MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver
Acting Executive Director

ESTIMATED TIME
4 HOURS

DATE: January 30, 2002

SUBJECT: IFQ Program

ACTION REQUIRED

(a) Review IFQ Committee report.
(b) Initial review of community QS purchase amendment (Amendment 66).

BACKGROUND

(a) Review IFQ Committee Report

The newly appointed IFQ Implementation and Cost Recovery Committee (Item C-3(a)(1)) met on December 2 to review and comment on the IFQ fee percentage of the commercial IFQ program for 2001 and to review four enforcement issues brought to the committee by NMFS Enforcement Division staff. The public notice for the IFQ Cost Recovery Program for 2001 is attached as Item C-3(a)(2). The NMFS letter on the enforcement issues is attached as Item C-3(a)(3)). A letter from the International Pacific Halibut Commission staff is attached as Item C-3(a)(4)) The committee minutes are attached as Item C-3(a)(5)).

(b) Initial Review of Community QS Purchase Amendment

The proposed action would allow eligible Gulf of Alaska communities to purchase commercial halibut and sablefish catcher vessel quota share (QS) in Areas 2C, 3A, and 3B for lease to community residents. The change would create a new category of eligible "person" that may hold halibut and sablefish quota share, with restrictions as developed by the Council and approved by the Secretary of Commerce. Currently, only persons who were originally issued catcher vessel QS or who qualify as IFQ crew members by working 150 days on the harvesting crew in any U.S. commercial fishery are eligible to purchase catcher vessel (B, C, and D category) quota share.

The proposed action targets small, rural, fishing-dependent coastal communities in the Gulf of Alaska that have documented participation in the halibut and sablefish fisheries. The criteria proposed to determine eligible communities are intended to distinguish a distinct set of rural Gulf communities that have experienced a decline in QS since the implementation of the IFQ program and have few alternative economic opportunities. While not necessarily a direct result of the implementation of the commercial IFQ program, declines in the number of community fishermen and access to nearby marine resources are on-going problems in rural communities that may be exacerbated by the IFQ program. The proposed action is an attempt to mitigate the identified problem and provide eligible communities with an opportunity to increase their participation in the IFQ fisheries. The purpose and design of this action is therefore intended to have distributional effects.

The concept proposed in this amendment is based on allowing an eligible community to identify or form an administrative entity to purchase and manage commercial QS, and lease the resulting IFQs to community residents. Note, however, that the action as proposed does not include formal provisions to ensure that QS will be leased exclusively to residents of the target communities.

The Council began considering allowing communities to purchase commercial halibut/sablefish QS in June 2000 in response to a proposal from the Gulf of Alaska Coastal Communities Coalition (Coalition). The proposal cited the disproportionate amount of QS transfers out of smaller, rural communities as a symptom of the continuing erosion of their participation in the commercial IFQ fisheries. Consideration of including communities in the commercial IFQ program is motivated by other sources as well. Several provisions of the Magnuson-Stevens Act, specifically National Standard 8, require that management programs take into account the social context of the fisheries, especially the role of communities. In addition, the National Research Council report, *Sharing the Fish* (1999), recommends that NMFS and the Council consider including fishing communities as stakeholders in fishery management programs, emphasizing the potential for communities to use QS to further overall community development.

The proposed action would be an amendment to the Gulf FMP (Amendment 66). The initial review draft of this analysis considers two alternatives: Alternative 1 (no action) and Alternative 2, which would allow eligible communities to hold commercial halibut and sablefish QS. The analysis considers eight elements under Alternative 2 that would shape the essential components of the IFQ program as it would relate to community purchases:

Element 1. Eligible communities
Element 2. Appropriate ownership entity
Element 3. Individual community use caps
Element 4. Cumulative community use caps
Element 5. Purchase, use, and sale restrictions (vessel size and block restrictions)
Element 6. Code of conduct
Element 7. Administrative oversight
Element 8. Sunset provision

The Council approved a suite of options for analysis under each of the above elements in June 2001. The complete list of alternatives is attached to this memo as Item C-3(b)(1). Note also that the Council and the SSC completed initial review of this analysis at the December 2001 meeting, but the Council determined that an AP review was necessary before releasing the document for public review. Thus, initial review of the draft analysis is re-scheduled for this meeting, and final action is tentatively scheduled for April or June 2002. The revised draft analysis was sent to the Council family on January 15.

IFQ Implementation & Cost Recovery Workgroup
Appointed 10/24/01

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Dated: September 26, 2001.

William J. Wagner III,

Captain, U.S. Coast Guard, Captain of the Port Corpus Christi.

[FR Doc. 01-31012 Filed 12-14-01; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 991207325-0063-02; I.D. 100699A]

Fisheries of the Exclusive Economic Zone Off Alaska; North Pacific Halibut and Sablefish IFQ Cost Recovery Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Announcement of standard prices and fee percentage for North Pacific halibut and sablefish Individual Fishing Quota (IFQ) cost recovery program.

SUMMARY: The National Marine Fisheries Service publishes IFQ standard prices and notification of adjustment of the IFQ fee percentage for the IFQ Cost Recovery Program in the halibut and sablefish fisheries of the North Pacific. This action is intended to provide holders of halibut and sablefish IFQs with information to calculate the payments required for IFQ cost recovery fees due by January 31, 2002.

DATES: Effective December 17, 2001.

FOR FURTHER INFORMATION CONTACT: Kristie Balovich, Fee Coordinator, 907-586-7344.

SUPPLEMENTARY INFORMATION:

Background

NMFS, Alaska Region, administers the halibut and sablefish IFQ programs in the North Pacific. The IFQ Programs are limited access systems authorized by section 303(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Northern Pacific Halibut Act of 1982. Fishing under the IFQ Programs began in March 1995. Regulations implementing the IFQ Program are set forth at 50 CFR part 679.

In 1996, the Magnuson-Stevens Act was amended (by Pub. L. 104-297) to, among other things, require the Secretary of Commerce to "collect a fee to recover the actual costs directly related to the management and enforcement of any . . . individual fishing quota program" (Section 304(d)(2)(A)). Section 304(d)(2)(B) of the Magnuson-Stevens Act specifies an upper limit on these fees, when the fees must be collected, and where the fees must be deposited. Section 303(d)(4) of the Magnuson-Stevens Act allows NMFS to reserve up to 25 percent of the fees collected for use in an IFQ loan program to aid in financing the purchase of IFQ or quota share (QS) by entry-level and small-vessel fishermen.

NMFS published, on December 27, 1999 (64 FR 72302), a proposed rule to implement the IFQ Cost Recovery Program and published the final rule on March 20, 2000 (65 FR 14919). The final regulations implementing the IFQ Cost Recovery Program are set forth at 50 CFR 679.45.

Under the regulations, an IFQ permit holder incurs a cost recovery fee liability for every pound of IFQ halibut and IFQ sablefish that is landed on his or her IFQ permit(s). The IFQ permit holder is responsible for self-collecting the fee liability for all IFQ halibut and IFQ sablefish landings on his or her permit(s). The IFQ permit holder is also responsible for submitting a fee liability payment to NMFS on or before the due date of January 31 following the year in which the IFQ landings were made. The dollar amount of the fee due is determined by multiplying the annual IFQ fee percentage (3 percent or less) by the ex-vessel value of each IFQ landing made on a permit and summing the totals of each permit (if more than one).

Fee Percentage

Three percent of the ex-vessel value of IFQ halibut and IFQ sablefish harvested is the maximum fee amount allowed by section 304(d)(2)(B) of the Magnuson-Stevens Act. Regulations at § 679.45(d) allow the Administrator, Alaska Region, NMFS (Regional Administrator) to reduce the fee percentage if actual management and enforcement costs could be recovered through a lesser percentage. In this event the Regional Administrator will publish a notification of any adjustment of the IFQ fee percentage in the **Federal Register** pursuant to § 679.45(d)(4).

For 2001, the Regional Administrator has determined that a fee of 2.0 percent (0.020) is necessary to recover the actual management and enforcement costs. Therefore, the Regional Administrator is adjusting the cost recovery fee applicable to year 2001 IFQ landings from 3 percent (0.03) to 2.0 percent (0.020).

Standard Prices

The fee liability is based on the sum of all payments of monetary worth made to fishermen for the sale of the fish. This includes any retro-payments (e.g., bonuses, delayed partial payments, post-season payments) made to the IFQ permit holder for previously landed IFQ halibut or sablefish.

For purposes of calculating IFQ cost recovery fees, NMFS distinguishes between two types of ex-vessel value: "Actual ex-vessel value" and "standard ex-vessel value." "Actual ex-vessel value" is the amount of money an IFQ permit holder received as payment for his or her IFQ fish sold. "Standard ex-vessel value" is the default value on which to base fee liability calculations. However, IFQ permit holders have the option of using "actual ex-vessel value" if they can satisfactorily document those values.

Regulations at § 679.45(c)(2)(i) require the Regional Administrator to publish IFQ standard prices during the last quarter of each calendar year. These standard prices are used, along with estimates of IFQ halibut and sablefish landings, to calculate standard values. The standard prices are described in U.S. dollars per IFQ equivalent pound, for IFQ halibut and IFQ sablefish landings made during the year. IFQ equivalent pound(s) means the weight amount, recorded in pounds, for an IFQ landing and calculated as round weight for sablefish and headed and gutted ("net") weight for halibut. NMFS calculates the standard prices to reflect, as closely as possible, by month and port or port-group, the variations in the actual ex-vessel values of IFQ halibut and IFQ sablefish landings. The standard prices for IFQ halibut and IFQ sablefish are listed in the following table. Data from ports are combined as necessary to protect confidentiality of data submissions.

