voting but who believes that a Council decision would have a significant and predictable effect on his or her financial interests may, at any time before a vote is taken, voluntarily recuse himself or herself by announcing to the Council an intent not to vote on the decision and identifying the financial interest that he or she believes is affected. 50 CFR 600.235(d).

Determination of Affected Individuals

Of the 11 voting Council members, seven members (**Mr. Cross, Mr. Down, Mr. Hull, Mr. Kinneen, Mr. Laukitis, Mr. Mezirow, and Ms Peterson**) are affected individuals in that they were appointed by the Secretary of Commerce to serve as voting members of the Council in accordance with section 302(b)(2) of the MSA.

In accordance with section 302(j)(2) of the MSA and 50 CFR 600.235(b)(1) and (b)(2), these seven members have disclosed and reported their financial interests in harvesting, processing, marketing, lobbying, or advocacy activity by filing with the Executive Director of the Council their annual, updated NOAA Form 88-195, Statement of Financial Interests.

Is the action before the Council a “Council decision”?

According to 50 CFR 600.235(a), a “*Council decision*” means approval of a fishery management plan (FMP) or FMP amendment (including any proposed regulations); request for amendment to regulations implementing an FMP; finding that an emergency exists involving any fishery (including recommendations for responding to the emergency); and comments to the Secretary on FMPs or amendments developed by the Secretary. It does not include a vote by a committee of a Council.” Any action (Actions 1 – 8) that recommends approval of FMP amendment(s) is a Council decision.

Determination of the “fishery or sector of the fishery” affected by a Council decision on Essential Fish Habitat Fishery Management Plan Amendments

The fishery or sector of the fishery is determined by the action before the Council. Section 1.2 of the draft Environmental Assessment for Essential Fish Habitat Omnibus Regulations (Analysis) describes the purpose and need for the action as follows:

The purpose of the eight proposed actions is to comply with the Final Rule implementing the EFH provisions of the MSA (50 CFR Part 600, Subpart J). The EFH Final Rule and each of the Council’s FMPs state that a review of EFH components should be completed every 5 years and the EFH provisions should be revised or amended, as warranted, based on the best scientific information available. To comply with the EFH Final Rule, the most recent 5-year review of

EFH was completed in October 2016 and synthesized in a Final Summary Report (Summary Report, NPFMC 2016) presented to the Council. Based on the review, the Council determined that new information is available to revise many of the EFH descriptions and maps in the Council FMPs. There are eight actions included in this omnibus EFH amendment package, all of which are intended to update the Council FMPs to incorporate the best new information available.

The actions are summarized in the table below:

EFH component	Council FMP	Recommended change	Corresponding action in this analysis
EFH descriptions of individual species	BSAI Groundfish	Update EFH descriptions in the FMP consistent with the stock assessment authors' recommendations in Sections 5.1 through 5.26 of the Summary Report, NPFMC 2016. Replace the existing EFH maps in the FMP with the 95th percentile maps by season (winter, spring, summer and fall) for each species and life stage as shown in Appendix 1.	Action 1
	GOA Groundfish	Update EFH descriptions in the FMP consistent with the stock assessment authors' recommendations in Sections 6.1 through 6.26 of the Summary Report, NPFMC 2016. Replace the existing EFH maps in the FMP with the 95th percentile maps by season for each species and life stage as shown in Appendix 2.	Action 2
	BSAI Crab	Update EFH descriptions in the FMP consistent with the stock assessment authors' bulleted recommendations in Section 7 of the Summary Report, NPFMC 2016. Replace the existing EFH maps in the FMP with the 95th percentile maps by season for each species and life stage as shown in Appendix 3.	Action 3
	Salmon	Update only marine EFH descriptions in the FMP consistent with the stock assessment authors' recommendations in Section 9 of the Summary Report, NPFMC 2016. Replace the existing marine EFH maps in the FMP with the model-	Action 4

		based maps for each species and life stage as shown in Appendix 4.	
	Arctic	Update EFH descriptions for all species in the FMP consistent with the stock assessment authors' recommendations in Section 10 of the Summary Report, NPFMC 2016. Replace the existing map for snow crab in Appendix B of the FMP with the map(s) recommended by the stock assessment author. See Appendix 5 for updated descriptions and map.	Action 5
Non-fishing activities that may adversely affect EFH	All Council FMPs	Update EFH conservation recommendations for non-fishing activities in all Council FMPs	Action 6
HAPC	All Council FMPs	Initiate HAPC proposal process	Action 7
Research and information needs	All Council FMPs	Research priorities for EFH in all Council FMPs may be revised	Action 8

We have determined that the fishery or sector of the fishery affected by the EFH FMP Amendments in Actions 1 - 5 is the entire fishery managed by each FMP. If an FMP amendment is recommended for the remaining actions, the fishery or sector of the fishery would be all the fisheries managed by the FMPs updated by that amendment. For example, Action 6 is updating EFH conservation recommendations for non-fishing activities in all Council FMPs. If taken as a single action, and FMP amendments are recommended by the Council, then the fisheries of the FMPs that are being amended would be totaled for any considerations of recusal.

