


MEMORANDUM

TO: Council and AP Members  
FROM: Chris Oliver   
Executive Director  
DATE: April 2, 2002  
SUBJECT: CDQ Program

ESTIMATED TIME  
6 HOURS

**ACTION REQUIRED**

- (a) Selection of a preferred alternative on CDQ Policy amendment package.
- (b) Scheduling final action.

**BACKGROUND**

- (a) Selection of a preferred alternative on CDQ Policy amendment package

The proposed action would implement several policy and administrative changes to the Community Development Quota (CDQ) Program, including changes to the role of NMFS and the State of Alaska in program oversight and the CDQ allocation process. The CDQ Program was created by the Council in 1992 as part of the inshore/offshore allocations of pollock in the BSAI. The Council established the program to provide western Alaska fishing communities an opportunity to participate in the BSAI fisheries that had been foreclosed to them because of the high capital investment needed to enter the fishery. The goals and purpose of the program are to allocate CDQ to eligible western Alaska communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally-based, fisheries-related economy (50 CFR 679.1(e)).

The proposed action would be an amendment to the BSAI FMP (Amendment 71). The action was categorically excluded under NEPA from further environmental review and the requirement to prepare an environmental review document, as it was determined that the action does not have the potential to pose significant individual or cumulative impacts on the human environment. The categorical exclusion is attached to this memo as Item C-4(a)(1).

The analysis (RIR/IRFA) considers eight policy issues that would change the administration of the current CDQ Program. The complete list of alternatives, as revised at the February Council meeting, is attached to this memo as Item C-4(a)(2). The no action alternative is included under every issue, as well as a suite of alternatives to the status quo. Each issue represents a distinct decision-making point, but many of the issues are inter-related. The eight issues under consideration are:

- Issue 1: Determine the process through which CDQ allocations are made
- Issue 2: Periodic or long-term CDQ allocations
- Issue 3: Define the role of government in oversight of the CDQ Program
- Issue 4: CDQ allocation process - Type of quotas
- Issue 5: CDQ allocation process - The evaluation criteria
- Issue 6: Extent of government oversight (definition of a CDQ project)
- Issue 7: Allowable investments by CDQ groups (fisheries-related restriction)
- Issue 8: Other administrative issues

This amendment was initiated for several reasons. The National Research Council (NRC) prepared a comprehensive report on the performance and effectiveness of the CDQ Program in 1999 upon request of Congress. The NRC made several recommendations to improve the program, many of which are at issue in this analysis. Secondly, Congressman Don Young has proposed the Western Alaska CDQ Program Implementation Improvement Act of 2001 (H.R. 553) in the 107<sup>th</sup> session of Congress. This legislation would amend Section 305(i) of the Magnuson-Stevens Act which addresses implementation of the CDQ Program. The amendments would make some significant policy and fisheries management changes to the CDQ Program, including increasing the autonomy of the CDQ groups by allowing them to determine the evaluation criteria used for making the allocations, as well as limiting government oversight to CDQ projects funded only by CDQ royalties. A Congressional hearing was held on July 19, 2001, and the bill remains within the Subcommittee on Fisheries Conservation, Wildlife, and Oceans. All of the policy changes proposed in H.R. 553 have been encompassed in this analysis under various alternatives and are discussed in more detail within the analysis.

In addition to the NRC report and H.R. 553, there is a general understanding that the CDQ Program and the CDQ groups have matured significantly since 1992. The CDQ Program has surpassed the expectations of many in accomplishing its goals, and the CDQ groups have gained valuable experience in managing their fisheries and related investments. As a result, the Council recognized the need to evaluate the CDQ Program and to identify issues of concern and alternatives to address those issues. The Council appointed a CDQ Policy Committee in December 2000 to address issues related to the CDQ oversight responsibilities of government as well as provide policy recommendations regarding the allocation process and overall program administration. The committee met in April and May of 2001 and provided a report to the Council at the June 2001 Council meeting. Based on the recommendations of the committee, the Council requested that staff prepare an analysis of the policy issues listed above.

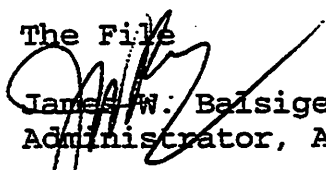
The Council approved sending the analysis out for public review at the December 2001 meeting, with the intent that the analysts would complete the document, including recommended modifications and analysis of several new alternatives and options. In February, the Council opted to select a preferred alternative under each of issues for consideration at the April 2002 meeting and schedule final action for June 2002. This schedule will allow staff to revise the analysis and include a chapter outlining the preferred alternative and proposed FMP language to implement the action for review in June.

The public review draft was mailed to the Council on March 15, 2002.



February 13, 2002

MEMORANDUM FOR: The File

FROM:  James W. Balsiger  
Administrator, Alaska Region

SUBJECT: Categorical Exclusion from Requirements to Prepare an Environmental Assessment for Alternatives to Revise Regulations Governing the Administration and Oversight of the Community Development Quota Program

In June 2001, the North Pacific Fishery Management Council (Council) requested analysis of alternatives that would amend the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) and regulations at 50 CFR 679 governing the Western Alaska Community Development Quota (CDQ) Program. These alternatives address the role of government in administration and oversight of the economic development aspects of the CDQ Program and the process through which allocations to CDQ groups are made. A draft analysis, dated November 15, 2001, was prepared by Council and NMFS staff and presented to the Council at its December 2001 meeting. The Council consolidated two issues into one issue and revised some of the alternatives. The revised list of issues and alternatives is attached.

The regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA) at 40 CFR 1500-1508 and NOAA Administrative Order (NOA) 216-6 allow some actions to be categorically excluded from both further environmental review and the requirement to prepare an environmental review document if the action individually or cumulatively does not have the potential to pose significant impacts on the quality of the human environment. Section 6.03.d.4 of NOA 216-6 specifically addresses the requirements for categorical exclusions for actions taken under the Magnuson-Stevens Fishery Conservation and Management Act. In addition, NAO-216-6 allows a categorical exclusion if a prior NEPA analysis was prepared for the same action and that analysis demonstrated that the action would not have a significant impact on the quality of the human environment (NAO-216-6, Section 5.05.b).



For the reasons described below, I have determined that these alternatives, if implemented, would not individually or cumulatively have a significant effect on the human environment. Therefore, this action is categorically excluded under NOA 216-6 and the NEPA from both further environmental review and the requirement to prepare an environmental review document.

#### Environmental Impacts of the CDQ Program

The CDQ Program affects the human environment through the fisheries conducted by the CDQ groups to harvest CDQ allocations. The amount available for harvest by each of the six CDQ groups is determined by (1) the amount available for catch in the CDQ Program as a whole (the "CDQ reserves"), and (2) the percentage allocation of each CDQ reserve to individual CDQ groups. The alternatives under consideration would not change the process through which the CDQ reserves are established. However, they could change the process through which allocations are made to individual CDQ groups.

The annual CDQ reserves for groundfish, prohibited species, halibut, and crab are determined by the total annual catch limit for each species and the percentage of each catch limit allocated to the CDQ Program. The total annual catch limits are established by NMFS for groundfish and prohibited species, by the International Pacific Halibut Commission for halibut, and by the State of Alaska for crab. The percentage of each catch limit allocated to the CDQ Program is determined by the American Fisheries Act (AFA) for pollock (10%), the Magnuson-Stevens Act for crab (7.5%), the FMP for all other groundfish and prohibited species (7.5%, except 20% for fixed gear sablefish), and 50 CFR 679 for halibut (20% to 100%). The environmental impacts of the annual allocations of groundfish and prohibited species to the CDQ Program are addressed by NMFS in the NEPA documents supporting the annual groundfish specifications process. NMFS is not required by NEPA to prepare environmental review documents associated with halibut and crab because these catch limits are not established by Federal actions.

The amount of CDQ catch available annually to each CDQ group is determined through a periodic, competitive allocation process. The alternatives proposed by the Council could change this allocation process. For example, the alternatives propose changes to the respective roles for NMFS, the State, and the Council in determining allocations among the groups; the number of years for which the allocations would be effective; and the criteria used to allocate CDQ reserves among the groups. However, specific percentage allocations or the amount of fish or

crab harvested by an individual CDQ group do not significantly change the environmental impacts of the CDQ fisheries as a whole, because the CDQ groups conduct their CDQ fisheries in a similar manner. For example, all six groups harvest pollock CDQ allocations using primarily large trawl catcher/processors that harvest pollock at the same time and in the same places that they harvest non-CDQ pollock. All six groups harvest cod using large longline catcher/processors that operate during the spring, summer, and late fall when the non-CDQ cod fisheries are closed. Halibut CDQ allocations are harvested primarily in small, near-shore fisheries in areas around the local CDQ communities. The crab CDQ allocations are harvested by large vessels fishing shortly after the non-CDQ crab fisheries close. Therefore, changes in the CDQ allocation process would not significantly change the impact of the CDQ fisheries on the environment because this impact is determined primarily by the total amount of CDQ harvested rather than the amount harvested by an individual group. Any impacts on the environment as a result of groundfish harvests off Alaska are considered annually in the NEPA documents prepared for the groundfish harvest specifications.

#### Previous NEPA Analyses

The CDQ Program began in 1992 with an allocation of 7.5 percent of the Bering Sea and Aleutian Islands area (BSAI) pollock total allowable catch. This allocation was made as part of Amendment 18 to the BSAI FMP and Amendment 23 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP). Amendments 18/23 implemented the initial "inshore/offshore" allocations of pollock in the BSAI and pollock and Pacific cod in the Gulf of Alaska. NMFS prepared a supplemental environmental impact statement (SEIS) for this action which analyzed the impact on the human environment of the pollock and Pacific cod allocations, including the pollock CDQ allocation. The final SEIS was dated March 5, 1992. This analysis provided a description of the physical, biological, economic, and social environment and analysis of the impact of the alternatives on groundfish stocks, bycatch, marine mammals, seabirds, coastal and marine habitat, the fishing industry, and fishing communities.

The administrative regulations governing the CDQ allocation process and oversight of the economic development aspects of the CDQ Program were implemented in 1992 (57 FR 54936; November 23, 1992). The alternatives now under consideration by the Council would revise these administrative regulations. An Environmental Assessment (EA) was prepared for the 1992 implementation of the administrative regulations (final EA dated December 7, 1992). In this EA, NMFS determined that "the CDQ program redistributes the

harvest of fisheries resources but will not change the total amount landed" and that "[p]hysical impacts on the environment associated with any of these alternatives are not expected to differ significantly from the current fishery. Physical impacts are associated with differences in fishing gear used, locations where fishing occurs, processing locations, etc."

The administrative regulations for the CDQ Program were revised in 1998 when NMFS implemented Amendment 39 to the BSAI FMP, Amendment 41 to the GOA FMP, and Amendment 5 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (63 FR 30381, June 4, 1998). Amendment 39/41/5 implemented the groundfish and crab license limitation program and expanded CDQ allocations to include 7.5 percent of all BSAI groundfish, prohibited species, and crab. These additional CDQ allocations created the "multispecies" CDQ Program. The North Pacific Fishery Management Council prepared an EA for Amendment 39/41/5 (final EA dated September 9, 1997). Based on this EA, NMFS concluded that the license limitation program and the expanded CDQ allocations would not have a significant impact on the environment. With respect to the CDQ Program, the EA concluded: "[T]he benefits of this type of fishery have been exhibited in the current pollock CDQ program where the result has been a slower paced fishery, higher value fisheries relative to the open access fishery, generally lower bycatch rates of PSC species, lower discard rates, and a more stable planning environment for the participants."

### Conclusions

In assessing the potential significance of the impacts of an action on the human environment, NAO-216-6 (section 5.05.c) requires determination that the proposed action does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, does not have uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, does not result in cumulatively significant impacts, and does not have any adverse effects upon endangered or threatened species or their habitats.

The alternatives under consideration by the Council address the role of government in administration and oversight of the economic development aspects CDQ Program. They are administrative and procedural in nature and they would not change the impact of the harvest of CDQ allocations on the environment. Therefore, I have determined that the alternatives do not involve a geographic area with unique characteristics, they are not

likely to have uncertain environmental impacts or unique or unknown risks, and they would not have any adverse effects upon endangered or threatened species or their habitats. Although some aspects of the alternatives are controversial, the controversy relates to administrative and policy issues associated with the role of government in oversight of the CDQ Program and the process through which CDQ allocations are made. These controversial issues are not associated with the potential environmental consequences of the alternatives. In addition, because the alternatives would not result in impacts on the environment, they would not establish a precedent or decision in principle about future proposals that would affect the human environment. Based on the information described in this memorandum, I have determined that the alternatives under consideration by the Council do not individually have any impact on the human environment. Therefore, the alternatives also would not have a cumulative impact on the human environment.