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2001 IFQ SEASON

LANDING LOCATION	PERIOD ENDING	HALIBUT STANDARD EX-VESSEL PRICE	SABLEFISH STANDARD EX-VESSEL PRICE
CORDOVA	March 31		
	April 30		
	May 31	$2.08	
	June 30		
	July 31	$2.15	
	August 31	$2.21	
	September 30	$2.25	
	October 31	$2.25	
	November 30	$2.25	
DUTCH HARBOR	March 31		
	April 30		
	May 31	$1.62	
	June 30	$1.66	
	July 31	$1.76	
	August 31	$1.78	$1.88
	September 30	$1.79	
	October 31	$1.79	
	November 30	$1.79	
HOMER	March 31		
	April 30		
	May 31		
	June 30	$2.03	
	July 31	$2.14	
	August 31	$2.08	
	September 30	$2.07	
	October 31	$2.07	
	November 30	$2.07	
KODIAK	March 31	$2.06	$2.27
	April 30	$2.00	$2.11
	May 31	$1.81	
	June 30	$1.90	
	July 31	$1.97	
	August 31	$1.94	
	September 30		
	October 31		
	November 30		
PETERSBURG	March 31	$2.39	
	April 30	$2.23	
	May 31	$2.15	
	June 30	$2.08	
	July 31	$2.17	
	August 31	$2.19	
	September 30	$2.16	
	October 31	$2.16	
	November 30	$2.16	
SEWARD	March 31	$2.40	$2.35
	April 30	$2.10	$1.97
	May 31	$2.02	$1.96
	June 30		
	July 31		
	August 31		
	September 30		
	October 31		
	November 30		
[1]BERING SEA	March 31		
	April 30		$1.89
	May 31	$1.61	$1.86
	June 30	$1.66	$1.76
	July 31	$1.76	$1.81
	August 31	$2.05	$2.05
	September 30	$1.76	$2.02
	October 31	$1.76	$2.02
	November 30	$1.76	$2.02
[2]CENTRAL GULF	March 31	$2.39	$2.25
	April 30	$2.16	$2.02
	May 31	$1.98	$2.01
	June 30	$1.96	$2.02
	July 31	$2.02	$2.18
	August 31	$2.02	$2.28
	September 30	$1.98	$2.10

REGISTERED BUYER STANDARD EX-VESSEL PRICES BY LANDING LOCATION FOR 2001 IFQ SEASON—Continued

LANDING LOCATION	PERIOD ENDING	HALIBUT STANDARD EX-VESSEL PRICE	SABLEFISH STANDARD EX-VESSEL PRICE
	October 31	$1.98	$2.10
	November 30	$1.98	$2.10
[3]SOUTHEAST	March 31	$2.41	$2.25
	April 30	$2.27	$2.16
	May 31	$2.22	$2.00
	June 30	$2.28	$2.16
	July 31	$2.26	$2.13
	August 31	$2.24	$2.06
	September 30	$2.18	$2.19
	October 31	$2.18	$2.19
	November 30	$2.18	$2.19
[4]ALL	March 31	$2.40	$2.24
	April 30	$2.21	$2.07
	May 31	$2.05	$2.00
	June 30	$2.03	$2.07
	July 31	$2.01	$2.09
	August 31	$2.09	$2.10
	September 30	$1.98	$2.15
	October 31	$1.98	$2.15
	November 30	$1.98	$2.15

[1] *Landing locations Within Port Group—Bering Sea*: Adak, Akutan, Akutan Bay, Atka, Bristol Bay, Chefornak, Dillingham, Captains Bay, Dutch Harbor, Egegik, Ikatan Bay, Hooper Bay, King Cove, King Salmon, Kipnuk, Mekoryuk, Naknek, Nome, Quinhagak, Savoonga, St. George, St. Lawrence, St. Paul, Togiak, Toksook Bay, Tununak, Beaver Inlet, Ugadaga Bay, Unalaska.

[2] *Landing Locations Within Port Group—Central Gulf of Alaska*: Anchor Point, Anchorage, Chignik, Cordova, Eagle River, False Pass, West Anchor Cove, Girdwood, Chinitna Bay, Halibut Cove, Homer, Kasilof, Kenai, Kenai River, Alitak, Kodiak, Port Bailey, Nikiski, Ninilchik, Old Harbor, Palmer, Sand Point, Seldovia, Resurrection Bay, Seward, Valdez.

[3] *Landing Locations Within Port Group—Southeast Alaska*: Angoon, Baranof Warm Springs, Craig, Edna Bay, Elfin Cove, Excursion Inlet, Gustavus, Haines, Hollis, Hoonah, Hyder, Auke Bay, Douglas, Tee Harbor, Juneau, Kake, Ketchikan, Klawock, Metlakatla, Pelican, Petersburg, Portage Bay, Port Alexander, Port Graham, Port Protection, Point Baker, Sitka, Skagway, Tenakee Springs, Thorne Bay, Wrangell, Yakutat.

[4] *Landing Locations Within Port Group— All*: For Alaska: All landing locations included in 1, 2, and 3. For California: Eureka, Fort Bragg, Other California. For Oregon: Astoria, Aurora, Lincoln City, Newport, Warrenton, Other Oregon. For Washington: Anacortes, Bellevue, Bellingham, Nagai Island, Edmonds, Everett, Granite Falls, Ilwaco, La Conner, Port Angeles, Port Orchard, Port Townsend, Ranier, Fox Island, Mercer Island, Seattle, Standwood, Other Washington. For Canada: Port Hardy, Port Edward, Prince Rupert, Vancouver, Haines Junction, Other Canada.

Dated: December 11, 2001.

Jonathan M. Kurland,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 01–31014 Filed 12–14–01; 8:45 am]

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UNITED STATES DEPARTMENT OF COMMERCE
NOAA / National Marine Fisheries Service
Alaska Enforcement Division
P.O. Box 21767
Juneau, Alaska 99802-1767

July 3, 2001

David Benton, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Dave
Chairman Benton,

Now that we have 6 full years of IFQ fishing completed, I feel it is time to evaluate certain enforcement aspects of the program. There are four main regulatory requirements which seem to be aggravating to the industry; (1) Prior Notice of Landings, (2) Offload window of 6am to 6pm, (3) Shipment Reports, and (4) Vessel Clearances. From the enforcement prospective, I feel there may be justification to amend these requirements. Following a brief summary of each requirement.

Prior Notice of Landing (PNOL)

*A vessel operator must contact NMFS Enforcement at least 6 hours prior to the offload of any IFQ species.

Enforcement benefits:
- allows officers time to travel to the offload site to monitor the offload.
- allows officers to prioritize which vessels to monitor.
- provides a deterrent effect when the operator knows that enforcement may show up to monitor the offload.

Industry complaints:
- vessels have to commit to a certain Registered Buyers at least 6 hours before offloading and may not get the benefit of competition for price.
- communications at sea are limited, so the vessel relies on Registered Buyers, or spouses, to call in the PNOL.
- Registered Buyers are restricted in their ability to bid on a load of IFQ fish if they have to wait 6 hours to offload. This is especially aggravating to the auction system in Homer.

Offload Window

*Vessels have to begin their offload of IFQ species between 6 am and 6 pm.

Enforcement benefits:

- with limited enforcement personnel in eight ports, having to cover a 12 hour offload window 7 days a week is already a challenge, but this allows officers to concentrate their efforts.
- restricting the offload times to the day time reduces the risk of unreported or under reported landings at night.

Industry complaints:

- although 6 am seems to be ok for the start time for Registered Buyers, 6 pm is too limiting when they get behind on offloads in the afternoons.
- vessels would like more flexibility in offload hours to work their crews more efficiently.

Shipment Report

*Registered Buyers are required to complete the shipment report before the IFQ fish leave the landing site. They must submit the Report to Enforcement within 7 days of the actual shipment. The Report is required to accompany the fish to the first destination.

Enforcement benefits:

- gives enforcement an audit tool to compare "fish in" with "fish out" of a plant.
- allows enforcement to identify whether a load of halibut or sablefish being transported was lawfully landed.

Industry concerns:

- one more report to fill out and submit

Vessel Clearance

*The vessel operator leaving Alaska with IFQ fish is required to either give a verbal "departure report" to enforcement and then get the Vessel Clearance (submit to a physical boarding) in Bellingham, or get the Vessel Clearance in certain Alaskan ports before heading south.

Enforcement benefits:

- allows enforcement the opportunity to inspect before the fish leave Alaska to be off loaded in Canada or the lower 48.
- provides a level of deterrence to a variety of reporting violations

Industry concerns:

- the requirement is onerous and costly when they have to divert off course to come dockside for a clearance.
- there are not enough port options for obtaining a clearance.

SUMMARY

I would like to meet with the IFQ Implementation Team to review these four topics. Some of these requirements have turned out to be of limited value to enforcement and amending any or all of these requirements may provide relief to NMFS enforcement as well as the fishing industry. I will make myself available to meet with the Team whenever possible. Please feel free to call me to discuss this in more detail, or if I need to clarify any of the issues. You can reach me at (907) 586-7225.

Sincerely,

D. Jeffrey Passer
Special Agent in Charge
Alaska Enforcement Division
NOAA/NMFS Office for Law Enforcement

INTERNATIONAL PACIFIC HALIBUT COMMISSION

ESTABLISHED BY A CONVENTION BETWEEN CANADA
AND THE UNITED STATES OF AMERICA

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July 18, 2001

Mr. David Benton, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Dear Chairman Benton:

We are writing in response to NMFS Enforcement's letter dated July 3 with regard to the IFQ program landing requirements. The IPHC has an extensive commercial catch sampling program that is necessary to assess the status of the halibut stocks. It is important for our samplers to meet a high proportion of the landings. Our sampling program also includes collecting NMFS sablefish logbooks by interviewing the skippers and providing edited logsheets to the NMFS sablefish assessment scientists at Auke Bay. The third requirement that the NMFS Enforcement letter has suggested reviewing, shipment reports, is not necessary for any of the Commission programs, therefore we are not concerned if the requirements are changed. However, the current landing requirements of: (1) prior notice of landings; (2) offload window of 6 a.m. to 6 p.m.; and (3) vessel clearance are essential to the IPHC sampling program. The following summarizes the sampling program and the rationale for the landing requirements.

Prior Notice of Landing (PNOL), Offload Window of 6 a.m. to 6 p.m., vessel clearances.

