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Recusal Examination for the June 2017 North Pacific Fishery Management Council Decision Concerning the Bering Sea and Aleutian Islands Trawl Limited Access Yellowfin Sole Fishery

Summary

At its June 2017 meeting, the North Pacific Fishery Management Council (Council) is scheduled to take final action on whether to further limit access to the Bering Sea and Aleutian Islands (BSAI) trawl limited access (TLA) yellowfin sole fishery. Specifically, the Council is considering eligibility criteria for continued and future participation in this fishery by trawl catcher vessels that target yellowfin sole for delivery to a mothership or catcher processor vessel for processing. This document examines whether any of the seven Council members appointed by the Secretary of Commerce are recused from voting on this action under 50 CFR 600.235 or recused from participating in this action under 50 CFR 600.225(b)(9)(ii). For reasons explained below, Council member Kinneen is recused from voting on this action under 50 CFR 600.235. The remaining members (Council members Cross, Down, Hull, Laukitis, Mezirow, and Peterson) are not recused from voting on this action under 50 CFR 600.235. None of the seven Council members are recused from participating in this action under 50 CFR 600.225(b)(9)(ii).

Statutory and Regulatory Background

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

Regulations at 50 CFR 600.225 include the rules of conduct for Council members and employees. Section 600.225(b) states: "Councils are responsible for maintaining high standards of ethical conduct among themselves, their staffs, and their advisory groups. In addition to abiding by the applicable Federal conflict of interest statutes, both members and employees of the Councils must comply with the following standards of conduct." Nine standards are listed. Section 600.225(b)(9)(ii) states: "No Council member may participate personally and substantially as a member through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a particular matter primarily of individual concern, such as a contract, in which he or she has a financial interest, even if the interest has been disclosed in accordance with § 600.235."

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

A Council decision will be considered to have a "significant and predictable effect on a financial interest" if there is a close causal link between the decision and an expected and substantially disproportionate benefit to the financial interest in harvesting, processing, lobbying, advocacy, or marketing of any affected individual or the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee, relative to the financial interests of other participants in

the same gear type or sector of the fishery. MSA § 302(j)(7)(A); 50 CFR 600.235(c)(2). For fisheries in which individual fishing quotas (IFQs) are assigned, the determining factor is “the percentage of IFQs assigned to the affected individual.” *Id.*

"Expected and substantially disproportionate benefit" is defined at 50 CFR 600.235(c)(3) as “a quantifiable positive or negative impact with regard to a matter likely to affect a fishery or sector of the fishery in which the affected individual has a significant interest, as indicated by:

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

In calculating an affected individual’s financial interest in the fishery or sector of the fishery in question, all harvesting, processing, and marketing activity of a wholly- or partially-owned company, including subsidiary companies, is attributed to the affected individual. For Council decisions affecting fisheries in which IFQs are assigned, all IFQs assigned to wholly- or partially-owned companies, including subsidiary companies, are attributed to the affected individual. The NOAA Office of General Counsel has determined that this interpretation of the 10% thresholds is consistent with the provisions of the MSA and the regulations at 50 CFR 600.235(c)(3).¹

Under 50 CFR 600.235(e), an affected individual who is recused from voting may participate in Council deliberations relating to the decision, after notifying the Council of the voting recusal and identifying the financial interest that would be affected. The affected individual also may state for the record how he or she would have voted. 50 CFR 600.235(f)(4).

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

Determination of affected individuals

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

¹ Letter dated April 8, 2015, from Lois J. Schiffer, General Counsel, NOAA Office of General Counsel, to Simon Kinneen.

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

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

The regulations at 50 CFR 600.235 apply to “Council decisions.” The term “Council decision” is defined at 50 CFR 600.235(a). Among other things, a “Council decision” includes Council actions that could result in the approval of a fishery management plan (FMP) or FMP amendment, or a Council request for amendment of regulations implementing an FMP, commonly referred to as a regulatory amendment. According to Section 2.1 of the February 2017 Initial Review Draft Regulatory Impact Review/Environmental Assessment/Initial Regulatory Flexibility Analysis (Analysis) prepared for this action, a decision by the Council to restrict trawl catcher vessel access to the BSAI TLA yellowfin sole fishery would require an amendment to the FMP for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI FMP) and modification of certain regulations at 50 CFR Part 679 implementing the BSAI FMP. Therefore, Council action on whether to restrict trawl catcher vessel access to the BSAI TLA yellowfin sole fishery is a “Council decision” because it could result in an FMP amendment and a regulatory amendment.