E. O. 12898 addresses "environmental justice," and instructs each Federal agency to identify and address disproportionately high and adverse human health and environmental effects on minority and low-income populations. As environmental justice concerns affect the human environment, it is appropriate to consider them in environmental review documents prepared under NEPA. The proposed action is administrative and procedural in nature and, because it does not have any impacts on the human environment, it also would not cause disproportionately high and adverse human health or environmental effects on minority or low-income populations.

Attachment

**Issues and Alternatives for CDQ Policy Analysis - Public Review Draft**  
**(As revised and adopted by the Council in Feb. 2002)**

**ISSUE 1: Determine the process through which CDQ allocations are made**

Issue 1 problem provides three alternatives for the process that will be used in the future to make allocations of groundfish, crab, halibut, and prohibited species quota among the CDQ groups. The alternatives do not address the total amount of each of these species allocated to the CDQ Program annually (the CDQ reserves) - only the process through which the CDQ reserves are divided up among the CDQ groups.

**Alternative 1:** No Action: NMFS's regulations governing the CDQ allocation process would not be revised. The administrative process described in Section 3 would continue.

**Alternative 2:** Improved Administrative Process: NMFS and the State would continue to make CDQ allocations through an administrative process. However, NMFS regulations would be revised to provide the opportunity for the CDQ groups to comment on the State's initial CDQ allocation recommendations and to appeal NMFS's administrative determination to approve the State's allocation recommendations.

**Alternative 3:** Rulemaking: CDQ allocations among the CDQ groups would be established in NMFS regulations through proposed and final rulemaking following the same process used by to allocate other federally managed fishery resources. The Council would develop CDQ allocation recommendations, and NMFS would implement the Council's recommended allocations in NMFS regulations. NMFS would not make independent decisions about the CDQ allocations, but it would review the Council's allocation recommendations for compliance with the MSA and other applicable laws. The State of Alaska could remain involved in the CDQ allocation process by making recommendations to the Council rather than to NMFS.

**ISSUE 2: Periodic or Long-Term CDQ Allocations**

**Alternative 1:** No Action. Continue to make periodic, competitive allocations among CDQ groups.

**Alternative 2:** Establish a fixed allocation cycle in regulation:

- Option 1:** 2-year allocation cycle
- Option 2:** 3-year allocation cycle (*as proposed in H.R. 553*)
- Option 3:** 5-year allocation cycle
- Option 4:** 10-year allocation cycle

**Sub-option 1:** Establish an "escape clause" which would allow the State to recommend reallocation of CDQ mid-cycle under extraordinary circumstances. The Council and NMFS would have to approve the State's recommended reallocation.

**Sub-option 2:** Establish an "escape clause" which would allow for a three-stage intervention process as follows:

- Level 1 - advisory (State advises groups of serious concerns)
- Level 2 - State mandates the group to make changes
- Level 3 - consider CDQ reallocation

**Alternative 3:** Make long-term allocations to the CDQ groups.



### **ISSUE 3: Define the role of government in oversight of the CDQ Program**

The appropriate role of government depends on the type of CDQ allocations being made. The following alternatives are appropriate if we continue to make periodic, competitive allocations among CDQ groups.

**Alternative 1:** No Action - Do not amend the BSAI FMP to add additional text about the role of government in administration and oversight of the economic development aspects of the CDQ Program.

**Alternative 2:** Amend the BSAI FMP to specifically identify elements of the government's responsibility for administration and oversight of the economic development elements of the CDQ Program, as follows:

Government oversight of the CDQ program and CDQ groups is limited by the following purposes:

1. Ensure community involvement in decision-making;
2. Detect and prevent misuse of assets through fraud, dishonesty, or conflict of interest by verifying CDP milestone compliance and financial performance;
3. Ensure that internal investment criteria and policies are established and followed;
4. Ensure that significant investments are the result of reasonable business decision, i.e., made after due diligence and with sufficient information to make an informed investment decision; and
5. Ensure that training, employment, and education benefits are being provided to the communities and residents.
6. Ensure that the CDQ Program is providing benefits to each CDQ community and meeting the goals and purpose of the program.

### **ISSUE 4: CDQ Allocation Process - Type of Quotas**

**Alternative 1:** No Action. CDQ and prohibited species quota (PSQ) are specified by species, area, and gear type (sablefish and halibut). Each CDQ group is eligible to receive a percentage allocation of each CDQ or PSQ reserve as recommended by the State of Alaska and approved by the Secretary of Commerce. The State decides how to balance demographic or socioeconomic factors with performance criteria.

**Alternative 2:** Establish a separate foundation quota and performance quota

Allocations of CDQ among the CDQ groups are categorized as foundation quota and performance quota as defined below:

Foundation quota - some proportion of the CDQ allocations are fixed or based on demographic characteristics, such as population.

Performance quota - some proportion of the CDQ allocations are based on competition among the groups in areas such as financial performance, feasibility of proposed projects, needs of the local fishery, etc. The process used for the competitive allocations will be determined under Issue 4.

**Option 1:** Foundation quota: 50% of the CDQ reserve is divided equally among the CDQ groups.  
Performance quota: 50% is allocated competitively among the CDQ groups.

**Option 2:** Foundation quota: 1% is allocated to the CDQ group for each community represented by the group.  
Performance quota: remainder is allocated competitively among the CDQ groups.

**Option 3:** Foundation quota: 1% is allocated to the CDQ group for every 1,000 people represented by the CDQ group.  
Performance quota: remainder is allocated competitively among the CDQ groups.

**Suboption 1:** Foundation quota applies only to a portion of the pollock allocation as described in Options 1 - 3.  
Performance quota applies to the remainder of the pollock allocations and allocations of all other species.

**Option 4:** Foundation quota: 50% of the CDQ pollock reserve is allocated to the CDQ group on the basis of the population of the communities represented by the group.  
Performance quota applies to the remainder of the pollock allocations and allocations of all other species.

#### **ISSUE 5: CDQ Allocation Process - The Evaluation Criteria**

Issue 5 addresses the evaluation criteria used to make CDQ allocations among the CDQ groups. The current evaluation criteria is published in State of Alaska regulations at 6 AAC 93, but is not published in NMFS regulations. The Council is considering the following three alternatives for regulations governing CDQ evaluation criteria in the future:

**Alternative 1:** No action - Do not publish CDQ evaluation criteria in NMFS regulations. The State could continue to publish CDQ evaluation criteria in State regulations.

**Alternative 2:** Revise the CDQ evaluation criteria and publish them in NMFS regulations.

The following criteria shall be used as the basis for allocating CDQ among the CDQ groups or eligible communities:

1. Number of participating communities, population, and economic condition.
2. A Community Development Plan that contains programs, projects, and milestones which show a well-thought out plan for investments, service programs, infrastructure, and regional or community economic development.
3. Past performance of the CDQ group in complying with program requirements and in carrying out its current plan for investments, service programs, infrastructure, and regional or community economic development.
4. Past performance of CDQ group governance, including: board training and participation; financial management; and community outreach.
5. A reasonable likelihood exists that a for-profit CDQ project will earn a financial return to the CDQ group.
6. Training, employment, and education benefits are being provided to residents of the eligible communities.
7. In areas of fisheries harvesting and processing, the CDQ group, to the greatest extent possible, has promoted conservation-based fisheries by taking actions that will minimize bycatch, provide for full retention and increased utilization of the fishery resource, and minimize impact to essential fish habitats.
8. Proximity to the resource.
9. The extent to which the CDP will develop a sustainable fisheries-based economy.
10. For species identified as "incidental catch species" or "prohibited species," CDQ allocations may be related to the recommended target species allocations.

**Alternative 3:** Develop CDQ evaluation criteria through the process proposed in H.R. 553.

## ISSUE 6: Extent of Government Oversight

**Alternative 1:** No Action. NMFS regulations governing the extent of government oversight of the business activities of the CDQ groups and affiliated businesses would not be revised.<sup>1</sup> An October 4, 2000, legal opinion by NOAA GC concludes that NMFS's regulations on the extent of oversight of the subsidiaries and affiliated businesses are unclear and need to be revised.

**Alternative 2:** NMFS regulations would be revised to clarify that government oversight of the CDQ Program applies to the activities of the CDQ group and to affiliated businesses.

The requirement for review and prior approval of significant investments or debt would apply to the CDQ group and to businesses over which a CDQ group exercised effective management control (subsidiaries). The regulations would include a rebuttable presumption regarding oversight of CDQ businesses, such that if a CDQ group owns 50% or more of a subsidiary company, the burden is on the CDQ group to prove that they do not exercise *effective management control* over that entity (as defined by control of the daily operations and management of the company). If it is determined that they do not exercise effective management control, then any activity of that entity is treated as a standard investment (not as a CDQ-owned business) and thus subject to lower oversight and reporting requirements.

**Alternative 3:** Revise NMFS regulations to clarify that oversight requirements for review and prior approval apply only to the activities of the CDQ group and do not apply to the subsidiaries or other affiliated businesses.

**Alternative 4:** (From H.R. 553) Revise NMFS regulations to clarify that government oversight extends only to activities of the CDQ group that are funded by royalties from the CDQ allocations.

H.R. 553 would require NMFS to define a CDQ project as follows:

(i) "CDQ project" means a program or activity that is administered or initiated by a CDQ group and that is funded by revenue the CDQ group derives or accrues during the duration of a community development plan approved by the Secretary from harvesting the fishery covered by the plan.

(ii) such term does not include a program or activity administered or initiated by a subsidiary, joint venture, partnership, or other entity in which a CDQ group owns an equity interest, if the program or activity is funded by the assets of the subsidiary, joint venture, partnership, or other entity, rather than by the assets of the CDQ group.

## ISSUE 7: Allowable Investments by CDQ Groups - Fisheries-Related Projects

**Alternative 1:** No Action. NMFS regulations implement what NMFS understood as the Council's intent, that the revenue generated by the CDQ allocations is to be spent on "fisheries-related" investments and projects to benefit the communities that are eligible for the CDQ Program. From NMFS regulations at 50 CFR 679.1(e):

*The goals and purpose of the CDQ program are to allocate CDQ to eligible Western Alaska communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally-based, fisheries-related economy.*

Current regulations do not include specific investment guidelines or a list of allowable investments. Some decisions about allowable investments have been made by policy or practicality. For example, CDQ groups provide scholarships for college without restricting the program of study to "fisheries-related." Investments

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<sup>1</sup>For purposes of this analysis, an "affiliated business" is any entity that is owned in whole or in part by a CDQ group. A "subsidiary" is an entity controlled by the CDQ group, and is also known as a "consolidated affiliate" because the entity controlled by a CDQ group generally is consolidated with the CDQ group for financial reporting purposes. Affiliated businesses owned by the CDQ group, but not controlled by the group are known as "unconsolidated affiliates."

in substance abuse programs are not restricted to people working in fisheries-related businesses. The CDQ groups' investment accounts include stocks, bonds, and other financial instruments which are not "fisheries-related."

**Alternative 2:** Continue to require that the CDQ groups invest only in "fisheries-related" projects, but clarify NMFS regulations as follows:

- Add specific prohibition against CDQ groups investing in non-fisheries related projects; and
- Clarify that this prohibition does not apply to certain categories of expenditures or investments, such as investment accounts or scholarships. Focus regulations on economic development projects.

**Alternative 3:** Revise NMFS regulations to allow investments in non-fisheries related projects. The following options represent the maximum amount of investment in non-fisheries related projects. Each CDQ group may decide the appropriate mix of investments up to the maximum and any group may choose to invest less than the maximum.

**Option 1:** Allow each CDQ group to invest up to 5% of its pollock royalties in non-fisheries related projects.

**Option 2:** Allow each CDQ group to invest up to 20% of its pollock royalties or a maximum of \$500,000 in non-fisheries related projects.