- IPHC receives PNOL from NMFS RAM Div. and samplers receive the information three times a day: at 6 a.m., at noon (6 hours later) and late in the evening.
- Bellingham NMFS Enforcement officers inform the IPHC Bellingham sampler when they receive vessel clearance information. This allows the sampler to know ahead of time what to expect as she is covering Vancouver (Canadian landings) and Bellingham.
- 6-hr PNOL allows the IPHC sampler to optimize sampling and interview time for multiple deliveries during their scheduled 12-hour day and allows the Commission to staff ports with one sampler. Samplers work 6 days per week.
- The sampler's goal is to interview *all* skippers that make a landing in their port and to meet *all* vessels during the offload or as many as reasonably practical
- In 2000, approximately 6,700 halibut logsheets were collected from Alaska landings.
- Samplers must randomly sample a percentage of a halibut trip, collecting fish lengths and cutting otoliths when the fish are offloaded from the vessel to the plant.
- In 2000, our goal was to sample vessels representing 50% (by weight) of the halibut landed in the staffed ports.

If the PNOL time were shortened or the landing window was greater, it would be more difficult for IPHC to staff the ports and continue to obtain the high ratio of samples and interviews that are necessary. The current system works well and we are able to hire and maintain quality field staff. With less restrictive landing requirements we would be required to increase our sampling budget to met the sampling goals, which would also affect the fleet through the IFQ Cost Recovery Program.

We understand that the industry has difficulty with the need to know their registered buyer for the PNOL. We also realize that there have been changes, such as auctions, to the way halibut trips are sold that make it difficult to complete the current prior notice of landing requirement concerning registered buyers. One option could be to replace the registered buyer requirement with a point of landing (landing dock). Since the point of offload is the key element in a delivery, this option would serve both Enforcement and Commission needs without compromising the free marketing of fish.

Concerning vessel clearances out of Alaskan waters, IPHC would benefit if the vessel clearance requirement was retained. It would be acceptable to us if all vessel clearances were done verbally with a "departure report".

The Commission staff has participated in the implementation discussions for the IFQ program and we appreciate being involved in the continuing discussions on this issue. A staff member will be available at the October Council meeting for discussion of this issue. The Commission's IFQ Implementation Team member is Heather Gilroy.

Sincerely,

Bruce M. Leaman
Executive Director

Minutes
IFQ Implementation and Cost Recovery Committee
December 2, 2001

The committee convened at approximately 1 pm on Sunday, December 2, 2001. Chairman Jeff Stephan, Bob Alverson, John Bruce, Norman Cohen, Arne Fuglvog, Dennis Hicks, Don Iverson, Jack Knutsen, Don Lane, Kris Norosz, Paul Peyton were in attendance. Gerry Merrigan was absent. Agency staff in attendance were Jane DiCosimo (NPFMC), Phil Smith (NMFS RAM), John Lepore and Tom Pearson (NMFS SF), Jeff Passer (NMFS Enforcement), and Heather Gilroy (IPHC), Radford Dew and Michael Ebel (USCG). Six members of the public also attended.

I. IFQ Cost Recovery Program

Phil Smith, Director, NMFS RAM Division, presented a summary of the 2000 and 2001 IFQ Cost Recovery Program and the IFQ Cost Recovery Fee for 2001. The IFQ Cost Recovery Fee for 2001 is 2% of the ex-vessel value, compared with 1.8% for 2000. The reason for the change in 2000 was due to the lower ex-vessel value for the sablefish and halibut fisheries this year. The committee discussed the status of proceeding with the cost recovery of the CDQ program. The committee will request Kimberly Ott of the North Pacific Loan Program to prepare a report on this loan program for committee consideration during their next meeting.

II. Enforcement Issues

NMFS agency staff reviewed four enforcement issues with the committee. The committee thanks Jeff Passer, Special Agent in Charge, NMFS Enforcement Division, Alaska Region, for his initiative to advance several issues that are relevant to the enforcement and operational aspects of the Halibut/Sablefish IFQ program [see 7/3/01 letter from Jeff Passer to David Benton, Agenda item C-6 (a)(3)]. The Committee also thanks Heather Gilroy and the IPHC for their thoughtful response to the issues that were addressed by Jeff Passer, and recognizes Shari Gross and HANA for having developed a thorough inventory and explanation of issues that are relevant to HANA's interest with respect to the Halibut/Sablefish IFQ program. The committee also recognizes the helpful contributions and insight from U.S. Coast Guard personnel and NMFS Sustainable Fisheries Division staff.

A. Prior Notice of Landing (PNOL): The Committee recommends that the Council may wish to consider making a recommendation to NMFS that they proceed with a regulatory amendment to revise the Prior Notice of Landing requirement by IPHC Area that includes analysis, consideration and possible combination of one or more of the following alternatives:

1. Eliminate the PNOL;
2. Replace the reporting of "Registered Buyers" with the reporting of "Location of Landings". NMFS Enforcement indicated that this substitution preserves relevant enforcement objectives. IPHC indicated that this substitution preserves valuable opportunities that benefit their sampling protocol. The committee generally expressed support for this option;
3. Change the PNOL requirement from 6 hours to 3 hours. The committee generally expressed support for this option;
4. Randomly apply the PNOL to buyers; that is, continue to require a PNOL but eliminate the requirement for a minimum number of hours for prior notice (i.e, the existing 6 hour, or suggested 3 hour, "wait period"), and expect NMFS to use their discretion to inspect vessels prior to product offload on a random basis. NMFS Enforcement expressed reservations about the ultimate effectiveness of this option.

B. Offload Window: The committee recommends maintaining the current offload window of 6:00 am to 6:00 pm. The committee felt that if the PNOL requirements were relaxed and slightly changed as suggested

above, it would be appropriate to maintain the offload window as it currently exists. The committee expressed support for maintaining a good IPHC sampling program, and a good NMFS enforcement effort. The IPHC recommended maintaining the current offload window because of the benefits that it provides for their sampling program. The IPHC indicated that an extension of the offload window would probably result in increased personnel requirements and costs for them if they were to attempt to maintain the existing rate of sampling coverage.

C. Vessel Clearance Requirement: The committee recommends that the Council may wish to consider making a recommendation to NMFS that they proceed with a regulatory amendment to eliminate the Vessel Clearance requirement, but still require a verbal "departure report". NMFS Enforcement stated that the Vessel Clearance requirement has little value to their enforcement program.

D. Shipment Report: The committee suggested eliminating the processor Shipment Report, and instead requiring that IFQ species be reported on the Product Transfer Report (PTR). NMFS Enforcement indicated that the substitution of the PTR for the processor Shipment Report does not risk the achievement of enforcement objectives.

III. Other Business

A. The committee recommends that the Council may wish to consider making a recommendation to NMFS that they incorporate the four above recommended housekeeping changes into an omnibus regulatory amendment, and that NMFS expedite the preparation and submission of such an omnibus regulatory amendment without coming back to the Council. This approach was similarly recommended to NMFS by the Council a number of years ago for these types of regulatory amendments. NMFS Enforcement indicated that they would informally communicate with the IPHC, the Council and the industry with respect this omnibus regulatory amendment. NMFS Enforcement indicated that the four regulatory requirements that have been recommended for modification by the committee have turned out to be of limited enforcement value, and that amending any or all of these requirements may provide relief to NMFS Enforcement as well as to the fishing industry.

B. The Committee recommends that the Council ask the IFQ Implementation and Cost Recovery Committee to reconvene prior to the February Council meeting so that it may develop comments for the Council with respect to the Final Review Analysis of the GOA Community IFQ Purchase Program (Amendment 66). The Committee proposes to meet on the first Sunday evening of the February Council meeting (2/3/02, 6:30 pm to 9:30 pm). In response to comments from some committee members, an attempt will be made to establish a telephone conference call connection for those committee members who are not able to travel to the February meeting. Time permitting, the committee may also schedule a preliminary discussion of the North Pacific Loan Program if a summary report about this loan program is available from Ms. Kimberly Ott by the time of the February committee meeting. (Note: The Council has rescheduled Initial Review of Amendment 66 to February, 2002, and Final Review to April or June; therefore, it is presumed that the committee will wish to meet at the time that the Council schedules Final Review, rather than in February as originally discussed).

C. The Committee thanks Jane DiCosimo for providing the committee with a thorough and complete package of pertinent background information well in advance of the committee meeting, and for her invaluable contribution to and support of the committee.

Alternatives and options for Gulf FMP Amendment 66

Alternative 1: (No Action) Only qualified persons as defined in the current Federal regulations could hold and use commercial halibut and sablefish QS in the Gulf of Alaska.

Alternative 1 would maintain the language and intent of the current regulations (50 CFR 679.41(g)), effectively limiting the transfer of QS to IFQ crew members and initial recipients. Individual Gulf community residents would continue to be allowed to purchase commercial halibut and sablefish QS and fish the resulting IFQs, but community entities could not receive or hold catcher vessel QS for community benefit.

Alternative 2: Allow eligible Gulf of Alaska coastal communities to hold commercial halibut and sablefish QS for lease to and use by community residents.

Element 1. Eligible Communities (Gulf of Alaska communities only)

Rural communities with less than 2,500 people, no road access to larger communities, direct access to saltwater, and a documented historic participation in the halibut/sablefish fisheries:

Suboption 1. Include a provision that the communities must also be fishery dependent, as determined by:

- Fishing as a principal source of revenue to the community, or
- Fishing as a principal source of employment in the community (e.g., fishermen, processors, suppliers)

Suboption 2. Decrease size to communities with less than 1,500 people.

Suboption 3. Increase size to communities with less than 5,000 people.

Element 2. Appropriate Ownership Entity

(a) Existing recognized governmental entities within the communities (e.g., municipalities, tribal councils or ANCSA corporations)
(b) New non-profit community entity
(c) Aggregation of communities
(d) Combination of the entities (allow different ownership entities in different communities depending on the adequacy and appropriateness of existing management structures)
(e) Regional or Gulf-wide umbrella entity acting as trustee for individual communities

Element 3. Use Caps for Individual Communities

Options (a) - (c) would establish **the same use caps** for all eligible communities:

(a) 2% of 2C and 1% of the combined 2C, 3A and 3B halibut QS, and 2% of Southeast and 2% of all combined sablefish QS.
(b) 1% of 2C and 0.5% of the combined 2C, 3A and 3B halibut QS, and 1% of Southeast and 1% of all combined sablefish QS.
(c) 0.5% of 2C and 0.5% of the combined 2C, 3A and 3B halibut QS, and 0.5% of Southeast and 1% of all combined sablefish QS.