Determination of the “fishery or sector of the fishery” affected by the action

The fishery or sector of the fishery is determined by the action before the Council. We have considered the stated purpose and need for the action, the alternatives and options under consideration, and the information in the Analysis. For the reasons provided below, we have determined that the fishery or sector of the fishery affected by the Council decision is the BSAI TLA yellowfin sole fishery.

Section 2.2 of the Analysis describes the purpose and need for the action as follows:

The Amendment 80 program assigns a portion of the BSAI yellowfin sole (TAC) to a TLA fishery. Amendment 80 catcher processors are precluded from fishing in the TLA fishery, however they are not prohibited from acting as a mothership for catcher vessels in this fishery. Since the implementation of the TLA fishery in 2008, American Fisheries Act (AFA) and Non-AFA catcher vessels, AFA catcher processors, floating processors, and Amendment 80 motherships have participated in the TLA fishery. In 2015, new vessels entered the TLA fishery. Historic participants are concerned about the impact of these new participants on their access to the yellowfin sole in the TLA fishery.

. . . Limiting access may help ensure that the TLA fishery continues to provide benefits to historic participants, mitigate the risk that a “race for fish” could develop, and help to maintain the consistently low rates of halibut bycatch in this fishery. The Council also recognizes that when the TAC assigned to the TLA fishery is relatively high, opportunities for new entrants could be provided without unduly constraining historic participants.

The Council is considering two alternatives. Alternative 1 is no action-status quo. Alternative 2 would permit a trawl catcher vessel to target BSAI TLA yellowfin sole and deliver its catch to a mothership or catcher/processor only if that trawl catcher vessel is assigned an LLP that is credited with at least one trip target landing in the BSAI TLA yellowfin sole fishery made to a mothership or catcher/processor between two ranges of years, with sub-options for a landing in any one year or in any two years within the selected range. Alternative 2 also includes two options that would allow trawl catcher vessels that do not meet the eligibility criteria to participate in the BSAI TLA yellowfin sole fishery under certain conditions.

The BSAI yellowfin sole fishery is primarily divided into three sectors – the CDQ sector, the Amendment 80 sector, and the BSAI TLA yellowfin sole sector. The action before the Council would not affect the CDQ or the Amendment 80 sectors because it would not modify any of the management measures currently in place for either of these sectors. Within the BSAI TLA yellowfin sole sector of the fishery, there are several groups of participants, such as AFA and non-AFA catcher vessels, AFA catcher/processor vessels, and Amendment 80 motherships. However, the allocation of yellowfin sole to the sector is not further allocated among these groups of participants, and the entire allocation of yellowfin sole to the BSAI TLA sector is available to all of these participants.

The alternatives and options for limiting access apply to only one group of participants in the BSAI TLA yellowfin sole fishery: AFA and non-AFA trawl catcher vessels that deliver their catch of BSAI TLA yellowfin sole to the offshore sector (either catcher/processor or mothership vessels). The Council is not considering alternatives that would directly limit access by the other participants in the BSAI TLA yellowfin sole fishery. However, any action to limit access by one group of participants in the BSAI TLA yellowfin sole fishery also affects the other participants and the BSAI TLA yellowfin sole fishery as a whole because the entire allocation of yellowfin sole to the BSAI TLA fishery is available to all of these participants. As stated in the purpose and need, an action that limits the access of trawl catcher vessels to the BSAI TLA yellowfin sole fishery “may help ensure that the TLA fishery continues to provide benefits to historic participants” who are concerned about their access to yellowfin sole in the TLA fishery and the impacts created by the entry of new participants.

Recusal Thresholds for the BSAI TLA Yellowfin Sole Fishery

Using the most recent fishing year for which information is available, the regulations at 50 CFR 600.235(c) require the voting recusal of a Council member with financial interests that: (1) harvest, process, or market more than ten percent of the total harvest of the fishery or sector of the fishery in question; or (2) fully or partially own more than ten percent of the vessels using the same gear type within the fishery or sector of the fishery in question. The most recent fishing year for which an entire year of information is available is 2016; however, almost 70% of the 2017 BSAI TLS yellowfin sole fishery has been harvested as of April 27, 2017. Although we examined available information for both years, the recusal conclusions for each Council member do not differ between years. Therefore, a choice between 2016 or 2017 fishing information is unnecessary because the recusal conclusion for each Council member remains the same for both years.