**Option 3:** Allow each CDQ group to invest up to 50% of total revenues in non-fisheries related projects.

**Option 4:** Allow each CDQ group to invest up to \$1,000,000 in non-fisheries related projects.

**Sub-option 1:** Require that any non-fisheries related investment be made in economic development projects in the region of Alaska represented by the CDQ group and be self-sustaining.

**Alternative 4:** No restrictions on what the CDQ groups may spend money on or what type of projects they may invest in. (*May represent intent of H.R. 553*)

**Sub-option 1:** Require that any non-fisheries related investment be made in economic development projects in the region of Alaska represented by the CDQ group and be self-sustaining.

## **ISSUE 8: Other CDQ Administrative Issues**

**Alternative 1:** No Action

**Option 1:** Allow transfer of CDQ between groups only after review by the State and NMFS

**Option 2:** Allow the transfer of PSQ between groups only during the month of January, only with a substantial amendment to the groups' CDPs, and only when the transfer is associated with a transfer of CDQ

**Option 3:** Approve alternative fishing plans only after review by both the State and NMFS

**Alternative 2:** Simplify the quota transfer and alternative fishing plan process

**Option 1:** Allow CDQ groups to transfer quota by submitting a transfer request directly to NMFS

**Option 2:** Allow NMFS to approve PSQ transfers directly, allow the transfer of PSQ during any month of the year, and allow PSQ transfer without an associated transfer of CDQ.

**Option 3:** CDQ groups would submit alternative fishing plans directly to NMFS

DONALD C. MITCHELL  
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April 2, 2002

RECEIVED  
APR - 3 2002  
N.P.F.M.C

David Benton, Chairman  
North Pacific Fishery Management Council  
605 West Fourth Avenue Suite 306  
Anchorage, Alaska 99501-2252

Re: Regulatory Impact Review/Initial  
Regulatory Flexibility Analysis  
for Proposed Amendment 71 to the  
Fishery Management Plan for Bering  
Sea/Aleutian Islands Groundfish  
(to Implement Policy and Administrative  
Changes to the Western Alaska Community  
Development Quota Program)

Dear Dave:

When I reviewed the initial Council/NMFS staff analysis of the proposed policy and administrative changes to the western Alaska community development quota (CDQ) program that the Council will consider during its April 2002 meeting, I noticed that the analysis does not analyze NMFS's and the State of Alaska's potential liability for negligently administering the oversight provisions of the CDQ program. When I inquired, I learned that Jim Balsiger requested NOAA General Counsel to provide such an analysis, but NOAA General Counsel declined to do so on the ground that potential liability is a policy, rather than a legal, issue.

On March 4, 2002 I sent Lisa Lindeman a memorandum in which I requested NOAA General Counsel to reconsider that decision. A copy of that memorandum is enclosed with this letter, and I would appreciate you including the memorandum in the briefing book for the April 2002 Council meeting that is being prepared for, and will be distributed to, the members of the Council.

Thanks.

Regards,



Don Mitchell

cc: Eugene Asicksik

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March 4, 2002

FACSIMILE TRANSMISSION

TO: Lisa Lindeman  
NOAA General Counsel, Alaska Region

FROM: Don Mitchell  
Norton Sound Economic Development Corporation

SUBJECT: NMFS Alaska Region Memorandum Requesting a  
Legal Opinion on Proposed Revisions to the  
Community Development Quota Program.

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In the above-referenced memorandum, on January 4, 2002 James Balsiger, the administrator of the NMFS Alaska Region, requested NOAA General Counsel to provide the Alaska Region a written legal opinion regarding three questions that the memorandum posed regarding the legal consequences that may flow from the North Pacific Fishery Management Council's adoption, and the Secretary of Commerce's approval and implementation, of revisions to the administration of the Western Alaska Community Development Quota (CDQ) Program that the Council presently is considering. The second question the memorandum posed is:

Is NMFS liable for decisions by a CDQ group or its subsidiaries that require NMFS review and approval? For example, if NMFS disapproves a proposed investment by a CDQ group, would NMFS be liable if the CDQ group loses an economic opportunity? Conversely, if NMFS approves an investment by the CDQ group, and the investment fails, is NMFS liable for any part of the loss?

It is my understanding that, in response to the memorandum, on February 15, 2002 NOAA General Counsel informed Administrator Balsiger that it had decided that the extent of government oversight over the business activities of CDQ groups and of the fishing companies in which CDQ groups own equity interests is a policy issue, rather than a legal issue, and that, for that reason, NOAA General Counsel will not provide the requested written legal analysis.

The purpose of this memorandum is to request NOAA General Counsel to reconsider that decision.

The Federal Tort Claims Act, 28 U.S.C. 2671 et seq., subjects the United States to liability for tort claims (albeit with certain exceptions that are not relevant here) in the same manner and to the same extent as a private individual would be liable under like circumstances. Pursuant to that statute, the United States has been held liable repeatedly for significant money damages when an employee of the federal government has negligently breached the duty to exercise ordinary care while participating in the implementation of a federal program. See e.g., Walker v. United States, 663 F. Supp. 258 (E.D. Okla. 1987) (United States liable for negligent action of a Department of the Interior Solicitor in discharging duty imposed by regulation to represent an Indian in a land proceeding); James v. United States, 483 F. Supp. 581 (N.D. Calif. 1980) (United States liable for negligent action of a naval doctor who failed to adequately inform a patient regarding his medical condition).

Alaska law imposes a similar duty to exercise ordinary care on state employees. See e.g., Lee v. State, 490 P.2d 1206 (Alaska 1971) (State of Alaska liable for money damages if actions of a state employee were "ordinarily negligent"); Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986) (State of Alaska liable for money damages if its employees failed to act reasonably and carefully).

Those and numerous other judicial decisions demonstrate that, if they fail to exercise ordinary care, NMFS Alaska Region employees who administer the CDQ program have the ability to subject the United States to liability for money damages under the Federal Tort Claims Act. And the members of the State CDQ Team have the ability to subject the State of Alaska to liability for money damages under Alaska law. But to the best of my knowledge, none of those federal and state employees are MBAs, CPAs, or have other educational credentials or training that qualify them to exercise ordinary care in analyzing, and in forming professionally knowledgeable opinions regarding, the frequently complex and esoteric business transactions that occur in North Pacific fisheries. Nor have those employees had any prior practical business experience on the financial side of the Bering Sea fishing business.

For those reasons, the possibility that a NMFS Alaska Region employee or a member of the State CDQ Team might subject the United States or the State of Alaska to liability for significant money damages through his or her negligent approval or disapproval of a proposed investment by a CDQ group or by a fishing company in which a CDQ group owns an equity interest is not merely theoretical.

To cite two examples that are based on actual prior experience:

First, in 1992 the Coastal Villages Fishing Cooperative (CVFC), which had only recently been organized and, consequently, was quite inexperienced regarding the business end of the highly competitive Bering Sea open access pollock fishery, submitted a community development plan (CDP) to the State CDQ Team in which CVFC proposed purchasing a catcher-processor vessel known as the Brown's Point. The State CDQ Team not only approved CVFC's purchase of the Brown's Point, and the terms and conditions thereof, but enthusiastically publicly lauded the purchase. In turn, NMFS Alaska Region employees responsible for administering the CDQ program rotely accepted the State CDQ Team's recommendation that the Secretary of Commerce approve CVFC's CDP.

CVFC's purchase of the Brown's Point quickly proved to be an obvious bad investment that exposed CVFC to the loss of millions of dollars out of pocket, and exposed CVFC member communities to the loss of millions of dollars of community benefits that the Council, and later the Congress, created the CDQ program to enable CVFC to provide.

CVFC subsequently succeeded in avoiding potentially catastrophic financial liability by negotiating a settlement with the seller of the Brown's Point. But what if an acceptable settlement had not been negotiated and CVFC had lost millions, and indeed tens of millions, of dollars as a consequence of the Brown's Point purchase? If, to recoup the money it had lost, CVFC and/or its member communities then had filed civil actions against the United States pursuant to the Federal Tort Claims Act, and against the State of Alaska pursuant to Alaska law, that alleged that the State CDQ Team and the NMFS Alaska Region employees who approved the purchase of the Brown's Point had been negligent in doing so, what would have been the outcome of those lawsuits?

Any answer to that question would be pure speculation. But what can be said with certainty is that 1) the unsuitability of the Brown's Point to participate profitably in the Bering Sea open access pollock fishery, and the defects in the terms on which CVFC purchased the vessel, were immediately subsequently obvious to all persons who were knowledgeable regarding the conduct of, and the in-the-usual-course-of-business financial arrangements that control, the fishery, and 2) that group of persons did not include the state and federal employees who approved CVFC's purchase of the Brown's Point, none of whom had the education, training, or experience to exercise ordinary care when they independently evaluated, and then approved, the purchase and the terms thereof.

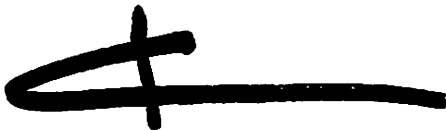


Second, what if the State CDQ Team disapproves a proposed investment by a CDQ group or by a fishing company in which a CDQ group owns an equity interest not because the investment is not financially responsible or would not enable the group to provide additional benefits to its member communities, but because the investment would be inconsistent with the unannounced fishery policy du jour of the Governor of Alaska for whom the members of the CDQ Team at that particular moment work; and NMFS Alaska Region employees who administer the CDQ program then rotely recommend to the Secretary of Commerce that he approve the State CDQ Team's disapproval?

I do not know the answers to the questions posed above. But it is clear to me, and I hope that upon subsequent reflection it will be clear to NOAA General Counsel, that whether the United States and/or the State of Alaska may be liable for money damages if NMFS Alaska Region employees and/or the State CDQ Team breach their duty to exercise ordinary care when they approve or disapprove an investment that has been proposed by a CDQ group or by a fishing company in which a CDQ group owns an equity interest is a very important, and presently unanalyzed, legal question. Because it is, on behalf of the Norton Sound Economic Development Corporation, I would respectfully, but strongly, urge NOAA General Counsel to reconsider its decision not to provide Administrator Balsiger a written legal opinion regarding the second question posed in his January 4, 2002 memorandum.

Thank you for your prompt consideration of this request.

Regards,

A large, bold, handwritten signature in black ink, appearing to be a stylized 'A' or similar character.

cc: Eugene Asicksik  
James Balsiger  
Sally Bibb



UNITED STATES DEPARTMENT OF COMM  
National Oceanic and Atmospheric Admini:  
Office of General Counsel  
P.O. Box 21109  
Juneau, Alaska 99802-1109  
April 3, 2002

Donald C. Mitchell  
Attorney at Law  
1335 F Street  
Anchorage, AK 99501

Dear Mr. Mitchell:

This responds to your March 4, 2002, memorandum requesting that NOAA General Counsel reconsider an opinion we provided to the National Marine Fisheries Service (NMFS) regarding the potential liability of NMFS employees in implementing the Community Development Quota (CDQ) program. Your request for reconsideration asks whether the United States could be held liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 et seq.

Our opinion is that the United States' risk of liability is minimal under the FTCA for oversight decisions made by NMFS because such decisions either would be covered by the statutory exception or the discretionary exception found at 28 U.S.C. § 2680(a). The U.S. Department of Commerce Office of General Counsel concurs in this opinion.

I am attaching a copy of our full opinion.

Sincerely,

A handwritten signature in black ink that reads "Lisa L. Lindeman".

Lisa L. Lindeman  
Alaska Regional Counsel

Attachments

cc: Craig R. O'Connor, Acting General Counsel, NOAA  
James Balsiger, Administrator, Alaska Region  
M. Timothy Conner, DOC-General Counsel  
Chris Oliver, Executive Director, North Pacific Fishery  
Management Council






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

April 1, 2002

MEMORANDUM FOR: Lisa L. Lindeman  
 Regional Attorney, Alaska Region

FROM: John Lepore   
 Staff Attorney, Alaska Region

SUBJECT: Request for a Legal Opinion on Proposed  
 Revisions to the Community Development  
 Quota (CDQ) Program

On March 5, 2002, National Oceanic and Atmospheric Administration, Office of General Counsel, Alaska Region (NOAA GCAK) received a request dated March 4, 2002, from Donald C. Mitchell, Esq., to reconsider whether National Marine Fisheries Service (NMFS) could be held ". . . liable for decisions by a CDQ group or its subsidiaries that require NMFS review and approval. The request for reconsideration followed an opinion from NOAA GCAK to the NMFS Alaska Regional Administrator that NMFS would not be liable for such decisions based on the Takings Clause of the Fifth Amendment to the U.S. Constitution. The request for reconsideration no longer uses the Takings Clause as a basis of liability, but instead relies on the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 et seq.