Options (d) or (e) would establish **use caps on an area basis** (i.e., eligible communities in Area 2C, 3A, and 3B would have different use caps):

(d) Place caps on individual communities that limits them from using more than 1% of the combined quota share in the area they reside in and an adjacent quota share area. Communities in 3A could not buy quota shares in 2C.

(e) Place caps on individual communities that limits them from using more than 0.5% of the combined quota share in the area they reside in and an adjacent quota share area. Communities in 3A could not buy quota shares in 2C.

Thus:

- 2C communities capped at 1% (or 0.5%) of the combined 2C and 3A halibut QS, and 1% (or 0.5%) of the combined Southeast and West Yakutat combined sablefish QS.
- 3A communities capped at 1% (or 0.5%) of the combined 3A and 3B halibut QS, and 1% (or 0.5%) of the combined West Yakutat and Central Gulf combined sablefish QS.
- 3B communities capped at 1% or (0.5%) of the combined 3A and 3B halibut QS, and 1% (or 0.5%) of the combined Central Gulf and Western Gulf combined sablefish QS.

Element 4. Cumulative Use Caps for all Communities

(a) 20% of the combined 2C, 3A, and 3B halibut QS, and 40% of the total combined Gulf of Alaska sablefish QS.
(b) 20% of the combined 2C, 3A, and 3B halibut QS, and 20% of the total combined Gulf of Alaska sablefish QS.
(c) 10% of the combined 2C, 3A, and 3B halibut QS, and 20% of the total combined Gulf of Alaska sablefish QS.
(d) 10% of the combined 2C, 3A, and 3B halibut QS, and 10% of the total combined Gulf of Alaska sablefish QS.
(e) No cumulative use caps.

Element 5. Purchase, use, and sale restrictions

Block Restrictions

(a) Communities would have the same blocked share restrictions as individuals
(b) Allow communities to buy only blocked shares or only unblocked shares
(c) Allow communities to buy blocked and unblocked shares

Suboption 1: Communities can purchase blocked and unblocked shares up to the ratio of blocked to unblocked shares in that area (i.e., communities are not limited to the number of blocks that they can own, but are limited in the number of pounds of blocked shares). The community would first need to purchase unblocked shares and then could purchase blocked shares up to the ratio in the area.

Suboption 2: Communities can purchase blocked quota shares in excess of the current limit on block ownership, up to:
(a) 5 blocks per community
(b) 20 blocks per community
(c) Without limitation

Vessel Size Restrictions

(a) Apply vessel size (share class) restrictions to the purchase of QS by communities.
(b) Do not apply vessel size (share class) restrictions to the purchase of QS by communities.
(c) Transferability of QS (permanent) and IFQs (on annual basis [leasing]) from commercial to community is restricted to the following class of shares:

(i) A category
(ii) C and D category
(iii) B and C category
(iv) B, C, and D category
(v) A, B, and C category
(vi) No transferability restrictions

Sale Restrictions
(All restrictions on quota shares (e.g., share class, blocked or unblocked status) would be retained once the quota is sold outside of the community.)

(a) Communities may only sell their QS:
1. after 3 years of ownership
2. to other communities
3. no sale restrictions

(b) Communities may:
1. divide QS blocks that result in IFQs in excess of 20,000 lbs in a given year in half upon sale
Suboption 1: Allow only Area 3B QS blocks that result in IFQs in excess of 20,000 lbs in a given year to be divided in half upon sale
2. "sweep up" blocks of less than 10,000 lbs and sell as blocks of up to 20,000 lbs

Element 6. Code of Conduct

Communities wishing to purchase and use halibut and sablefish QS shall establish a code of conduct that provides for, to the extent practicable, the following provisions:

(a) Maximize fishing of community IFQs by community residents
(b) Maximize benefit from use of community IFQ for crew members that are community residents
(c) Minimize administrative costs
(d) Minimize bycatch and/or habitat impacts

Element 7. Administrative Oversight

(a) Require submission of detailed information to NMFS prior to being considered for eligibility as a community QS recipient
(b) Require submission of an annual report detailing accomplishments

Element 8. Sunset Provisions

(a) No sunset provision
(b) Review program after 5 years and consider sunsetting program if review reveals a failure to accomplish the stated goals.

(c) Review program after 5 years and, if changes are necessary, provide a "drop-through"[1] of purchase and use privileges, whereby the initial privileges granted to participating communities would continue for an additional 10 years. Additional community purchases would be subject to a new set of purchase and use standards. Incentives for communities to convert from the initial set of purchase and use privileges to the new set would be provided.

Suboption 1: Review program after 10 years

Suboption 2: Review program after 3 years

[1]As described in the National Research Council's 1999 publication Sharing the Fish, p. 150.

AGENDA C-3
FEBRUARY 2002
Supplemental

Deep Sea Fishermen's Union of the Pacific

5215 Ballard Avenue N.W.
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Established 1912

Mr. David Benton, Chairman
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Dear Chairman Benton,

As the newly elected President of the Deep Sea Fishermen's Union (DFSU) I want to take this opportunity to articulate the Union's position and concerns on the continuing dialogue regarding community development quotas (CDQ) sought by the Coalition of Fisheries Dependent Communities (CFDC). This organization represents the residents of 40 plus communities adjacent to the Gulf of Alaska.

This group expresses concern over the loss of young people in their communities because of the lack of economic infrastructure and seeks remedy by obtaining preferential access to all species of fish in the Gulf of Alaska. The proposal was initially discussed in a meeting with the NPFMC on February 2, 1998. The Fishing Vessel Owner's Association (FVOA) and their Manager, Bob Alverson, responded to the proposal in a well-researched and documented reply on March 23, 1998. DFSU would suggest that the FVOA response be given careful scrutiny during any deliberations by the NPFMC on this topic.

Our research of the issue yields the following:

1-The federal government has provided 13 native regional corporations under the auspices of the Alaska Native Claims Settlement Act (ANCSA) with nearly a billion dollars. There are at least five corporations whose catchment area covers the geographic region in question. They have been efficient, businesslike and

successful and we commend them for their sage investments in tourism, construction, mines, timber and commercial real estate. Perhaps it would be appropriate for these corporate entities' economic involvement in fishing vessels, permits, fishery quota purchases and in processor facilities.

2-The Bureau of Indian Affairs (BIA) also offers a loan guarantee program that backs commercial loans at 90% from banks to Alaskan Native Tribes or Alaskan Native Claims Settlement Act Corporations. The interest rates are very favorable and allow for loans up to $5.5 million for tribes or corporations. Correctly, these loans are only accessible to very specific groups and inherently provide them an advantage.

3-The current groundfish license limited entry program in the Gulf of Alaska exempts boats of 25 feet in length. This provision is specifically intended to encourage entry-level fisherman from these coastal communities to participate freely in the inside cod fish fishery off Alaska. It further supports this by not requiring the acquisition of limited entry permits. Also, in 1996 the Board of Fisheries allocated up to 20% of the Pacific Cod resources in the Gulf of Alaska for harvest inside three miles by vessels using jig gear and by limit seine vessels no longer than 58 feet that use pots. No trawlers or longline vessels are permitted access. This would, per se, favor these local communities.

Our point in citing items 1-3 is that there appears to be a number of means already funded and available to aid CFDC in improving its economic infrastructure. And, since that is the case we would like an explanation of the need to obtain preferential access as manifested by the CDQ.

DSFU also has concerns about any corporations that may evolve from this process. It is our position that these need to be wholly owned and operated by the designated representatives for these communities.

As you are doubtlessly aware, we have been a Union for 90 years. We are working fisherman who know our craft and have extensive experience with the IFQ process. The IFQ has had notable successes. Should the CDQ be modeled accordingly there are some areas that have become loopholes, which are worth consideration. The hired skipper provision has been severely taken advantage of by allowing non-participating individuals and entities to take vast sums of money away from the industry with next to zero effort or reinvestment. We feel this is very unhealthy for the halibut/black cod industry as a whole and sincerely hope that these administrative contrivances will not be tolerated.

We strongly recommend that, if implemented, that the vessels catching fish for these communities be completely owned and manned by members of that community. It is our understanding that as a derivative of the Boldt decision the Makah Tribe is allocated quota and harvests that quota with vessels owned and manned by the tribe. The Union feels that this is an excellent model and strongly supports this approach.

We would also appreciate the continuing opportunity to review and provide comment on whatever form this initiative may take if it unfolds. The long, distinguished and progressive history of our Union can only aid and strengthen this process. In doing this, we look forward to working with the CFDC.

Thank you in advance for your consideration of these points and we are honored by the ability to provide them. Please feel free to contact me or our Executive Director, Beau Bergeron if we can be of any assistance.

Sincerely,

Pat Hunter
President

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALEUTIAN PRIBILOF ISLAND COMMUNITY DEVELOPMENT ASSOCIATION,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, and NATIONAL MARINE FISHERIES SERVICE,

Defendants.

and

NORTON SOUND ECONOMIC DEVELOPMENT CORPORATION, et al.,

Defendant-Intervenors.

No. A01-0053-CV (HRH)

DECISION ON APPEAL

Plaintiff moves for partial summary judgment.[1] Defendants oppose the motion and cross-move for summary judgment on all counts in plaintiff's complaint.[2] The court has allowed intervenors to

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1 Clerk's Docket No. 23.

2 Clerk's Docket No. 26.

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submit briefing,[3] and oral argument has been heard. Although plaintiff has styled its brief as a motion for partial summary judgment, the substance of plaintiff's complaint together with jurisdiction under the Magnuson-Stevens Fishery Conservation and Management Act, the applicable sections of the Administrative Procedure Act (APA), and the facts presented make it clear that the court is reviewing an administrative decision. Accordingly, the court treats the parties' moving papers as their briefs on appeal.

INTRODUCTION

Plaintiff is the Aleutian Pribilof Island Community Development Association (hereinafter referred to as APICDA). Defendants are the United States Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), and the National Marine Fisheries Service (NMFS). Plaintiff APICDA participates in the Community Development Quota program established by the Magnuson-Stevens Act. Under the act, a portion of the Bering Sea/Aleutian Island groundfish, halibut, and crab fisheries are set aside for exclusive use by communities in western Alaska. These portions, referred to as Community Development Quotas (CDQs), are allocated among eligible western Alaska communities for the purpose of developing viable fishing industries in those communities. Currently, 65 communities participate in the CDQ program. Their interests are represented by six multi-community organizations or

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[3] Clerk's Docket Nos. 25 & 27.