The total amount of yellowfin sole available for harvest in the 2016 BSAI TLA fishery was 14,979 metric tons (mt) and the total amount of yellowfin sole available for harvest in the 2017 BSAI TLA fishery is 18,151 mt. The ten percent harvesting, processing, and marketing threshold is 1,497.9 mt for the 2016 BSAI TLA yellowfin sole fishery and 1,815.1 mt for the 2017 BSAI TLA yellowfin sole fishery.

Determination as to whether the action is a particular matter primarily of individual concern for any Council member under 50 CFR 600.225

Council actions that would affect only a Council member's financial interest and a few other fishery participants have been found to be particular matters primarily of individual concern.² The Analysis demonstrates that there are more than a few vessels harvesting yellowfin sole in the BSAI TLA fishery and more than a few vessels that could be affected by this action. Therefore, we have determined that the action to limit trawl catcher vessel access to the BSAI TLA yellowfin sole fishery is not a particular matter primarily of individual concern for any Council member.

Individual determinations as to whether any Council member's financial interests exceed the recusal thresholds under 50 CFR 600.235

Mr. Cross

According to Mr. Cross' financial disclosure statement dated January 5, 2017, Mr. Cross is employed with Aleutian Spray Fisheries, Inc. (ASF). ASF has financial interests in trawl catcher vessels and AFA catcher/processor vessels. However, none of these vessels harvested or processed BSAI TLA yellowfin sole in either 2016 or 2017. Because the Council's decision will not result in an expected and substantially disproportionate benefit to Mr. Cross' listed financial interests, no significant and predictable effect from a Council decision on limiting trawl catcher vessel access to the BSAI TLA yellowfin sole fishery exists for any of Mr. Cross' disclosed financial interests. Therefore, Mr. Cross is not required to recuse himself from voting on the action under 50 CFR § 600.235.

Mr. Kinneen

According to Mr. Kinneen's financial disclosure statement dated January 20, 2017, Mr. Kinneen is employed with Norton Sound Economic Development Corporation (NSEDC), a Community Development Quota (CDQ) group. NSEDC has financial interests that own trawl catcher vessels, AFA catcher/processor vessels, and Amendment 80 catcher/processor vessels, but only one of these vessels has participated in the BSAI TLA yellowfin sole fishery.³ In 2016, Mr.

² The proposed rule preamble for the original recusal regulations at 50 CFR 600.235 identified "contracts with the member's employer, grants to the member's academic institution, and management measures that affect only the member's business and a few other fishery participants" as examples of particular matters primarily of individual concern. 62 Fed. Reg. 42474, 42475 (August 7, 1997).

³ This information was released to the public through the Pollock Conservation Cooperative and High Seas Catchers' Cooperative Joint Annual Report 2016, available at https://www.npfmc.org/wp-content/PDFdocuments/catch_shares/CoopRpts2016/PCC_HSCC_AFA16.pdf.

Kinneen's financial interests harvested [REDACTED] from the BSAI TLA fishery, which exceeds the harvesting threshold of 1,497.9 mt. As of April 21, 2017, Mr. Kinneen's financial interests harvested [REDACTED] from the BSAI TLA fishery, which exceeds the harvesting threshold of 1,815.1 mt. Under the regulations at 50 CFR 600.235(c), exceedance of a recusal threshold indicates that the Council's decision will result in an expected and substantially disproportionate benefit to Mr. Kinneen's listed financial interests and that a significant and predictable effect from a Council decision on limiting trawl catcher vessel access to the BSAI TLA yellowfin sole fishery exists for Mr. Kinneen's financial interests.⁴ Therefore, Mr. Kinneen is required to recuse himself from voting on the action under 50 CFR § 600.235.

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

Mr. Down, Mr. Hull, Mr. Laukitis, Mr. Mezirow, and Ms. Peterson

According to their current financial disclosure statements, none of these Council members have financial interests in trawl catcher vessels, Amendment 80 catcher/processors, or AFA catcher/processors, and none of them have financial interests that participate in the BSAI TLA yellowfin sole fishery. Without any financial interests in the BSAI TLA yellowfin sole fishery, the Council's decision will not result in an expected and substantially disproportionate benefit to any of these Council members' listed financial interests, and no significant and predictable effect from a Council decision on limiting trawl catcher vessel access to the BSAI TLA yellowfin sole fishery exists for any of their disclosed financial interests. Therefore, none of these Council members are required to recuse themselves from voting on the action under 50 CFR § 600.235.

⁴ Because Mr. Kinneen's financial interests exceed the harvesting threshold, we do not need to determine whether his financial interests exceed the vessel ownership recusal threshold.