The Office of General Counsel, Department of Commerce, concurs in this opinion.

The FTCA and Legal Precedent

The FTCA provides a limited waiver to the sovereign immunity of the Federal government for negligent or wrongful acts of its employees acting within the scope of their employment. According to 28 U.S.C. § 1346(b):

[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the



negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

However, 28 U.S.C. § 2680 provides several exceptions to this waiver of sovereign immunity. Two such exceptions, found in paragraph (a) of Section 2680, provides that the provisions of 28 U.S.C. §§ 1346(b), 2671 et seq. do not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

These exceptions to the waiver of sovereign immunity, referred to as the "statutory exception" and the "discretionary function exception," respectively, were included in the FTCA to assure that the Federal government would not be held liable for authorized activities. Dalehite v. United States, 73 S.Ct. 956, 346 U.S. 15, 97 L.Ed. 1427 (1953), rehearing denied 74 S.Ct. 13, 346 U.S. 841, 98 L.Ed. 362, rehearing denied 74 S.Ct. 117, 346 U.S. 880, 98 L.Ed. 386, rehearing denied 74 S.Ct. 511, 347 U.S. 924, 98 L.Ed. 1078.

The statutory exception assures that the legality of a statute or regulation is not tested through the FTCA. Hence, if a government employee is acting pursuant to and in furtherance of regulations, liability under FTCA will not ensue, unless the employee does not exercise due care while executing that regulation. Dupree v. United States, 247 F.2d 819 (3<sup>rd</sup> Cir. 1957).

In Hathahley v. United States, 351 U.S. 173, 181, 76 S.Ct. 745, 752, 100 L.Ed. 1065 (1956), the U.S. Supreme Court indicated that "[d]ue care' implies at least some minimal concern for the rights of others." In Hathahley, the United States was held liable for the action of its employees because

they acted in complete disregard for the property rights of the petitioners. Federal agents, without providing notice as required by Federal law, sold or destroyed horses under state statute. This was considered a "wrongful act" that was actionable under the FTCA. Furthermore, the "statutory exception" did not apply because Federal agents did not exercise due care (i.e., they failed to provide notice prior to selling or destroying horses), while executing a statute or regulation (i.e., the Federal Range Code prohibiting the unlawful grazing of livestock).

The discretionary function exception assures that certain Federal government activities are protected from exposure to lawsuits by private individuals. Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988); United States v. Varig Airlines, 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). Also, it prevents judicial "second-guessing" of government decisions based on social, economic, and political policy. GATX/Airlog Co. v. United States, 234 F.3d 1089 (9<sup>th</sup> Cir. 2000); United States v. Gaubert, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991).

In Berkovitz, the U.S. Supreme Court established a two-part test to determine whether a government employee is performing a discretionary function. First, a court must determine whether the action is a matter of choice for the employee because a discretionary action is one that requires an element of judgment or choice. Second, the challenged act must involve judgment or choice of the kind the discretionary function exception was designed to protect.

Soon after establishing the two-part test in Berkovitz, the U.S. Supreme Court revisited the discretionary function exception in Gaubert. There, the U.S. Supreme Court held that the:

[Discretionary] exception also protects Government agents' actions involving the necessary element of choice and grounded in the social, economic, or political goals of a statute and regulations. If an employee obeys the direction of a mandatory regulation, the Government will be protected [under the statutory exception] because the action will be deemed in furtherance of the policies which led to the regulation's promulgation; and if the employee violates a mandatory regulation, there will be no

shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, there is a strong presumption that the agent's acts are grounded in policy when exercising that discretion.

In Gaubert, the shareholders of a savings and loan association brought action against the United States under the FTCA for negligent supervision of directors and officers and negligent involvement in day-to-day operations by Federal regulators. The United States was not found liable under the FTCA because Federal regulators either acted pursuant to duly promulgated regulations or exercised a discretionary function authorized by those regulations.

#### Analysis

The factual circumstances of Federal oversight in Gaubert provide some similarities to the Federal oversight of CDQ organizations. In both situations an industry is being regulated by the Federal government for social, economic, or political goals. In Gaubert, it was the savings and loan associations that were being regulated by the Federal government to ensure that the public was adequately protected. Under the CDQ program, the Federal government regulates CDQ organizations to ensure that the beneficiaries of the CDQ program (i.e., eligible communities pursuant to provisions in the Magnuson-Stevens Fishery Conservation and Management Act at 16 U.S.C. § 1855(i)) are adequately protected. In both situations regulations were duly promulgated to provide a mechanism to achieve the stated goal. Also, in both situations, Federal regulators are charged with executing those regulations, either by complying with mandatory provisions, or by exercising discretion when such authority is provided.

If Federal regulators execute mandatory provisions of statutes or regulations with due care, their actions are excepted from liability under the FTCA by the statutory exception. In Hathahley, exercising due care meant not violating the law being executed. If Federal regulators make judgments or choices that are authorized by statute or regulations and those judgments or choices are policy, economic, or political

in nature, such judgment or choices are excepted from liability under the FTCA by the discretionary function exception. These two exceptions are well founded in law, and by applying the Berkovitz test, one can determine which exception will apply.


The two example cases provided in the request for reconsideration can be distinguished from the circumstances surrounding the Federal oversight of CDQ organizations. In both Walker v. United States, 663 F.Supp. 258 (E.D. Okla. 1987) and James v. United States, 483 F.Supp 581 (N.D. Calif. 1980), special circumstances gave rise to liability. In Walker, a Federal attorney failed to adequately represent an Indian in a land proceeding, which was a duty imposed by statute. The U.S. District Court found that the government attorney was grossly negligent for violating a statutory provision. In James, a naval doctor failed to adequately inform an applicant regarding his medical condition after a pre-employment examination. The U.S. District Court found that a duty does not exist between an employer and a prospective employee to ascertain whether the prospective employee is physically fit for the job they seek. However, when the employer assumes that duty (i.e., performs an examination to ascertain physical fitness), the employer is liable if the examination is performed in a negligent manner.

Federal oversight of the CDQ program will be performed by NMFS in a manner prescribed by Federal law. Therefore, a duty will exist under Federal law. If NMFS performs acts that are required by statute, then the statutory exception will apply to those acts. If NMFS makes choices or judgments consistent with policy, economic, or political objectives of Federal law, then the discretionary function exception will apply to those choices or judgments.

### Conclusion

The United States' risk for liability is minimal under the FTCA for oversight decisions made by NMFS employees for the CDQ Program because such decisions would either be covered by the statutory exception (i.e., mandatory actions exercised with due care) or discretionary function exception (i.e., actions that require judgment or choice and that are policy, economic, or political in nature).

MEMORANDUM

TO: Council and AP Members  
FROM: Chris Oliver   
Executive Director  
DATE: April 2, 2002  
SUBJECT: CDQ Program

ESTIMATED TIME 6 HOURS
---------------------------

**ACTION REQUIRED**

- (a) Selection of a preferred alternative on CDQ Policy amendment package.
- (b) Scheduling final action.

**BACKGROUND**

- (a) Selection of a preferred alternative on CDQ Policy amendment package

The proposed action would implement several policy and administrative changes to the Community Development Quota (CDQ) Program, including changes to the role of NMFS and the State of Alaska in program oversight and the CDQ allocation process. The CDQ Program was created by the Council in 1992 as part of the inshore/offshore allocations of pollock in the BSAI. The Council established the program to provide western Alaska fishing communities an opportunity to participate in the BSAI fisheries that had been foreclosed to them because of the high capital investment needed to enter the fishery. The goals and purpose of the program are to allocate CDQ to eligible western Alaska communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally-based, fisheries-related economy (50 CFR 679.1(e)).

The proposed action would be an amendment to the BSAI FMP (Amendment 71). The action was categorically excluded under NEPA from further environmental review and the requirement to prepare an environmental review document, as it was determined that the action does not have the potential to pose significant individual or cumulative impacts on the human environment. The categorical exclusion is attached to this memo as Item C-4(a)(1).

The analysis (RIR/IRFA) considers eight policy issues that would change the administration of the current CDQ Program. The complete list of alternatives, as revised at the February Council meeting, is attached to this memo as Item C-4(a)(2). The no action alternative is included under every issue, as well as a suite of alternatives to the status quo. Each issue represents a distinct decision-making point, but many of the issues are inter-related. The eight issues under consideration are:

- Issue 1: Determine the process through which CDQ allocations are made
- Issue 2: Periodic or long-term CDQ allocations
- Issue 3: Define the role of government in oversight of the CDQ Program
- Issue 4: CDQ allocation process - Type of quotas
- Issue 5: CDQ allocation process - The evaluation criteria
- Issue 6: Extent of government oversight (definition of a CDQ project)
- Issue 7: Allowable investments by CDQ groups (fisheries-related restriction)
- Issue 8: Other administrative issues



This amendment was initiated for several reasons. The National Research Council (NRC) prepared a comprehensive report on the performance and effectiveness of the CDQ Program in 1999 upon request of Congress. The NRC made several recommendations to improve the program, many of which are at issue in this analysis. Secondly, Congressman Don Young has proposed the Western Alaska CDQ Program Implementation Improvement Act of 2001 (H.R. 553) in the 107<sup>th</sup> session of Congress. This legislation would amend Section 305(i) of the Magnuson-Stevens Act which addresses implementation of the CDQ Program. The amendments would make some significant policy and fisheries management changes to the CDQ Program, including increasing the autonomy of the CDQ groups by allowing them to determine the evaluation criteria used for making the allocations, as well as limiting government oversight to CDQ projects funded only by CDQ royalties. A Congressional hearing was held on July 19, 2001, and the bill remains within the Subcommittee on Fisheries Conservation, Wildlife, and Oceans. All of the policy changes proposed in H.R. 553 have been encompassed in this analysis under various alternatives and are discussed in more detail within the analysis.

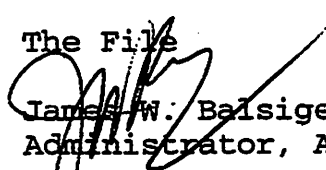
In addition to the NRC report and H.R. 553, there is a general understanding that the CDQ Program and the CDQ groups have matured significantly since 1992. The CDQ Program has surpassed the expectations of many in accomplishing its goals, and the CDQ groups have gained valuable experience in managing their fisheries and related investments. As a result, the Council recognized the need to evaluate the CDQ Program and to identify issues of concern and alternatives to address those issues. The Council appointed a CDQ Policy Committee in December 2000 to address issues related to the CDQ oversight responsibilities of government as well as provide policy recommendations regarding the allocation process and overall program administration. The committee met in April and May of 2001 and provided a report to the Council at the June 2001 Council meeting. Based on the recommendations of the committee, the Council requested that staff prepare an analysis of the policy issues listed above.

The Council approved sending the analysis out for public review at the December 2001 meeting, with the intent that the analysts would complete the document, including recommended modifications and analysis of several new alternatives and options. In February, the Council opted to select a preferred alternative under each of issues for consideration at the April 2002 meeting and schedule final action for June 2002. This schedule will allow staff to revise the analysis and include a chapter outlining the preferred alternative and proposed FMP language to implement the action for review in June.

The public review draft was mailed to the Council on March 15, 2002.



February 13, 2002

MEMORANDUM FOR: The File  
FROM:  James W. Balsiger  
Administrator, Alaska Region  
SUBJECT: Categorical Exclusion from Requirements to  
Prepare an Environmental Assessment for  
Alternatives to Revise Regulations Governing  
the Administration and Oversight of the  
Community Development Quota Program

In June 2001, the North Pacific Fishery Management Council (Council) requested analysis of alternatives that would amend the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) and regulations at 50 CFR 679 governing the Western Alaska Community Development Quota (CDQ) Program. These alternatives address the role of government in administration and oversight of the economic development aspects of the CDQ Program and the process through which allocations to CDQ groups are made. A draft analysis, dated November 15, 2001, was prepared by Council and NMFS staff and presented to the Council at its December 2001 meeting. The Council consolidated two issues into one issue and revised some of the alternatives. The revised list of issues and alternatives is attached.