"CDQ groups"[4] of which APICDA is one. Each regulatory period, the CDQ groups apply for and receive allocative shares of the quotas. The process is competitive because the quota for each fishery is limited, and therefore a larger share for one group necessarily means a smaller potential share for all other groups.

Plaintiff appeals the Secretary of Commerce's approval of the 2001-2002 Community Development Quota (CDQ) for western Alaska communities as provided by the Magnuson-Stevens Act. Specifically, plaintiff finds fault with the 2001-2002 allocation of the pollock CDQ. Plaintiff was allocated 14% of the 2001-2002 pollock CDQ, which was less than the 18% plaintiff requested and less than the 16% plaintiff was allocated the previous regulatory period.

Allocation involves both State of Alaska and federal oversight as provided by federal regulations implementing the Magnuson-Stevens Act. See 50 C.F.R. § 679.30. The State reviews applications called "proposed Community Development Plans" (CDPs) and entertains commentary from all interested parties through a public hearing. 50 C.F.R. § 679.30(b). The State then competitively evaluates the proposed CDPs and presents quota recommendations to the North Pacific Fishery Management Council. Id. at (b), (c). If the council approves the State's recommendations, the State submits them to NMFS. Id. at (d).[5]

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[4] 50 C.F.R. § 679.30 states that CDQ allocations "are made to CDQ groups and not to vessels or processors...."

[5] The State's role is governed by Chapter 93 of Title 6 of the Alaska Administrative Code, which is devoted to the Western Alaska Community Development Quota Program.

Thereafter, NMFS, acting for the Secretary of Commerce, either approves or rejects the State's recommendations. Id. at (d). If NMFS rejects the State's recommendations, NMFS must advise the State in writing of the reasons for rejection. Id. The State may then submit revised recommendations. Id. NMFS' Approval of the State's recommendations results in an allocation of the various Bering Sea/Aleutian Island fisheries among the CDQ groups. It is NMFS approval of the State's recommendations regarding the allocation of the 2001-2002 CDQ that plaintiff herein challenges.

FACTS

In May of 2000, the State of Alaska announced the release of its CDP application packets for the 2001-2002 CDQ program period.[6] The State mailed application packets to the six entities that participated in the previous period's CDQ allocation (including APICDA). The announcement stated that the application process was pursuant to federal regulations (50 C.F.R. § 679.30) and the Alaska Administrative Code (6 AAC § 93).[7] The application packet included the deadline for submission and also informed applicants of the date and purpose of public hearing.[8] In addition to notifying the CDQ

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[6] See letter from the Alaska Department of Economic Development to Governor Tony Knowles (May 23, 2001), 8 AR at 2.

[7] Id.

[8] Copy of the Community Development Plan Application Packet, 9 AR at 004.

groups, the State also issued a public notice of the application period and hearing date.[9]

The six CDQ groups (including APICDA), timely applied for allocations through proposed CDPs.[10] In its application, APICDA requested 18% of the CDQ for pollock.[11] The State held a public hearing addressing the applications on September 20, 2001. APICDA appeared at the hearing and, for approximately 20 minutes, presented testimony in support of their proposed CDP.[12] In addition to allowing testimony at the public hearing, the State also met privately with each of the six CDP applicants. APICDA met with the State for approximately an hour and a half to discuss their application.[13]

On September 29, 2000, the State made its CDQ recommendations to the North Pacific Fishery Management Council. On this same day, the State notified all of the CDQ groups of its proposed recommendations.[14] Although APICDA requested 18% of the

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[9] Photocopy of Public Notice of CDQ Application Period as published in the Anchorage Daily News on May 23, 2000, 20 AR at 26.

[10] 2001-2002 Multi-Species CDQ Community Development Plans submitted by the six CDQ groups, 70 AR through 79 AR.

[11] APICDA Multi-Species CDP Application (2001-2002), 71 AR at 134.

[12] 2001-2002 Multi-Species CDQ Allocation Public Hearing Minutes (Sept. 20, 2000), 20 AR at 36-46.

[13] Complaint at 5, ¶ 14.

[14] See NMFS Approval of the 2001-2002 Community Development Plans and Percentage Allocations to the Community Development Quota Groups, Decision Memorandum, 44 AR at 17.

Bering Sea/Aleutian Island pollock CDQ, the state recommended that APICDA be allocated 14%.[15] In the State's recommendations to the council, each of the CDQ groups received a smaller allocation of Bering Sea/Aleutian Island pollock than requested for the 2001-2002 regulatory period[16] because the combined requests for pollock made by the six CDQ groups exceeded the total amount of CDQ allocation available by over 25%.[17]

At the council meeting, three of the CDQ groups provided public testimony. One of those groups expressed support for the recommendations. The council approved the CDQ allocations as recommended by the State.[18]

Prior to submitting its recommendations to the NMFS, the State requested that APICDA and four other CDQ groups revise their proposed CDPs to reflect the CDQ allocations recommended by the

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[15] 2001-2002 Multi-Species CDQ Program Recommendations (Oct. 16, 2000), submitted from the Alaska Department of Community and Economic Development to James W. Balsiger, Alaska Regional Director, NMFS, 20 AR at 1.

[16] The State's recommendations to the North Pacific Fishery Management Council and the CDQ groups' requested pollock allocations are found in appendices to the State's recommendations to NMFS at 20 AR 1. Compare recommended percentages with the requested percentages at 20 AR 108-127. APICDA requested 18% of the pollock quota and received 14%. Bristol Bay Economic Development Corporation requested 23% and received 21%. Central Bering Sea Fishermen's Association requested 10% and received 4%. Coastal Villages Region Fund requested 25% and received 24%. Norton Sound Economic Development Corporation requested 32% and received 23%. Yukon-Delta Fisheries Development Association requested 17% and received 14%.

[17] Total CDQ Requested, 2001-2002 Multi-Species CDQ Program Recommendations (October 16, 2000), 20 AR at 14.

[18] Minutes from the October 4-8, 2000, North Pacific Fishery Management Council Meeting, 14 AR at 18.

State to NMFS.[19] APICDA refused to comply, informing the State that to revise its proposed CDP to conform to the State's recommendations would imply that APICDA agreed with the State's recommendations, which it did not.[20] On October 16, 2000, the State transmitted its recommendations for the CDQ program to NMFS for NMFS approval.[21] Simultaneous with the State's submission to NMFS, APICDA formally notified NMFS that it did not agree with the State's CDQ allocation recommendations and asserted that NMFS should reject the State's recommendations as they stood.[22] Through interoffice correspondence, NMFS addressed the possibility that the

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[19] Letter from the Alaska Department of Community and Economic Development to Larry Cotter, CEO of APICDA (Oct. 9, 2000), attached as Exhibit 2 to Motion for Partial Summary Judgment, Clerk's Docket No. 23. This letter requests that all revisions be submitted by October 16, 2000. The letter also states that it "constitutes part of the CDQ Team's consultation under 6 AAC § 93.040(f)." Although the letter is not part of the administrative record compiled by NMFS, its contents are referred to in the revised CDPs submitted by four other CDQ groups: Coastal Villages Region Fund, Norton Sound Economic Development Corporation, Bristol Bay Economic Development Corporation, and Central Bering Sea Fishermen's Association. See 14 AR at 1, 15 AR at 1, 16 AR at 1, and 17 AR at 1. There is no indication from the record that the State requested the Yukon-Delta Fisheries Development Association to revise its CDP.

[20] Letter from APICDA to Bryce Edgmon, CDQ manager, Alaska Department of Community and Economic Development (Oct. 16, 2000), 18 AR at 1.

[21] 2001-2002 Multi-Species CDQ Program Recommendations (Oct. 16, 2000), 20 AR at 1-23.

[22] Letter from APICDA to Jim Balsiger, Alaska Regional Director, NMFS (Oct. 16, 2000), 19 AR at 1.

APICDA pollock allocation was "controversial."[23] NMFS knew that APICDA had declined to update its CDP as the State requested.[24] NMFS considered the possibility that APICDA or other adversely affected CDQ groups would "further interject themselves into the NMFS review and approval process," and NMFS recognized that there was "neither policy precedent or a regulatory provision for an appeal of the State's recommendations."[25] As NMFS predicted, APICDA further interjected itself, presenting NMFS with specific arguments as to why NMFS should entirely reject the State's recommendations.[26] NMFS responded to APICDA, notifying it that NMFS would consider APICDA's arguments as part of its review of the State's recommendations.[27]

On November 14, 2000, NMFS informed the State that it was rejecting the State's CDQ recommendations because they lacked

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[23] NMFS/NOAA interoffice e-mail memorandum (re State of Alaska 01-02 CDQ recommendations, possible problem) (Oct. 17, 2000), 21 AR at 1. In its approval of the State's recommendations, NMFS also states that "[t]his issue is controversial due to the requests we received from two CDQ groups to disapprove the State's allocation recommendations." 44 AR at 1.

[24] NMFS/NOAA interoffice e-mail memorandum (re State of Alaska 01-02 CDQ recommendations, possible problem) (Oct. 17, 2000), 21 AR at 1.

[25] Id.

[26] Letter and attached memorandum from APICDA to Jim Balsiger, Alaska Regional Director, NMFS (Oct. 31, 2000), 22 AR at 1-22.

[27] Letter from NMFS to APICDA (Nov. 3, 2000), 24 AR at 1.

sufficient explanation.[28] NMFS reasoned that the State did not explain why it was recommending changes to some of the CDQ allocations (changes from the previous allocation period), and concluded that it (NMFS) needed a "more detailed explanation of the State's rationale to provide an administrative record of the reasons for CDQ allocations."[29]

APICDA, having become aware of NMFS' rejection of the recommendations, contacted NMFS and expressed a desire to review and respond to any revised recommendations that the State might make to NMFS.[30] APICDA also acknowledged that neither the Alaska Administrative Code nor the federal regulations provided for its participation in the NMFS process,[31] yet it was permitted to do so.

On November 29, 2000, the State resubmitted the recommendations along with a detailed rationale supporting those recommendations.[32] The State's memorandum to NMFS addresses specific criteria that it used to evaluate the various CDPs and the requested revised CDPs.[33] The memorandum also addresses specific

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[28] Letter from NMFS to the Deputy Commissioner of the Alaska Department of Community and Economic Development (Nov. 14, 2000), 26 AR at 1.