Accordingly, at the lowest level, recusal would be considered for each FMP separately. For example, for Action 1 (update EFH descriptions in the BSAI Groundfish FMP), the entire groundfish fishery managed by the BSAI Groundfish FMP would be considered. If an action encompasses more than a single FMP amendment, i.e., Action 6, then as explained above, the fisheries for each FMP amended by the action would be totaled for comparison to the recusal level. Finally, only an action that is a "Council decision" will trigger section 302(j)(7)(A) of the MSA and 50 CFR 600.235(c)(1), i.e., "No affected individual may vote on any Council decision that would have a significant and predictable effect on a financial interest disclosed in his/her report filed under paragraph (b) of this section."

Determination as to whether the Council decisions concerning Essential Fish Habitat Fishery Management Plan Amendments is a particular matter primarily of individual concern for any Council member under 50 CFR 600.225

We have determined that the EFH actions by the Council are not particular matters primarily of individual concern for any affected individual. The actions would update EFH information and maps based on the best scientific information available and would be applicable to all participants in the affected fisheries. Because the EFH actions would affect more than a few fishery participants, it is not a particular matter primarily of individual concern.³

Determinations as to whether there is an expected and substantially disproportionate benefit from a Council decision on Essential Fish Habitat Fishery Management Plan Amendments for any affected individual under 50 CFR 600.235

Given the nature of the actions and the information in the financial disclosures provided by the affected individuals, **Mr. Cross, Mr. Down, Mr. Hull, Mr. Laukitis, Mr. Mezirow, and Ms. Peterson**, are not required to recuse themselves, as the Council decisions on Actions 1 – 8 will not result in an expected and substantially disproportionate benefit to their listed financial interests. Therefore, no significant and predictable effects from a Council decision on EFH FMP amendments exist for these affected individuals.

Mr. Kinneen

According to Mr. Kinneen's financial disclosure statement dated January 20, 2017, Mr. Kinneen is employed with Norton Sound Economic Development Corporation (NSEDC), a Community Development Quota (CDQ) group. NSEDC has financial interests that own vessels that participate in the groundfish fisheries in the BSAI. These are the *Alaska Ocean*, the *Alaska Rose*, the *Arica*, the *Bering Rose*, the *Cape Horn*, the *Destination*, the *Glacier Bay*, the *Great Pacific*, the *Northern Glacier*, the *Pacific Glacier*, the *Rebecca Irene*, the *Sea Wolf*, and the *Unimak*. These thirteen vessels had a combined total catch of [REDACTED] mt of groundfish in the BSAI in 2016. This total amount exceeds the 10% harvesting recusal threshold of 200,000 mt (ten percent of the total groundfish harvest limit in the BSAI). Exceedance of the recusal threshold indicates that the Council's decision on EFH amendments for the BSAI Groundfish FMP will have a significant and predictable effect on Mr. Kinneen's financial interests.

Further, when the amount of groundfish catch by the thirteen vessels under the BSAI Groundfish FMP is added to the amount of catch or quota attributed to NSEDC under the other FMPs, the sum exceeds the recusal threshold for voting on a Council decision that would include an amendment to the BSAI Groundfish FMP with an amendment to any or all of the other FMPs. For example, adding the recusal threshold for voting on a Council decision for the BSAI

³ The proposed rule preamble for the original recusal regulations at 50 CFR 600.235 identified "management measures that affect only the [Council] member's business and a few other fishery participants" as an example of a particular matter primarily of individual concern. 62 Fed. Reg. 42474, 42475 (August 7, 1997).

Groundfish FMP to the recusal threshold for voting on a Council decision for GOA Groundfish FMP results in a combined recusal threshold of 259,808 mt for voting on a Council decision that includes both FMPs.

The amount of groundfish catch of the thirteen vessels under the BSAI Groundfish FMP exceeds the combined recusal threshold for voting on a Council decision that includes an amendment to the BSAI Groundfish FMP with an amendment to the GOA Groundfish FMP, even if the catch attributed to NSEDC under the GOA Groundfish FMP is not considered. However, a Council decision that does not include an amendment to the BSAI Groundfish FMP will not result in an exceedance of the recusal threshold for voting for **Mr. Kinneen**.

Therefore, under 50 CFR § 600.235, **Mr. Kinneen** is recused from voting on a Council decision to amend the BSAI Groundfish FMP as a separate action as well as if the amendments to the BSAI Groundfish FMP are combined with the amendments to any or all of the other FMPs.

Although **Mr. Kinneen** is required to recuse himself from voting on the EFH amendments to the BSAI Groundfish FMP, he may participate in all aspects of the Council's deliberations relating to those actions after he notifies the Council of the voting recusal and identifies the financial interests that are affected. **Mr. Kinneen** also may state for the record how he would have voted on the action.