The regulations implementing the procedural provisions of the National Environmental Policy Act (NEPA) at 40 CFR 1500-1508 and NOAA Administrative Order (NOA) 216-6 allow some actions to be categorically excluded from both further environmental review and the requirement to prepare an environmental review document if the action individually or cumulatively does not have the potential to pose significant impacts on the quality of the human environment. Section 6.03.d.4 of NOA 216-6 specifically addresses the requirements for categorical exclusions for actions taken under the Magnuson-Stevens Fishery Conservation and Management Act. In addition, NAO-216-6 allows a categorical exclusion if a prior NEPA analysis was prepared for the same action and that analysis demonstrated that the action would not have a significant impact on the quality of the human environment (NAO-216-6, Section 5.05.b).



For the reasons described below, I have determined that these alternatives, if implemented, would not individually or cumulatively have a significant effect on the human environment. Therefore, this action is categorically excluded under NOA 216-6 and the NEPA from both further environmental review and the requirement to prepare an environmental review document.

#### Environmental Impacts of the CDQ Program

The CDQ Program affects the human environment through the fisheries conducted by the CDQ groups to harvest CDQ allocations. The amount available for harvest by each of the six CDQ groups is determined by (1) the amount available for catch in the CDQ Program as a whole (the "CDQ reserves"), and (2) the percentage allocation of each CDQ reserve to individual CDQ groups. The alternatives under consideration would not change the process through which the CDQ reserves are established. However, they could change the process through which allocations are made to individual CDQ groups.

The annual CDQ reserves for groundfish, prohibited species, halibut, and crab are determined by the total annual catch limit for each species and the percentage of each catch limit allocated to the CDQ Program. The total annual catch limits are established by NMFS for groundfish and prohibited species, by the International Pacific Halibut Commission for halibut, and by the State of Alaska for crab. The percentage of each catch limit allocated to the CDQ Program is determined by the American Fisheries Act (AFA) for pollock (10%), the Magnuson-Stevens Act for crab (7.5%), the FMP for all other groundfish and prohibited species (7.5%, except 20% for fixed gear sablefish), and 50 CFR 679 for halibut (20% to 100%). The environmental impacts of the annual allocations of groundfish and prohibited species to the CDQ Program are addressed by NMFS in the NEPA documents supporting the annual groundfish specifications process. NMFS is not required by NEPA to prepare environmental review documents associated with halibut and crab because these catch limits are not established by Federal actions.

The amount of CDQ catch available annually to each CDQ group is determined through a periodic, competitive allocation process. The alternatives proposed by the Council could change this allocation process. For example, the alternatives propose changes to the respective roles for NMFS, the State, and the Council in determining allocations among the groups; the number of years for which the allocations would be effective; and the criteria used to allocate CDQ reserves among the groups. However, specific percentage allocations or the amount of fish or

crab harvested by an individual CDQ group do not significantly change the environmental impacts of the CDQ fisheries as a whole, because the CDQ groups conduct their CDQ fisheries in a similar manner. For example, all six groups harvest pollock CDQ allocations using primarily large trawl catcher/processors that harvest pollock at the same time and in the same places that they harvest non-CDQ pollock. All six groups harvest cod using large longline catcher/processors that operate during the spring, summer, and late fall when the non-CDQ cod fisheries are closed. Halibut CDQ allocations are harvested primarily in small, near-shore fisheries in areas around the local CDQ communities. The crab CDQ allocations are harvested by large vessels fishing shortly after the non-CDQ crab fisheries close. Therefore, changes in the CDQ allocation process would not significantly change the impact of the CDQ fisheries on the environment because this impact is determined primarily by the total amount of CDQ harvested rather than the amount harvested by an individual group. Any impacts on the environment as a result of groundfish harvests off Alaska are considered annually in the NEPA documents prepared for the groundfish harvest specifications.

#### Previous NEPA Analyses

The CDQ Program began in 1992 with an allocation of 7.5 percent of the Bering Sea and Aleutian Islands area (BSAI) pollock total allowable catch. This allocation was made as part of Amendment 18 to the BSAI FMP and Amendment 23 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (GOA FMP). Amendments 18/23 implemented the initial "inshore/offshore" allocations of pollock in the BSAI and pollock and Pacific cod in the Gulf of Alaska. NMFS prepared a supplemental environmental impact statement (SEIS) for this action which analyzed the impact on the human environment of the pollock and Pacific cod allocations, including the pollock CDQ allocation. The final SEIS was dated March 5, 1992. This analysis provided a description of the physical, biological, economic, and social environment and analysis of the impact of the alternatives on groundfish stocks, bycatch, marine mammals, seabirds, coastal and marine habitat, the fishing industry, and fishing communities.

The administrative regulations governing the CDQ allocation process and oversight of the economic development aspects of the CDQ Program were implemented in 1992 (57 FR 54936; November 23, 1992). The alternatives now under consideration by the Council would revise these administrative regulations. An Environmental Assessment (EA) was prepared for the 1992 implementation of the administrative regulations (final EA dated December 7, 1992). In this EA, NMFS determined that "the CDQ program redistributes the

harvest of fisheries resources but will not change the total amount landed" and that "[p]hysical impacts on the environment associated with any of these alternatives are not expected to differ significantly from the current fishery. Physical impacts are associated with differences in fishing gear used, locations where fishing occurs, processing locations, etc."

The administrative regulations for the CDQ Program were revised in 1998 when NMFS implemented Amendment 39 to the BSAI FMP, Amendment 41 to the GOA FMP, and Amendment 5 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (63 FR 30381, June 4, 1998). Amendment 39/41/5 implemented the groundfish and crab license limitation program and expanded CDQ allocations to include 7.5 percent of all BSAI groundfish, prohibited species, and crab. These additional CDQ allocations created the "multispecies" CDQ Program. The North Pacific Fishery Management Council prepared an EA for Amendment 39/41/5 (final EA dated September 9, 1997). Based on this EA, NMFS concluded that the license limitation program and the expanded CDQ allocations would not have a significant impact on the environment. With respect to the CDQ Program, the EA concluded "[T]he benefits of this type of fishery have been exhibited in the current pollock CDQ program where the result has been a slower paced fishery, higher value fisheries relative to the open access fishery, generally lower bycatch rates of PSC species, lower discard rates, and a more stable planning environment for the participants."

### Conclusions

In assessing the potential significance of the impacts of an action on the human environment, NAO-216-6 (section 5.05.c) requires determination that the proposed action does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, does not have uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, does not result in cumulatively significant impacts, and does not have any adverse effects upon endangered or threatened species or their habitats.

The alternatives under consideration by the Council address the role of government in administration and oversight of the economic development aspects CDQ Program. They are administrative and procedural in nature and they would not change the impact of the harvest of CDQ allocations on the environment. Therefore, I have determined that the alternatives do not involve a geographic area with unique characteristics, they are not

likely to have uncertain environmental impacts or unique or unknown risks, and they would not have any adverse effects upon endangered or threatened species or their habitats. Although some aspects of the alternatives are controversial, the controversy relates to administrative and policy issues associated with the role of government in oversight of the CDQ Program and the process through which CDQ allocations are made. These controversial issues are not associated with the potential environmental consequences of the alternatives. In addition, because the alternatives would not result in impacts on the environment, they would not establish a precedent or decision in principle about future proposals that would affect the human environment. Based on the information described in this memorandum, I have determined that the alternatives under consideration by the Council do not individually have any impact on the human environment. Therefore, the alternatives also would not have a cumulative impact on the human environment.

E. O. 12898 addresses "environmental justice," and instructs each Federal agency to identify and address disproportionately high and adverse human health and environmental effects on minority and low-income populations. As environmental justice concerns affect the human environment, it is appropriate to consider them in environmental review documents prepared under NEPA. The proposed action is administrative and procedural in nature and, because it does not have any impacts on the human environment, it also would not cause disproportionately high and adverse human health or environmental effects on minority or low-income populations.

Attachment

**Issues and Alternatives for CDQ Policy Analysis - Public Review Draft  
(As revised and adopted by the Council in Feb. 2002)**

**ISSUE 1: Determine the process through which CDQ allocations are made**

Issue 1 problem provides three alternatives for the process that will be used in the future to make allocations of groundfish, crab, halibut, and prohibited species quota among the CDQ groups. The alternatives do not address the total amount of each of these species allocated to the CDQ Program annually (the CDQ reserves) - only the process through which the CDQ reserves are divided up among the CDQ groups.

**Alternative 1:** No Action: NMFS's regulations governing the CDQ allocation process would not be revised. The administrative process described in Section 3 would continue.

**Alternative 2:** Improved Administrative Process: NMFS and the State would continue to make CDQ allocations through an administrative process. However, NMFS regulations would be revised to provide the opportunity for the CDQ groups to comment on the State's initial CDQ allocation recommendations and to appeal NMFS's administrative determination to approve the State's allocation recommendations.

**Alternative 3:** Rulemaking: CDQ allocations among the CDQ groups would be established in NMFS regulations through proposed and final rulemaking following the same process used by to allocate other federally managed fishery resources. The Council would develop CDQ allocation recommendations, and NMFS would implement the Council's recommended allocations in NMFS regulations. NMFS would not make independent decisions about the CDQ allocations, but it would review the Council's allocation recommendations for compliance with the MSA and other applicable laws. The State of Alaska could remain involved in the CDQ allocation process by making recommendations to the Council rather than to NMFS.

**ISSUE 2: Periodic or Long-Term CDQ Allocations**

**Alternative 1:** No Action. Continue to make periodic, competitive allocations among CDQ groups.

**Alternative 2:** Establish a fixed allocation cycle in regulation:

- Option 1:** 2-year allocation cycle
- Option 2:** 3-year allocation cycle (*as proposed in H.R. 553*)
- Option 3:** 5-year allocation cycle
- Option 4:** 10-year allocation cycle

**Sub-option 1:** Establish an "escape clause" which would allow the State to recommend reallocation of CDQ mid-cycle under extraordinary circumstances. The Council and NMFS would have to approve the State's recommended reallocation.

**Sub-option 2:** Establish an "escape clause" which would allow for a three-stage intervention process as follows:

- Level 1 - advisory (State advises groups of serious concerns)
- Level 2 - State mandates the group to make changes
- Level 3 - consider CDQ reallocation

**Alternative 3:** Make long-term allocations to the CDQ groups.

**ISSUE 3: Define the role of government in oversight of the CDQ Program**

The appropriate role of government depends on the type of CDQ allocations being made. The following alternatives are appropriate if we continue to make periodic, competitive allocations among CDQ groups.

**Alternative 1:** No Action - Do not amend the BSAI FMP to add additional text about the role of government in administration and oversight of the economic development aspects of the CDQ Program.

**Alternative 2:** Amend the BSAI FMP to specifically identify elements of the government's responsibility for administration and oversight of the economic development elements of the CDQ Program, as follows:

Government oversight of the CDQ program and CDQ groups is limited by the following purposes:

1. Ensure community involvement in decision-making;
- ✓ 2. Detect and prevent misuse of assets through fraud, dishonesty, or conflict of interest by verifying CDP milestone compliance and financial performance; *Clean up lang.*
3. Ensure that internal investment criteria and policies are established and followed;
4. Ensure that significant investments are the result of reasonable business decision, i.e., made after due diligence and with sufficient information to make an informed investment decision; and
5. Ensure that training, employment, and education benefits are being provided to the communities and residents.
6. ? Ensure that the CDQ Program is providing benefits to each CDQ community and meeting the goals and purpose of the program.

*1st  
Priority ?*

**ISSUE 4: CDQ Allocation Process - Type of Quotas**

**Alternative 1:** No Action. CDQ and prohibited species quota (PSQ) are specified by species, area, and gear type (sablefish and halibut). Each CDQ group is eligible to receive a percentage allocation of each CDQ or PSQ reserve as recommended by the State of Alaska and approved by the Secretary of Commerce. The State decides how to balance demographic or socioeconomic factors with performance criteria.

**Alternative 2:** Establish a separate foundation quota and performance quota

Allocations of CDQ among the CDQ groups are categorized as foundation quota and performance quota as defined below:

Foundation quota - some proportion of the CDQ allocations are fixed or based on demographic characteristics, such as population.

Performance quota - some proportion of the CDQ allocations are based on competition among the groups in areas such as financial performance, feasibility of proposed projects, needs of the local fishery, etc. The process used for the competitive allocations will be determined under Issue 4.