[29] Id.

[30] Letter from APICDA to Jim Balsiger, Alaska Regional Director, NMFS, re Challenges to State of Alaska's 2001-02 CDQ Allocation Recommendations (Nov. 27, 2000), 32 AR 1-3.

[31] Id. at 2.

[32] State of Alaska's Revised CDQ Allocation Recommendations (Nov. 29, 2000), 33 AR at 1-9.

[33] Id. at 4-5.

arguments asserted by APICDA and analyzes specific portions of the State's rationale for allocating APICDA a smaller percentage of the pollock CDQ than it had the previous allocation period.[34] After receiving a copy of the State's revised recommendations, APICDA presented NMFS with its objections.[35]

On January 17, 2001, NMFS issued a memorandum approving the State's CDQ recommendations for the years 2001 and 2002.[36] In the memorandum, NMFS devoted significant consideration to the objections raised by APICDA as well as to other substantive arguments raised by other CDQ groups.[37] In fact, NMFS devoted an entire section of its memorandum to "Challenges to the CDQ Allocation Process"[38] and another section to "Additional Rebuttal to the State's Findings," both of which primarily address arguments raised by APICDA.[39] NMFS also expounded on its precise role in the

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[34] Id. at 4-6.

[35] Letter from APICDA to Jim Balsiger, Alaska Regional Director, NMFS, re Challenge to State of Alaska's 2001-02 CDQ Allocation Recommendations (Nov. 30, 2000), 34 AR at 1-4; Letter from APICDA to Jim Balsiger, Alaska Regional Director, NMFS re Challenge to State of Alaska's 2001-02 CDQ Allocation Recommendations (Dec. 15, 2000), 37 AR 1-22.

[36] NMFS Approval of the 2001-02 Community Development Plans and Percentage Allocations to the Community Development Quota Groups, Decision Memorandum, 44 AR at 1-25. The court is aware that in years past, the Department of Commerce has published its approval of the CDQ allocations in the Federal Register. For reasons that have not been explained to the court, approval of the 2001-02 CDQ allocations has yet to be published in the Federal Register.

[37] Id. at 9-25.

[38] Id. at 16.

[39] Id. at 24.

CDQ allocation process. NMFS explained that its role in the CDQ allocation process was limited to approval or rejection of the State's recommendations, and that such review did not include evaluation of the CDQ groups' applications anew. [40] NMFS stated that its role in the CDQ program

> is defined by the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands area (groundfish FMP), the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (crab FMP), and regulations at 50 CFR 679...." [41]

NMFS further noted that the Magnuson-Stevens Act "does not specifically instruct the Secretary to allocate CDQ to eligible communities or to CDQ groups, nor does it contain requirements about how allocations of quota to the eligible communities should be made." [42] Rather, according to NMFS, its own role with respect to CDQ allocations is expressed and implied through the crab and groundfish fishery management plans (specifically the 1992

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[40] Id. at 12. On this point NMFS stated the following:

> The role of NMFS in review and approval of the CDPs and the allocation of quota to the eligible communities is limited by regulatory design to conducting a careful inquiry of the record provided by the State for its recommendations and to determining whether the State considered relevant factors and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the recommendations made by the State.

[41] Id. at 10.

[42] Id. at 10-11.

groundfish FMP), read in conjunction with the implementing federal regulations.[43] NMFS then concluded that it approved the State's recommendations based on the following determinations:

> (1) the State followed the requirements of 50 CFR 679 in developing its allocation recommendations; (2) the proposed CDPs contain the information required under §679.30(a); and (3) the State considered relevant factors in making its CDQ allocation recommendations and it provided a reasonable explanation of the application of these factors.[44]

After NMFS approved the State's CDQ allocation recommendations, APICDA filed this action, asserting the following seven claims against the federal defendants: (1) that there was insufficient notice on the public hearing regarding the proposed CDPs; (2) that the Magnuson-Stevens Act requires the State's criteria for evaluating the CDPs (6 AAC § 93) to be approved by the Secretary and published, and those criteria were not published; (3) that APICDA was denied due process because it was not provided adequate notice that its allocation for CDQ pollock was going to be less than it was the previous allocation period and because it was not afforded the opportunity to respond to the State's recommended CDQ allocation; (4) that in developing and implementing the CDQ program, NMFS illegally delegated its own authority to the State; (5) that NMFS' approval of the recommendations was arbitrary and capricious; (6) that APICDA is entitled to declaratory relief from

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[43] See id. at 11. The 1992 Groundfish FMP is not a part of the administrative record.

[44] Id. at 25.

this court that its pollock allocation should continue at the percentage of the CDQ set for the previous allocation period; and (7) that APICDA has been denied equal protection under the law.[45] The parties have cross-moved as to these claims, although, as noted above, these proceedings are an administrative appeal.

STANDARD OF REVIEW

Plaintiff seeks judicial review of the Secretary's approval of the CDQ pollock allocation for the 2001-2002 regulatory period. The allocation of pollock under the CDQ program is a regulatory action taken by the Secretary. The Magnuson-Stevens Act grants federal district courts the power to "set aside" any regulation or action of the Secretary of Commerce found to be "(A) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (D) without observance of procedure required by law." 16 U.S.C. § 1855(f)(1)(B)) (incorporating 5 U.S.C. 706(2)(A), (B), (C) & (D)). The act specifically precludes a court from reviewing de novo whether the Secretary's action was warranted by the facts or whether the Secretary's action was supported by substantial evidence. See 16 U.S.C. § 1855(f)(1)(B) (excluding 5 U.S.C. § 706(2)(E) & (F)).

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[45] See Complaint at 8-17, Clerk's Docket No. 1.

ARGUMENTS[46]

As a preliminary matter, the intervening parties have presented an argument that this court lacks jurisdiction to adjudicate APICDA's claims due to the absence of an indispensable party. Relying exclusively upon Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990), the intervenors argue that where the allocation of rights to a limited resource among competing claimants is at issue, all the competing claimants are indispensable parties to the adjudication process under Rule 19(b), Federal Rules of Civil Procedure. The intervenors argue that because one of the six CDQ allocation applicants (Central Bering Sea Fishermen's Association) is not a party to this suit, the court cannot address questions involving allocation.

There is no indispensable party problem here. APICDA seeks review of the CDQ allocation process under the Magnuson-Stevens Act and the APA. Any person adversely affected by agency action may seek review of such action. Makah, 910 F.2d at 559. As provided by the Magnuson-Stevens Act, the court has limited authority to "set aside" regulations or actions of the Secretary of Commerce. 16 U.S.C. § 1855(f)(1)(B). The act does not provide the court with authority to allocate CDQs, nor has plaintiff convinced the court that it has such authority. Although plaintiff's complaint seeks a declaration from this court that the 1999-2000 CDQ

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[46] Because it is at times unclear which of APICDA's arguments correspond to which of its claims, the court has organized the arguments so that they are manageable to analyze.

allocations remain in effect, plaintiff has essentially disavowed its request for that relief. Thus, the problem of allocating competing rights to a limited resource present in Makah is not at issue here.

Allegations that the 2001-2002 CDQ Was Allocated without Observance of the Procedures required by Law

APICDA presents various arguments to the effect that the 2001-2002 pollock CDQ was allocated without observance of the procedures required by law. At the outset, the court notes that it is not reviewing the regulations themselves, but only whether the Secretary's acts were in conformity with the regulations. Under the Magnuson-Stevens Act, regulations established by the Secretary of Commerce to implement the CDQ program are subject to judicial review if filed within 30 days from the date of their promulgation. 16 U.S.C. § 1855(f)(1); Norbird Fisheries, Inc. v. NMFS, 112 F.3d 414, 416 (9th Cir. 1997). Regulations are "promulgated" and the thirty-day clock starts ticking when the regulations are published in the Federal Register. See Northwest Envtl. Defense Ctr. v. Brennen, 958 F.2d 930, 934 (9th Cir. 1992). Regulations setting forth the procedures applying to the CDQ applicants, the State's role in evaluating proposed CDPs and recommending quotas to NMFS, and NMFS' role in approving or rejecting the recommendations were all published in the Federal Register on November 23, 1992. Groundfish Fishery of the Bering Sea Aleutian Islands Area, 57 Fed. Reg. 54936, 54944-54946 (Nov. 23, 1992). APICDA filed its action in February of 2001, far past 30 days after the regulations were

promulgated. To the extent APICDA seeks to maintain a cause of action that challenges the way the regulations divide the roles within the CDQ program between the State and NMFS, APICDA's cause of action is beyond the statute of limitations period.

That said, APICDA asserts a number of other procedural arguments. APICDA first asserts that notice of the public hearing and the public hearing itself were formally insufficient, and that it (APICDA) was never given an opportunity to consult with the State as is required by the regulations. On the first point, APICDA makes various allegations. APICDA alleges: (1) that it was not given a reasonable opportunity to understand the impact of the proposed CDPs, (2) that the State never informed APICDA that it was contemplating a change in the CDQ allocations from the previous regulatory period, (3) that the State never identified the performance or programmatic concerns it had about APICDA or other CDQ groups, (4) that the State never informed the CDQ groups that "population" was a primary factor in determining the CDQ allocation, (5) that the State never informed APICDA or other groups of which actions taken by the groups most positively or negatively affected their chances of getting their requested share of the quota, and (6) that the State did not make available for public review all State materials pertinent to the hearing.

In addressing public hearings on the CDQ applications, the pertinent regulation states the following:

> When the CDQ application period has ended, the State must hold a public hearing to obtain comments on the proposed CDPs from all

> interested persons. The hearing must cover the substance and content of proposed CDPs so the affected parties, have a reasonable opportunity to understand the impact of the proposed CDPs. The State must provide reasonable public notification of hearing date and location. At the time of public notification of the hearing, the State must make available for public review all State materials pertinent to the hearing.

50 C.F.R. § 679.30(b). The corresponding section of the Alaska Administrative Code merely requires the State to schedule at least one public hearing on all proposed CDPs, properly notify all interested parties in writing, make available teleconferencing sites in each geographical area subject to a proposed CDP, and record the hearing. 6 AAC § 93.035.