**Option 1:** Foundation quota: 50% of the CDQ reserve is divided equally among the CDQ groups.  
Performance quota: 50% is allocated competitively among the CDQ groups.

**Option 2:** Foundation quota: 1% is allocated to the CDQ group for each community represented by the group.  
Performance quota: remainder is allocated competitively among the CDQ groups.



Option 3: Foundation quota: 1% is allocated to the CDQ group for every 1,000 people represented by the CDQ group.

Performance quota: remainder is allocated competitively among the CDQ groups.

Suboption 1: Foundation quota applies only to a portion of the pollock allocation as described in Options 1 - 3.

Performance quota applies to the remainder of the pollock allocations and allocations of all other species.

Option 4: Foundation quota: 50% of the CDQ pollock reserve is allocated to the CDQ group on the basis of the population of the communities represented by the group.

Performance quota applies to the remainder of the pollock allocations and allocations of all other species.

#### **ISSUE 5: CDQ Allocation Process - The Evaluation Criteria**

Issue 5 addresses the evaluation criteria used to make CDQ allocations among the CDQ groups. The current evaluation criteria is published in State of Alaska regulations at 6 AAC 93, but is not published in NMFS regulations. The Council is considering the following three alternatives for regulations governing CDQ evaluation criteria in the future:

Alternative 1: No action - Do not publish CDQ evaluation criteria in NMFS regulations. The State could continue to publish CDQ evaluation criteria in State regulations.

Alternative 2: Revise the CDQ evaluation criteria and publish them in NMFS regulations.

The following criteria shall be used as the basis for allocating CDQ among the CDQ groups or eligible communities:

1. Number of participating communities, population, and economic condition.
2. A Community Development Plan that contains programs, projects, and milestones which show a well-thought out plan for investments, service programs, infrastructure, and regional or community economic development.
3. Past performance of the CDQ group in complying with program requirements and in carrying out its current plan for investments, service programs, infrastructure, and regional or community economic development.
4. Past performance of CDQ group governance, including: board training and participation; financial management; and community outreach.
5. A reasonable likelihood exists that a for-profit CDQ project will earn a financial return to the CDQ group.
6. Training, employment, and education benefits are being provided to residents of the eligible communities.
7. In areas of fisheries harvesting and processing, the CDQ group, to the greatest extent possible, has promoted conservation-based fisheries by taking actions that will minimize bycatch, provide for full retention and increased utilization of the fishery resource, and minimize impact to essential fish habitats.
8. Proximity to the resource.
9. The extent to which the CDP will develop a sustainable fisheries-based economy.
10. For species identified as "incidental catch species" or "prohibited species," CDQ allocations may be related to the recommended target species allocations.

Alternative 3: Develop CDQ evaluation criteria through the process proposed in H.R. 553.

## ISSUE 6: Extent of Government Oversight

**Alternative 1:** No Action. NMFS regulations governing the extent of government oversight of the business activities of the CDQ groups and affiliated businesses would not be revised.<sup>1</sup> An October 4, 2000, legal opinion by NOAA GC concludes that NMFS's regulations on the extent of oversight of the subsidiaries and affiliated businesses are unclear and need to be revised.

**Alternative 2:** NMFS regulations would be revised to clarify that government oversight of the CDQ Program applies to the activities of the CDQ group and to affiliated businesses.

The requirement for review and prior approval of significant investments or debt would apply to the CDQ group and to businesses over which a CDQ group exercised effective management control (subsidiaries). The regulations would include a rebuttable presumption regarding oversight of CDQ businesses, such that if a CDQ group owns 50% or more of a subsidiary company, the burden is on the CDQ group to prove that they do not exercise *effective management control* over that entity (as defined by control of the daily operations and management of the company). If it is determined that they do not exercise effective management control, then any activity of that entity is treated as a standard investment (not as a CDQ-owned business) and thus subject to lower oversight and reporting requirements.

**Alternative 3:** Revise NMFS regulations to clarify that oversight requirements for review and prior approval apply only to the activities of the CDQ group and do not apply to the subsidiaries or other affiliated businesses.

**Alternative 4:** (From H.R. 553) Revise NMFS regulations to clarify that government oversight extends only to activities of the CDQ group that are funded by royalties from the CDQ allocations.

H.R. 553 would require NMFS to define a CDQ project as follows:

(i) "CDQ project" means a program or activity that is administered or initiated by a CDQ group and that is funded by revenue the CDQ group derives or accrues during the duration of a community development plan approved by the Secretary from harvesting the fishery covered by the plan.

(ii) such term does not include a program or activity administered or initiated by a subsidiary, joint venture, partnership, or other entity in which a CDQ group owns an equity interest, if the program or activity is funded by the assets of the subsidiary, joint venture, partnership, or other entity, rather than by the assets of the CDQ group.

## ISSUE 7: Allowable Investments by CDQ Groups - Fisheries-Related Projects

**Alternative 1:** No Action. NMFS regulations implement what NMFS understood as the Council's intent, that the revenue generated by the CDQ allocations is to be spent on "fisheries-related" investments and projects to benefit the communities that are eligible for the CDQ Program. From NMFS regulations at 50 CFR 679.1(e):

*The goals and purpose of the CDQ program are to allocate CDQ to eligible Western Alaska communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally-based, fisheries-related economy.*

Current regulations do not include specific investment guidelines or a list of allowable investments. Some decisions about allowable investments have been made by policy or practicality. For example, CDQ groups provide scholarships for college without restricting the program of study to "fisheries-related." Investments

<sup>1</sup>For purposes of this analysis, an "affiliated business" is any entity that is owned in whole or in part by a CDQ group. A "subsidiary" is an entity controlled by the CDQ group, and is also known as a "consolidated affiliate" because the entity controlled by a CDQ group generally is consolidated with the CDQ group for financial reporting purposes. Affiliated businesses owned by the CDQ group, but not controlled by the group are known as "unconsolidated affiliates."

in substance abuse programs are not restricted to people working in fisheries-related businesses. The CDQ groups' investment accounts include stocks, bonds, and other financial instruments which are not "fisheries-related."

**Alternative 2:** Continue to require that the CDQ groups invest only in "fisheries-related" projects, but clarify NMFS regulations as follows:

- Add specific prohibition against CDQ groups investing in non-fisheries related projects; and
- Clarify that this prohibition does not apply to certain categories of expenditures or investments, such as investment accounts or scholarships. Focus regulations on economic development projects.

**Alternative 3:** Revise NMFS regulations to allow investments in non-fisheries related projects. The following options represent the maximum amount of investment in non-fisheries related projects. Each CDQ group may decide the appropriate mix of investments up to the maximum and any group may choose to invest less than the maximum.

**Option 1:** Allow each CDQ group to invest up to 5% of its pollock royalties in non-fisheries related projects.

**Option 2:** Allow each CDQ group to invest up to 20% of its pollock royalties or a maximum of \$500,000 in non-fisheries related projects.

**Option 3:** Allow each CDQ group to invest up to 50% of total revenues in non-fisheries related projects.

**Option 4:** Allow each CDQ group to invest up to \$1,000,000 in non-fisheries related projects.

**Sub-option 1:** (Require that any non-fisheries related investment be made) in economic development projects in the region of Alaska represented by the CDQ group and be self-sustaining.

**Alternative 4:** No restrictions on what the CDQ groups may spend money on or what type of projects they may invest in. (May represent intent of H.R. 553)

**Sub-option 1:** Require that any non-fisheries related investment be made in economic development projects in the region of Alaska represented by the CDQ group and be self-sustaining.

#### ISSUE 8: Other CDQ Administrative Issues

**Alternative 1:** No Action

**Option 1:** Allow transfer of CDQ between groups only after review by the State and NMFS

**Option 2:** Allow the transfer of PSQ between groups only during the month of January, only with a substantial amendment to the groups' CDPs, and only when the transfer is associated with a transfer of CDQ

**Option 3:** Approve alternative fishing plans only after review by both the State and NMFS

**Alternative 2:** Simplify the quota transfer and alternative fishing plan process

**Option 1:** Allow CDQ groups to transfer quota by submitting a transfer request directly to NMFS

**Option 2:** Allow NMFS to approve PSQ transfers directly, allow the transfer of PSQ during any month of the year, and allow PSQ transfer without an associated transfer of CDQ.

**Option 3:** CDQ groups would submit alternative fishing plans directly to NMFS

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DONALD C. MITCHELL  
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(907) 276-1681 dcraigm@aol.com

April 2, 2002

RECEIVED  
APR - 2 2002  
N.P.F.M.C.

David Benton, Chairman  
North Pacific Fishery Management Council  
605 West Fourth Avenue Suite 306  
Anchorage, Alaska 99501-2252

Re: Regulatory Impact Review/Initial  
Regulatory Flexibility Analysis  
for Proposed Amendment 71 to the  
Fishery Management Plan for Bering  
Sea/Aleutian Islands Groundfish  
(to Implement Policy and Administrative  
Changes to the Western Alaska Community  
Development Quota Program)

Dear Dave:

When I reviewed the initial Council/NMFS staff analysis of the proposed policy and administrative changes to the western Alaska community development quota (CDQ) program that the Council will consider during its April 2002 meeting, I noticed that the analysis does not analyze NMFS's and the State of Alaska's potential liability for negligently administering the oversight provisions of the CDQ program. When I inquired, I learned that Jim Balsiger requested NOAA General Counsel to provide such an analysis, but NOAA General Counsel declined to do so on the ground that potential liability is a policy, rather than a legal, issue.

On March 4, 2002 I sent Lisa Lindeman a memorandum in which I requested NOAA General Counsel to reconsider that decision. A copy of that memorandum is enclosed with this letter, and I would appreciate you including the memorandum in the briefing book for the April 2002 Council meeting that is being prepared for, and will be distributed to, the members of the Council.

Thanks.

Regards,



Don Mitchell

cc: Eugene Asicksik

DONALD C. MITCHELL  
Attorney at Law  
1335 F Street  
Anchorage, Alaska 99501  
(907) 276-1681 dcraigm@aol.com

March 4, 2002

FACSIMILE TRANSMISSION

TO: Lisa Lindeman  
NOAA General Counsel, Alaska Region

FROM: Don Mitchell  
Norton Sound Economic Development Corporation

SUBJECT: NMFS Alaska Region Memorandum Requesting a  
Legal Opinion on Proposed Revisions to the  
Community Development Quota Program.

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In the above-referenced memorandum, on January 4, 2002 James Balsiger, the administrator of the NMFS Alaska Region, requested NOAA General Counsel to provide the Alaska Region a written legal opinion regarding three questions that the memorandum posed regarding the legal consequences that may flow from the North Pacific Fishery Management Council's adoption, and the Secretary of Commerce's approval and implementation, of revisions to the administration of the Western Alaska Community Development Quota (CDQ) Program that the Council presently is considering. The second question the memorandum posed is:

Is NMFS liable for decisions by a CDQ group or its subsidiaries that require NMFS review and approval? For example, if NMFS disapproves a proposed investment by a CDQ group, would NMFS be liable if the CDQ group loses an economic opportunity? Conversely, if NMFS approves an investment by the CDQ group, and the investment fails, is NMFS liable for any part of the loss?

It is my understanding that, in response to the memorandum, on February 15, 2002 NOAA General Counsel informed Administrator Balsiger that it had decided that the extent of government oversight over the business activities of CDQ groups and of the fishing companies in which CDQ groups own equity interests is a policy issue, rather than a legal issue, and that, for that reason, NOAA General Counsel will not provide the requested written legal analysis.

The purpose of this memorandum is to request NOAA General Counsel to reconsider that decision.

The Federal Tort Claims Act, 28 U.S.C. 2671 et seq., subjects the United States to liability for tort claims (albeit with certain exceptions that are not relevant here) in the same manner and to the same extent as a private individual would be liable under like circumstances. Pursuant to that statute, the United States has been held liable repeatedly for significant money damages when an employee of the federal government has negligently breached the duty to exercise ordinary care while participating in the implementation of a federal program. See e.g., Walker v. United States, 663 F. Supp. 258 (E.D. Okla. 1987) (United States liable for negligent action of a Department of the Interior Solicitor in discharging duty imposed by regulation to represent an Indian in a land proceeding); James v. United States, 483 F. Supp. 581 (N.D. Calif. 1980) (United States liable for negligent action of a naval doctor who failed to adequately inform a patient regarding his medical condition).

Alaska law imposes a similar duty to exercise ordinary care on state employees. See e.g., Lee v. State, 490 P.2d 1206 (Alaska 1971) (State of Alaska liable for money damages if actions of a state employee were "ordinarily negligent"); Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986) (State of Alaska liable for money damages if its employees failed to act reasonably and carefully).

Those and numerous other judicial decisions demonstrate that, if they fail to exercise ordinary care, NMFS Alaska Region employees who administer the CDQ program have the ability to subject the United States to liability for money damages under the Federal Tort Claims Act. And the members of the State CDQ Team have the ability to subject the State of Alaska to liability for money damages under Alaska law. But to the best of my knowledge, none of those federal and state employees are MBAs, CPAs, or have other educational credentials or training that qualify them to exercise ordinary care in analyzing, and in forming professionally knowledgeable opinions regarding, the frequently complex and esoteric business transactions that occur in North Pacific fisheries. Nor have those employees had any prior practical business experience on the financial side of the Bering Sea fishing business.

For those reasons, the possibility that a NMFS Alaska Region employee or a member of the State CDQ Team might subject the United States or the State of Alaska to liability for significant money damages through his or her negligent approval or disapproval of a proposed investment by a CDQ group or by a fishing company in which a CDQ group owns an equity interest is not merely theoretical.

To cite two examples that are based on actual prior experience:

First, in 1992 the Coastal Villages Fishing Cooperative (CVFC), which had only recently been organized and, consequently, was quite inexperienced regarding the business end of the highly competitive Bering Sea open access pollock fishery, submitted a community development plan (CDP) to the State CDQ Team in which CVFC proposed purchasing a catcher-processor vessel known as the Brown's Point. The State CDQ Team not only approved CVFC's purchase of the Brown's Point, and the terms and conditions thereof, but enthusiastically publicly lauded the purchase. In turn, NMFS Alaska Region employees responsible for administering the CDQ program rotely accepted the State CDQ Team's recommendation that the Secretary of Commerce approve CVFC's CDP.

CVFC's purchase of the Brown's Point quickly proved to be an obvious bad investment that exposed CVFC to the loss of millions of dollars out of pocket, and exposed CVFC member communities to the loss of millions of dollars of community benefits that the Council, and later the Congress, created the CDQ program to enable CVFC to provide.

CVFC subsequently succeeded in avoiding potentially catastrophic financial liability by negotiating a settlement with the seller of the Brown's Point. But what if an acceptable settlement had not been negotiated and CVFC had lost millions, and indeed tens of millions, of dollars as a consequence of the Brown's Point purchase? If, to recoup the money it had lost, CVFC and/or its member communities then had filed civil actions against the United States pursuant to the Federal Tort Claims Act, and against the State of Alaska pursuant to Alaska law, that alleged that the State CDQ Team and the NMFS Alaska Region employees who approved the purchase of the Brown's Point had been negligent in doing so, what would have been the outcome of those lawsuits?

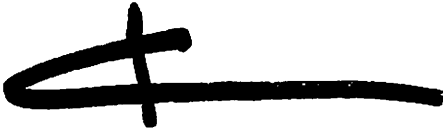
Any answer to that question would be pure speculation. But what can be said with certainty is that 1) the unsuitability of the Brown's Point to participate profitably in the Bering Sea open access pollock fishery, and the defects in the terms on which CVFC purchased the vessel, were immediately subsequently obvious to all persons who were knowledgeable regarding the conduct of, and the in-the-usual-course-of-business financial arrangements that control, the fishery, and 2) that group of persons did not include the state and federal employees who approved CVFC's purchase of the Brown's Point, none of whom had the education, training, or experience to exercise ordinary care when they independently evaluated, and then approved, the purchase and the terms thereof.

Second, what if the State CDQ Team disapproves a proposed investment by a CDQ group or by a fishing company in which a CDQ group owns an equity interest not because the investment is not financially responsible or would not enable the group to provide additional benefits to its member communities, but because the investment would be inconsistent with the unannounced fishery policy du jour of the Governor of Alaska for whom the members of the CDQ Team at that particular moment work; and NMFS Alaska Region employees who administer the CDQ program then rotely recommend to the Secretary of Commerce that he approve the State CDQ Team's disapproval?

I do not know the answers to the questions posed above. But it is clear to me, and I hope that upon subsequent reflection it will be clear to NOAA General Counsel, that whether the United States and/or the State of Alaska may be liable for money damages if NMFS Alaska Region employees and/or the State CDQ Team breach their duty to exercise ordinary care when they approve or disapprove an investment that has been proposed by a CDQ group or by a fishing company in which a CDQ group owns an equity interest is a very important, and presently unanalyzed, legal question. Because it is, on behalf of the Norton Sound Economic Development Corporation, I would respectfully, but strongly, urge NOAA General Counsel to reconsider its decision not to provide Administrator Balsiger a written legal opinion regarding the second question posed in his January 4, 2002 memorandum.

Thank you for your prompt consideration of this request.

Regards,

A large, bold, handwritten signature in black ink, appearing to be a stylized 'A' or similar character.

cc: Eugene Asicksik  
James Balsiger  
Sally Bibb



# PUBLIC TESTIMONY SIGN-UP SHEET FOR AGENDA ITEM C-4 CQ Policy Amendment

**PLEASE SIGN ON THE NEXT BLANK LINE.  
LINES LEFT BLANK WILL BE DELETED.**

	NAME	AFFILIATION
1.	ERIC OLSON	BRISTOL BAY ECON. DEV. CORP (BBEDC)
2.	STEVE RIEGER/DON MITCHELL EUGENE ASICKSIK	NORTON SOUND ECON. DEV CORP. (NSEDC)
3.	LARRY COTTER	ALEUTIANS/PRIPILOF ISLAND (APICDA) COMMUNITY DEV. ASSN
4.	PHILLIP LESTENKOF/STEVE MINOR	CENTRAL BERING SEA FISHERY ASSN (CBSFA)
5.	MORGEN CROW	COASTAL VILLAGES REGIONAL FUND (CVRF)
6.	JOHN LAMONT	YUKON DELTA FISHERY DEV. ASSN (YDFDA)
7.	CLEM TILLION	SELF (3 minutes)
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# PUBLIC TESTIMONY SIGN-UP SHEET FOR AGENDA ITEM C-4 CDQ

**PLEASE SIGN ON THE NEXT BLANK LINE.  
LINES LEFT BLANK WILL BE DELETED.**

	NAME	AFFILIATION
<del>1.</del>	ERIC OLSON	
<del>2.</del>	STEVE REIGER / DON MITCHELL / EUGENE ASIKKSIK	
<del>3.</del>	EUGENE ASIKKSIK	
<del>4.</del>	LARRY COTTER	
<del>5.</del>	PHILLIP KESTENKOFF / STEVE MINOR	
6.	MORWEN CROW	
7.	JOHN LAMONT	
8.	CLARA TULLON	
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PLEASE PRINT



**UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration**

*National Marine Fisheries Service  
P.O. Box 21668  
Juneau, Alaska 99802-1668*

C-4

April 8, 2002

Dave Benton, Chairman  
North Pacific Fishery Management Council  
605 West 4<sup>th</sup> Avenue, Suite 306  
Anchorage, Alaska 99501-2252

Dear Dave:

Attached are NMFS's recommendations about the issues and alternatives the North Pacific Fishery Management Council (Council) will consider for Amendment 71 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area. Amendment 71 addresses eight issues related to the allocations and oversight of the Western Alaska Community Development Quota (CDQ) Program. The Council is scheduled to select its preferred alternative at the April 2002 meeting. The overall preferred alternative will be a combination of the preferred alternatives for each of the eight issues addressed in the draft analysis.

Once the Council selects its preferred alternative, the analysts will revise the analysis to describe the preferred alternative as a single policy recommendation. They also will prepare draft FMP amendment text for the Council to review at its June 2002 meeting, when it is scheduled to take final action on Amendment 71.

Sincerely,

James W. Balsiger  
Administrator, Alaska Region

Attachment



NMFS Recommendations on BSAI FMP Amendment 71  
Preferred Alternative

Issue 1 - The CDQ Allocation Process

Issue 1 provides three alternatives for the process through which the CDQ reserves are allocated among the CDQ groups. Alternative 1 is no action and would not revise NMFS's current regulations. Alternative 2 would revise the current administrative process to include more opportunities for the CDQ groups to comment on and appeal the State's CDQ allocation recommendations and NMFS's administrative determinations. Alternative 3 would implement CDQ allocations through proposed and final rulemaking based on the Council's analysis and recommendations, rather than through the current administrative process.

NMFS's recommendation on Issue 1 depends on the Council's preferred alternative for Issue 2 - the length of the CDQ allocation cycle. If the Council recommends continuing with relatively short-term allocations among the CDQ groups, then NMFS recommends that the Council select Issue 1, Alternative 2 as the preferred alternative for the process for making these allocations. NMFS considers short-term allocations to be 2-year, 3-year, or 5-year allocation cycles as described by Issue 2, Alternative 2, Options 1, 2, and 3. However, if the Council recommends a 10-year allocation cycle (Issue 2, Alternative 2, Option 4) or long-term, fixed CDQ allocations (Issue 2, Alternative 3), then NMFS recommends that the Council implement these allocations through rulemaking, for reasons discussed below under Issue 2.

Assuming continued periodic, competitive CDQ allocations, NMFS recommends Issue 1, Alternative 2 because the improved administrative process provides more stability to the CDQ Program and CDQ groups. Alternative 3, which would make CDQ allocations through rulemaking, is appealing to NMFS because it would remove the agency from some aspects of a difficult decision-making process, it would not require NMFS to implement an administrative appeals process, and it would be consistent with how other fishery allocations are made. However, NMFS does not recommend making CDQ allocations through rulemaking for the following reasons.

First, we have used an administrative process to make CDQ allocations for nearly ten years. It is an established process

that all parties are used to. Second, the administrative process described in Alternative 2 would be conducted by the Alaska Regional Administrator on behalf of the Secretary of Commerce. NMFS regulations at 50 CFR 679 would specify that the Regional Administrator's decision on CDQ allocations would be the final agency action for purposes of judicial review. The Regional Administrator operates in a similar capacity for the administrative determinations and appeals process for other Alaska Region quota fisheries, permits, and licenses (see 50 CFR 679.43). If Alaska Region staff are responsible for the administrative process, then we are more able to prioritize the allocations and devote the staff resources necessary to ensure that they are made on time. We cannot make these assurances for a rulemaking process because much of the process occurs outside of our region and beyond our control. Therefore, Alternative 2 provides the best chance that the process required to make new CDQ allocations will be complete when the existing allocations expire, thereby providing needed stability to the CDQ Program.

Alternative 2 would require NMFS to devote more agency resources to the administration of the CDQ Program, primarily to support the administrative appeals process, but also to support increased involvement in all administrative decisions that ultimately are NMFS's responsibility. However, the increase in responsibility for the CDQ Program has occurred as a result of the growth and maturity of the CDQ Program and would not occur solely as a result of the Council recommending Alternative 2.

#### Issue 2 - Length of the CDQ Allocation Cycle

Issue 2 provides the Council the opportunity to decide whether it supports continuing a periodic, competitive CDQ allocations among the eligible CDQ groups or wants to move to more long-term allocations. Alternative 2, Options 1, 2, or 3 represent continuation of the current periodic, competitive CDQ allocations on a 2-year, 3-year, or 5-year cycle. Alternative 3, Option 4 (10-year allocation cycle) and Alternative 4 (fixed allocations with no expiration date) represent a move toward more long-term allocations, increased autonomy for the CDQ groups, and reduced government oversight.

Enforcement of the current administrative regulations rely primarily on requirements for review and prior approval of Community Development Plans (CDPs) and amendments to the plans, and on the CDQ allocation process. The existence of periodic, competitive CDQ allocations provides an incentive for the CDQ groups to comply with CDQ regulations and to be responsive to requests for information from the State and NMFS. When the State

makes CDQ allocation recommendations, it must assess whether the CDQ groups have complied with State and NMFS regulations. Past performance is a factor considered by the State in making CDQ allocation recommendations. Reductions in CDQ allocations could be recommended if the State finds that a group has not complied with specific regulations or has not operated consistent with the goals and purpose of the program.