As is clear from the record, the State notified APICDA and the other CDQ groups in advance in writing of the public hearing addressing the proposed CDPs. Moreover, each of the CDQ applicants was afforded the opportunity to address the State and answer questions from them at the hearing. APICDA took advantage of this opportunity. APICDA would have the court assume that the CDQ applicants are entitled to notice of and opportunity to attack the State's recommendations to NMFS. Neither the Alaska Administrative Code nor the Code of Federal Regulations expresses nor implies this. The State is not required to reveal whether it intends to recommend an allocation percentage for one CDQ group that is smaller than what that group received the previous regulatory period or smaller than what the CDQ requested this regulatory period. The regulations do not require the State to reveal anything as to its intentions. Indeed, the Alaska Administrative Code specifically provides that

APICDA competitively evaluate the proposed CDPs "[a]fter the public hearing under 6 AAC 93.035...." 6 AAC § 93.040(a). Also, neither state nor federal regulations require the State to reveal the relative weight it affords to each of the various factors it must consider when competitively evaluating the completed CDPs. What is more, all of the factors that the State does consider when evaluating proposed CDPs are listed in the Alaska Administrative Code chapter addressing the Western Alaska Community Development Quota Program. See 6 AAC § 93.040(b). Population is the second factor listed. See id. Thus, the implication that the State either impermissibly failed to notify the CDQ applicants that population would weigh into its decision-making process or impermissibly considered population as a factor affecting CDQ allocation is baseless.

This also holds true for the argument that the State did not provide APICDA and the other CDQ groups all relevant materials before and at the hearing. The State provided APICDA with all the information that it was required by regulation to provide. The court concludes that APICDA received all that it was entitled to receive under the regulations as regards notice and public hearing. APICDA's arguments as to notice and hearing fail.

APICDA also asserts that the proper procedures were not followed after the hearing. Specifically, APICDA asserts that under the state regulations, it was entitled to consult with the State prior to the State issuing its recommendations to NMFS. APICDA

asserts that the State did not consult with APICDA as the regulations require.

This argument rings hollow for a number of reasons. The section of the Alaska Administrative Code upon which APICDA relies states that when there is insufficient quota available to meet the combined requests of the CDQ applicants, before the State recommends an apportionment of the quota to NMFS, "it shall consult with the applicants that might be affected by the proposed apportionment." 6 AAC § 93.040(f). The very next sentence states that "[t]he CDQ team may request an applicant to submit a revised CDP to assist the CDQ team...." In this instance, the State requested APICDA to submit a revised CDP to conform with its recommended allocations. The State also acknowledged that a revised CDP would be part of the consultation between APICDA and the State and that, if APICDA desired, it could "make arrangements" with the State for further consultation.[47] APICDA did not comply with the State's request for a revised CDP, nor did it seek further consultation at this stage of the proceedings. With the exception of a letter informing the State that it would not submit a revised CDP, all other correspondence from APICDA regarding the allocation process was sent to NMFS. Further, NMFS accepted and considered the arguments that APICDA presented to it, included APICDA's arguments as part of the

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[47] Letter from the Alaska Department of Community and Economic Development to Larry Cotter, CEO of APICDA (Oct. 9, 2000), attached as Exhibit 2 to APICDA's Memorandum in Support of Partial Summary Judgment, Clerk's Docket No. 23. As stated, this letter is not part of the administrative record.

administrative record, and directly addressed APICDA's arguments in its memorandum approving the State's recommendations.

Finally, APICDA argues that pursuant to subsection 679.30(g), before its quota may be "reduced," it must be provided with a report that details the problems that the State has found and the basis for a change to its quota allocation. Because it was never provided with such a report, APICDA argues that NMFS acted contrary to its own implementing regulations.

Again, APICDA misapplies the regulations. Subsection 679.30(g) governs changes in existing CDPs during a regulatory period, not the approval of CDPs at the advent of a new regulatory period. APICDA's quota allocation for pollock was not reduced within one regulatory period. Rather, at the end of the 1999-2000 regulatory period, APICDA's pollock allocation would expire. See 50 C.F.R. § 679.30(a) ("Allocations of CDQ ... are harvest privileges that expire upon the expiration of the CDP."). The 2001-2002 pollock allocation was the result of a separate competitive allocation among all the qualified applicants. See id. ("further CDQ allocations are not implied or guaranteed, and a qualified applicant must reapply for further allocations on a competitive basis with other qualified applicants."). APICDA was not entitled to any additional report from the State.

This last argument raised by APICDA brings to light a false assumption upon which APICDA relies throughout its briefing. The assumption is that APICDA was somehow entitled to the same share of the pollock CDQ that it received in the 1999-2000 regulatory

period (16%) and, therefore, a negative change in its pollock CDQ from one regulatory period to the next constitutes a deprivation of a property interest.[48] This is simply wrong. See id. (quoted above). The harvest privilege is not a property interest. Nor is a negative change in quota allocation from one regulatory period to the next a deprivation of property. In sum, APICDA received as much, if not more process than it was due. Its arguments as to alleged procedural deficiencies in the allocation process fail.

Allegations that the Secretary Acted in Excess of Statutory Authority

APICDA argues that the Secretary's approval of the State's recommendations was beyond statutory authority. APICDA contends that under the Magnuson-Stevens Act, the criteria used by the State to evaluate the proposed CDPs must be published in the Federal Register. APICDA asserts that although the criteria used by the State to evaluate CDPs are found in the Alaska Administrative Code (6 AAC § 93), nowhere are those same criteria published in the Federal Register. APICDA asserts that because the evaluation criteria are not published in the Federal Register, the allocation process does not conform with the Magnuson-Stevens Act.

Plaintiff's argument is without merit. The Magnuson-Stevens Act provides that, in order "[t]o be eligible to participate in the western Alaska community development quota program ... a community shall ... meet criteria developed by the Governor of

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[48] APICDA has vaguely asserted that its "reduction" in pollock quota from one regulatory period to the next is a deprivation of property without due process.

Alaska, approved by the Secretary, and published in the Federal Register...." 16 U.S.C. § 1855(i)(1)(B)(iii) (emphasis added). The Secretary fulfilled this obligation by approving and publishing the State's eligibility regulations in the final rule-making for the CDQ program on November 23, 1992. See Department of Commerce Rules and Regulations Addressing the Groundfish Fishery of the Bering Sea and Aleutian Islands Area, 57 Fed. Reg. 54936, 54944 (Nov. 23, 1992). Nowhere does the Magnuson-Stevens Act provide or otherwise require the Secretary to publish the criteria that the State employs to evaluate proposed CDPs. Accordingly there is no statutory basis for plaintiff's claim on this matter.

APICDA also argues that the Secretary illegally delegated its authority in the CDQ process to the State of Alaska. APICDA contends that NMFS itself must apply the evaluation criteria found in the Alaska Administrative Code in order to make an independent decision about the appropriate CDQ allocations, and NMFS did not do so.

Nothing within the Magnuson-Stevens Act or the implementing regulations requires NMFS to do as APICDA contends. The Magnuson-Stevens Act states that "the North Pacific Council and the Secretary shall establish a western Alaska community development quota program under which a percentage of the total allowable catch of any Bering Sea fishery is allocated to the program." 16 U.S.C. § 1855(i)(1)(A). The act further sets forth the requirements a community or group of communities must meet to be eligible to participate in the program. 16 U.S.C. § 1855(i)(1)(B). The statute

does not specifically address the Secretary's role in the CDQ program. However, the implementing regulations provide some insight.

Under subsection 679.30(d), NMFS approves the proposed CDPs "that it determines meet all the applicable requirements." If NMFS does not approve the CDPs, it "must so advise the State in writing, including the reasons thereof." Id. The State may then "submit a revised proposed CDP along with revised recommendations for approval to NMFS." NMFS interprets these statements as limiting its own role in the allocation process to one of review.[49] NMFS submits that it is required to approve the State's recommendations if it finds that the State followed the requirements described in the regulations, if the State provided a rationale that demonstrates its consideration of relevant facts, and if the State provided a reasonable explanation for its recommendations.[50] This is so because, as NMFS suggests, primary responsibility for implementing the CDQ allocations lies with the State, as does the day-to-day administration of the CDQ program.[51] NMFS submits that requiring it to independently evaluate the CDQ applications, as APICDA suggests it should, would require NMFS either to override or to

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[49] NMFS Approval of the 2001-02 Community Development Plans and Percentage Allocations to the Community Development Quota Groups, Decision Memorandum, 44 AR at 10-12.

[50] Id. at 12.

[51] Id.

duplicate the role of the State.[52] Again, nothing in the Magnuson-Stevens Act or regulations at subsection 679.30(d) expresses or implies that NMFS is required to do so.

The CDQ program is a joint program of the Secretary of Commerce and the Governor of the State of Alaska. The program was designed by Alaskans to benefit Alaskans.[53] In light of this dual participation, and because of the deference this court is required to grant NMFS in interpreting its own regulatory role (see Department of Health & Human Services v. Chater, 163 F.3d 1129, 1133 (9th Cir. 1998) (court must give substantial deference to an agency's interpretation of its own regulations because its expertise makes it well-suited to interpret the language)), the court concludes that NMFS did not act contrary to its statutory authority when it approved the State's resubmitted recommendations.

Allegations that the Secretary's Acts Were Arbitrary and Capricious

APICDA also argues that NMFS approval of the State's recommendations was arbitrary and capricious. At the risk of repeating itself, the court will specifically address the Secretary's approval of the State's recommendations.

As stated above, NMFS is not required by law or regulation to evaluate CDQ applications under criteria designed for the State to apply. See 50 C.F.R. § 679.30(d). Moreover, once it became clear to NMFS that the State's initial recommendation did not

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[52] Id.

[53] Id. at 11.

provide sufficient explanation, NMFS called upon the State to provide what was lacking, and the State did so. APICDA asserts that NMFS merely made "passing reference" to the arguments that APICDA raised and that NMFS' approval constitutes a rubber-stamping of the State's recommendations. That is patently not the case. NMFS initially rejected the State's recommendations because of a lack of supporting rationale. NMFS also stated that it had considered the arguments presented in APICDA's correspondence of October 31, 2000, when it decided to reject the State's initial recommendations.[54] The rejection forced the State to provide additional analysis, which it did, including at times specific reference to APICDA's concerns. Upon reviewing the resubmitted recommendations, NMFS considered APICDA's concerns. In fact, NMFS devoted entire sections of its analysis to the arguments that APICDA raised throughout the process, addressing those arguments with specific facts found and rationale provided by the State. Although the federal regulations expounding upon NMFS' role in the CDQ allocation process are admittedly sparse, NMFS performed its functions fully and properly with careful consideration of APICDA's arguments. The Secretary's approval of the State's recommendations was neither arbitrary nor capricious.