The length of the CDQ allocation cycle affects the enforcement aspect of the CDQ allocations. The shorter the allocation cycle, the more focused the CDQ groups are on establishing a good compliance record, and the more quickly the State and NMFS can use changes in CDQ allocations as an enforcement tool. However, a balance is needed between the enforcement role of the allocation cycle and stability for the CDQ groups. The shorter the allocation cycle, the less stability for the program due to the potential for frequent changes in allocations and the resulting impact on the CDQ groups' financial situation.

A 2-year allocation cycle is too short to complete the administrative process for CDQ allocations and is costly to the groups, the State, and NMFS. A 5-year allocation cycle provides more financial stability to the groups and would reduce administrative costs, but the effectiveness of the enforcement incentive associated with allocations would be reduced. If an administrative problem develops in the first year of the allocation cycle, it could continue to occur for four years before the State and NMFS could address it in an allocation adjustment. NMFS believes that a 3-year allocation cycle provides a good balance among financial stability for the CDQ groups, administrative costs to the groups and the government, and the need to use the CDQ allocations as a means to enforce the administrative regulations. Therefore, if the Council wishes to continue periodic, competitive CDQ allocations, NMFS recommends that it select Alternative 2, Option 2 as its preferred alternative.

If the Council supports more long-term CDQ allocations, NMFS recommends that the Council make these allocations through rulemaking rather than through the existing administrative process. Allocations of such a long term should be made through the Council process with further analysis of the environmental, social, and economic impacts of such a significant allocation decision.

### Issue 3 - The Role of Government in Oversight

Issue 3 provides one alternative to the status quo that would

define the role of government oversight in the CDQ Program. If approved by the Council, this definition of the role of government would be added to the FMP and would be used to guide development of CDQ regulations and policies. Alternative 2 provides a list of six government oversight functions which generally describe the current role of government in oversight of the program. This role is being performed primarily by the State of Alaska, with general oversight by NMFS. The Council could recommend increasing or reducing the role of government in oversight of the CDQ Program by adding or removing specific elements of Alternative 2 or by some of the recommendations it makes for other issues.

If the Council selects Alternative 2 as its preferred alternative for Issue 3, NMFS recommends that the Council consider reorganizing of the elements of government oversight in and revising the wording of one of the elements, as follows:

Government oversight of the CDQ program and CDQ groups is limited by the following purposes:

1. Ensure that the CDQ Program is providing benefits to each CDQ community and meeting the goals and purpose of the program.
2. Detect and prevent misuse of assets through fraud, dishonesty, or conflict of interest;
3. Ensure community involvement in decision-making;
4. Ensure that internal investment criteria and policies are established and followed;
5. Ensure that significant investments are the result of reasonable business decisions, i.e., made after due diligence and with sufficient information to make an informed investment decision; and
6. Ensure that training, employment, and education benefits are being provided to the communities and residents.

The reasons for NMFS's suggested revisions are described in more detail on page 80 of the analysis. In summary, they reorganize the elements of government oversight to place the most general and important responsibilities first, followed by the more specific oversight responsibilities. The proposed revision to the responsibility associated with preventing the misuse of assets would remove the last part of the proposed element to allow the Council, NMFS, and the State to determine through

regulation the appropriate methods to accomplish this oversight responsibility.

#### Issue 4 - CDQ Allocation Process - Type of Quotas

Issue 4 provides four options that would divide the CDQ allocations into separate foundation quotas and performance quotas. Consideration of foundation quotas was recommended by the National Research Council in its 1999 report to Congress on the CDQ Program for reasons discussed in more detail on page 91 of the analysis.

Option 1 would divide 50 percent of each CDQ and PSQ reserve equally among the CDQ groups. The remaining 50 percent of the reserves would be allocated on a competitive basis following the process selected by the Council under some of the other issues. Option 2 would allocate 1 percent of each CDQ and PSQ reserve to each CDQ group for each community represented by the group. This option would allocate approximately 65 percent of the CDQ and PSQ reserves on the basis of a foundation quota and the remaining 35 percent on a competitive basis. Option 3 would allocate 1 percent of each CDQ and PSQ reserve to each CDQ group for every 1,000 people represented by the group. This option would allocate approximately 27 percent of the reserves on the basis of a foundation quota and the remaining 63 percent on a competitive basis. Options 1 through 3 also have a sub-option that would apply the foundation quota to the allocation of the pollock CDQ reserve only and not to any other CDQ or PSQ reserves. Option 4 would allocate 50 percent of the pollock CDQ reserve to the CDQ groups on the basis of population.

NMFS does not have a recommendation on the preferred alternative for Issue 4. We believe that this is a policy issue most appropriate for the Council to address. However, we do request that the Council provide an explanation for the administrative record of its recommendation. If the Council selects the no action alternative, it should explain why it believed, after consideration of NRC recommendations and the analysis, that foundation quotas were not advisable for the CDQ Program. On the other hand, if the Council recommends one of the options for foundation quotas, NMFS requests that the Council provide an explanation of the benefits that the particular foundation quota would provide.

#### Issue 5 - CDQ Allocation Process - The Evaluation Criteria

Issue 5 provides the alternative of codifying the evaluation criteria used to make CDQ allocations in NMFS regulations. This



would require the State to use only the evaluation criteria in regulation and would prohibit it from using any other criteria. NMFS supports codifying the evaluation criteria in NMFS regulations because it would provide the CDQ groups with better information about the basis for the CDQ allocations and would simplify NMFS's review of the State's allocation recommendations. However, with one exception, NMFS does not have a position on whether each of the specific criteria developed by the State, the CDQ Policy Committee, and the Council are the criteria that should be used to make CDQ allocations. The one exception to this position is that NMFS specifically recommended inclusion of criterion #10 related to incidental catch and prohibited species.

We have reviewed the elements of Alternative 2 and we find no inconsistencies in the proposed evaluation criteria. The proposed criteria all are appropriate factors to consider when allocating CDQ among competing CDQ groups to support local and regional economic development that emphasizes reliance on fishery resources and development of fisheries based economies. The proposed criteria are very similar to the criteria currently used by the State. Therefore, NMFS does not expect that application of these criteria would make a significant change in the basis for making CDQ allocations. If the Council selects Alternative 2 as its preferred alternative, NMFS requests that the Council review the interpretation of each evaluation criterion on pages 126 through 130 and determine whether this interpretation is consistent with Council intent.

NMFS recommends that the Council not include Option 1 in its preferred alternative. Option 1 would amend NMFS regulations to require the State to use a scorecard, or a quantitative method for evaluating the proposed CDPs and past performance of the CDQ group. Although NMFS supports the goal of increasing the objectivity of the CDQ allocation process, we do not believe that the scorecard process described in Option 1 should be implemented in NMFS regulations. The description of the scorecard process states that some aspects of the scorecard process would remain confidential, which NMFS believes would undermine the objective of improving the transparency of the allocation process. If a scorecard is used to develop CDQ allocation recommendations, the State would be required to explain the entire process and how it contributed to its recommendations. The Council could recommend that the State develop a scorecard process and the State could use this process in making its allocation recommendations, as long as it fully explained the process. However, NMFS does not believe that this requirement should be included in NMFS regulations at this time.

## Issue 6 - Extent of Government Oversight

Issue 6 addresses the extent of government oversight of the activities of the CDQ groups and businesses owned by the CDQ groups. The main issue that the Council must consider is whether the government should require prior review and approval of significant investments by businesses over which the groups have effective management control. This issue was the subject of a NOAA General Counsel legal opinion which stated that NMFS regulations were not clear on this issue and should be revised to provide clarification. Therefore, NMFS recommends that the Council should not select Alternative 1 no action, as the preferred alternative.

None of the alternatives propose to remove the requirement that the government review and approve significant investment decisions by the CDQ group itself. Alternative 2 would clarify NMFS regulations to require that the State and NMFS also review and approve significant investments by the CDQ groups' subsidiaries (entities over which the group has management control). Alternative 3 would clarify NMFS regulations to limit requirements for review and prior approval to the CDQ group itself (the non-profit corporation), and it would not authorize the government to require prior approval of any investments by subsidiaries. Alternative 4 would limit government oversight to expenditures by the CDQ group of royalty revenue only.

The choice of the preferred alternative is a policy decision that involves consideration of the level of autonomy that the CDQ groups should have in making business decisions and the role that oversight plays in compliance with CDQ Program regulations. A requirement for review and prior approval of significant investments by a subsidiary allows the government to identify investments that are not consistent with the CDQ groups' investment policies, the goals and purpose of the program, or any specific CDQ regulation before the investment is made. This is an important element in enforcement of program regulations. However, it is objectionable to some of the CDQ groups because it provides an opportunity for the government to interject other issues or policies into the decision making process and it reduces the control that the groups have over their business activities.

NMFS could implement Alternative 2, Alternative 3, or Alternative 4 by revising regulations to clarify the State and NMFS's authority to collect information about the subsidiaries and affiliated businesses and to require the level of review and prior approval authorized by the alternative. If the Council

recommended limiting government oversight under Alternative 3 or Alternative 4, NMFS could implement reporting requirements and other safeguards that would reduce the possibility that a CDQ group could use a subsidiary to make investments inconsistent with the CDQ Program regulations. In addition, through the CDQ allocation process, past performance of the CDQ group and its subsidiaries would be considered. However, from an enforcement standpoint, identifying problems or potential violations before they occur is preferable to trying to enforce a penalty or reduce an allocation after the fact. This is particularly true for compliance issues that may not be serious enough to warrant a full percentage point reduction in allocation, but still need to be enforced through some mechanism.

#### Issue 7 - Allowable Investments (Fisheries versus Non-Fisheries Investments)

Issue 7 provides four alternatives to revise the requirements that CDQ groups invest only in fisheries-related economic development projects. Alternative 1 would not make any changes in NMFS regulations. Alternative 2 would continue to require only fisheries-related investments, but would clarify the regulations. Alternative 3 provides four options for allowing some investment in non-fisheries related projects. Alternative 4, which we believe represents the intent of H.R. 553, would remove any restrictions on CDQ investments.

NMFS believes that establishing the goals and purpose of the CDQ Program is a policy recommendation best made by the Council. We have supported the fisheries development focus of the CDQ Program, and we continue to support this emphasis. However, we recognize the benefits that could be obtained for the eligible communities and the program as a whole by allowing some investment in other economic development projects. Expanding investment opportunities would allow the CDQ groups to use their resources to provide more appropriate benefits to some of their communities. In addition, the restriction on fisheries-related investments may be forcing the CDQ groups to invest in projects that may not be the most profitable or beneficial to the communities they represent.

We request that the Council consider the relationship between its preferred alternative for Issue 7 on non-fisheries investments, the current goals and purpose of the CDQ Program in 50 CFR 679.2(e), and the proposed evaluation criteria in Issue 5, Alternative 2. The goals and purpose of the program and the proposed evaluation criteria still place the primary focus of the CDQ Program on supporting fisheries-related investments. For

example, one evaluation criterion in Issue 5, Alternative 2 would require that the State consider "the extent to which the CDP will develop a sustainable fisheries-based economy." We interpret this evaluation criterion to mean that a CDQ group that proposes to use its allocations to develop a fisheries-based economy would have an advantage over groups that were proposing to invest in non-fisheries related projects, even if those investments were within the allowable limits for non-fisheries related investments. However, if the Council selected an option that allowed a significant percentage of the CDQ revenues to be invested in non-fisheries investments (e.g. Alternative 3, Option 3 or Alternative 4), then the Council should consider broadening the goals and purpose of the CDQ Program and removing the focus of the evaluation criteria on fisheries.

#### Issue 8 - Other Administrative Issues

Issue 8 provides three options for simplifying regulations related to the transfer of annual CDQ among CDQ groups and the approval of alternative fishing plans. Alternative 2, Option 1 would allow the CDQ groups to submit quota transfer request directly to NMFS rather than applying through the State via the CDP amendment process. Option 2 would allow the CDQ groups to transfer prohibited species quota (PSQ) by applying directly to NMFS, would remove the restriction on transferring prohibited species quota only in January, and would allow PSQ transfer without an associated transfer of CDQ. Option 3 would allow the CDQ groups to submit alternative fishing plans directly to NMFS for approval, rather than submitting them through the State.

NMFS supports all of these proposed regulatory amendments because they would simplify reporting requirements, save time and money for the government agencies and the CDQ groups, and provide the CDQ groups with more flexibility to manage their fisheries.