APICDA's Request
that the 1999-2000 CDQ Allocation
Should Remain in Effect

In its complaint, APICDA requests declaratory relief. Specifically, APICDA seeks a declaration that the pre-existing CDQ

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[54] Id. at 19.

allocations (those in operation from 1999 through 2000) remain in effect.[55] As the federal defendants point out, APICDA has essentially disavowed the declaratory relief it seeks. APICDA has not provided the court with any authority supporting jurisdiction to declare the pre-existing CDQ allocations in effect. Plus, at this point, APICDA has stated that it seeks remand solely of NMFS' approval of the recommended CDQ allocations.[56] For these reasons, APICDA is not entitled to the declaratory relief it seeks in its complaint.

APICDA's Equal Protection Claim

APICDA's complaint also asserts an equal protection challenge to the Secretary's action. APICDA has not provided any argument in its briefing that supports its equal protection challenge. Specifically, APICDA has not provided the court with any evidence that it was treated differently than any of the other CDQ applicants. Defendants have provided numerous arguments as to why plaintiff's equal protection challenge fails, and these arguments are well taken. For these reasons, the court rejects APICDA's equal protection challenge.[57]

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[55] Complaint at 15 & 16, ¶¶ 54-60.

[56] See Motion for Partial Summary Judgment at 4, Clerk's Docket No. 23.

[57] In its briefing, APICDA also argues that by approving the State's recommendations without considering the economic impacts, the Secretary has violated the Regulatory Flexibility Act, 5 U.S.C. § 601, et seq. APICDA's complaint does not allege a violation of the Regulatory Flexibility Act. Nor has APICDA moved for leave to amend its complaint. The court therefore declines to address APICDA's Regulatory Flexibility Act argument.

CONCLUSION

For the foregoing reasons, plaintiff's motion for partial summary judgment is denied. Defendants' motion for summary judgment is granted. The decision of the Secretary of Commerce is affirmed.

DATED at Anchorage, Alaska, this 30 day of January, 2002.

H. Russel Holland, Judge
District of Alaska

A01-0053--CV (HRH)

P. PARTNOW
J. REEVES (DORSEY)
M. SEVILLE (HURR)
UNITED STATES ATTORNEY (USA)

Gulf of Alaska Coastal Communities Coalition
Council Testimony
Community IFQ Purchase Proposal (C-3)
February 8, 2002

Mr Chairman, members of the Council, my name is Duncan Fields and to my right is Freddy Christiansen, President of the Gulf of Alaska Coastal Communities Coalition. As you are aware, the Gulf Coalition generated the community purchase proposal and today we will be speaking on behalf of the Coalition.

The GOAC^3 supports the AP motion regarding the Community IFQ Purchase Proposal. You will notice that this motion is similar one you reviewed in December in that it addresses several concerns raised in public testimony and by the Advisory Panel. In addition, the motion clarifies State of Alaska and NMFS expectations regarding the community Code of Conduct and Administrative Oversight. Throughout the Council process we have encouraged public input and suggestions for this analysis. The AP's current suggestions should complete a large set of options for the Council to consider at Final Action. We would recommend that final action be scheduled for your April meeting.

There is one technical correction to the AP motion. On page 3 under the "Sale Restrictions" heading, the options should be numbered rather than lettered and the new language currently designated as "Suboption 1" should actually be option 3. So that there will be 4 options for the Council to consider under this heading.

I should also not that on page 3 a new heading "Use Restrictions" provides an option to limit the amount of community quota shares that can be fished by an individual in the community. Then, on the bottom of the page, new option "a" clearly specifies that communities can only lease their quota shares to community residents. I believe that these were the two primary issues addressed by the public both in December at the SSC and recently before the AP.

The Coalition is sensitive to staff resources and time constraints. Much of the motion was available to staff since the December meeting and I believe that all of the new options are manageable. Nevertheless, if the Council believes that staff may be unable to complete the analysis in time for final action in April, we would suggest one possible deletion.

On page 3 of the motion, under Element 5 -- "Purchase, use and sale restrictions", the new option (d) could be deleted. The proportionality suggested by this option is similar to the proportionality suboption under Block Restrictions and it is expected that the discussion will indicate that, as with the block proportionality restriction, this option would be difficult to adhere to and difficult to administer.

We want to again thank the Council for your consideration of our proposal and emphasize that the program will mean a great deal to many coastal communities. Again, we encourage you to schedule final action for April.

Thank you

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
Juneau, Alaska 99802-1109

February 5, 2002

MEMORANDUM FOR: Lisa Lindeman
Alaska Regional Attorney

FROM: Jonathan Pollard
Attorney-Advisor

SUBJECT: Decision in *APICDA v. Department of Commerce*, No. A01-0053-CV (Alaska, January 30, 2002)

On January 30, 2002, Judge Holland issued an order upholding NMFS' approval of the 2001-2002 Community Development Quota (CDQ) pollock allocation for the Aleutian Pribilof Island Community Development Association (APICDA). APICDA had claimed that the NMFS' approval of the Community Development Plan (CDP) allocation recommended by the State of Alaska violated the Magnuson-Stevens Act, the Administrative Procedure Act and the equal protection and due process requirements of the United States Constitution, asserting the following seven claims: (1) that the State and NMFS provided insufficient prior public notice of the State's proposed CDP allocations; (2) that the Magnuson-Stevens Act requires the State's criteria for evaluating CDP proposals to be approved by NMFS and published in the Federal Register; (3) that APICDA was denied due process because it was not provided adequate notice that its CDQ pollock allocation was to be less than it was in the previous allocation period; (4) that NMFS unlawfully delegated its authority to approve CDP allocations to the State; (5) that NMFS' approval of the State's recommendations we arbitrary and capricious; (6) that APICDA is entitled to a declaratory relief setting APICDA's pollock allocation at the percentage that had been set for the previous allocation period; and (7) that APICDA had been denied equal protection under the law. Although APICDA had asserted its arguments in a "Motion for Summary Judgment," Judge Holland ruled that APICDA's claims were in fact and law an appeal from NMFS' administrative decision to approve the State's CDP pollock allocations for 2002-2003.

At the outset, Judge Holland ruled that the Court had no jurisdiction to review the NMFS regulations implementing the CDQ program. Regulations setting forth the procedures applying to the CDQ applicants, the State's role in evaluating proposed CDPs and recommending quotas to NMFS, and NMFS role in approving the recommendations were all published in the Federal Register on November 23, 1992. These regulations were subject to judicial review only during the first 30 days after promulgation. 16 U.S.C. § 1855(f)(1). Since APICDA filed its action in February 2001, Judge Holland ruled that "[t]o the extent that APICDA seeks to maintain a cause of action that challenges the way the regulations divide the roles within the CDQ program between the State and NMFS, APICDA's cause of action is beyond the statute of limitations period." *APICDA*, at page 16.

Judge Holland then proceeded to rule against APICDA on each of its claims for relief. Much of the opinion addresses technical points regarding publication of CDQ "eligibility" criteria and CDP "evaluation" criteria and public notice requirements for proposed changes to existing CDPs during an allocation period. However, the more interesting portions of the opinion address the roles of the State and NMFS and the procedure NMFS followed in reviewing and ultimately approving the State's CDP recommendation for APICDA. Judge Holland noted that the administrative record demonstrated that NMFS and the State took their CDP development, review and approval responsibilities seriously. Judge Holland wrote that --

> [o]nce it became clear to NMFS that the State's initial recommendation did not provide sufficient explanation [for the State's recommendations], NMFS called upon the State to provide what was lacking, and the State did so. APICDA asserts that NMFS merely made "passing reference" to the arguments that APICDA raised and that NMFS' approval constitutes a rubber-stamping of the State's recommendations. That is patently not the case. NMFS initially rejected the State's recommendations because of a lack of supporting rationale. NMFS also states that it had considered the arguments presented in APICDA's correspondence of October 31, 2001, when it decided to reject the State's initial recommendations. The rejection forced the State to provide additional analysis, which it did, including at times specific reference to APICDA's concerns. Upon reviewing the resubmitted recommendations, NMFS considered APICDA's concerns. In fact, NMFS devoted entire sections of its analysis to the arguments that APICDA raised throughout the process, addressing those alternatives with specific facts found and rationale provided by the State. *Although the federal regulations expounding upon NMFS' role in the CDQ allocation process are admittedly sparse, NMFS performed its functions fully and properly with careful consideration of APICDA's arguments.* The Secretary's approval of the State's recommendations was neither arbitrary nor capricious.

(emphasis added). *APICDA*, at pages 24-25.

Judge Holland held that NMFS' decision to approve the State's recommendation was reasonable because NMFS "accepted and considered" APICDA's objections to the State's recommendations during NMFS' review, and because NMFS and the State responded to those objections on the record. Although federal regulations do not require NMFS and the State to respond APICDA's objections, Judge Holland found that in practice NMFS and the State had used a procedure that demonstrated careful consideration of APICDA's arguments. Given the importance Judge Holland attached to this consideration, there is a significant likelihood that the decision might have been in favor of APICDA without this clear demonstration that APICDA's objections were considered on the record and rejected.

It is clear that Judge Holland was impressed with the degree to which NMFS and the State evaluated the CDP recommendations in light of APICDA's objections. However, the CDQ regulations provided no guidance to fishery managers about how this evaluation should be conducted. Moreover, the CDQ regulations provided scant time for this evaluation prior to the commencement of the 2002 CDQ fishery, and would have provided no additional time for the State to revise its CDP allocations if NMFS had disapproved the State's recommendations. These regulatory shortcomings are serious and must be addressed in the future through revisions to the federal CDQ regulations.

cc: Jim Balsiger
Ron Berg
Sue Salveson
Sally Bibb
Mariam McCall
Robert Babson