



May 29, 2015

Via Email and First Class Mail-Return Receipt Requested

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Mr. Sam Cotten, Commissioner
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Dear Mr. Kinneen, Mr. Long and Mr. Cotten:

This letter is in response to your May 22, 2015 requests for review of a determination by the Designated Official in the Alaska Section of the NOAA Office of General Counsel¹ that Mr. Kinneen and Mr. Long must recuse themselves from an upcoming vote of the North Pacific Fishery Management Council (NPFMC). *See* 50 C.F.R. § 600.235(g).

The upcoming vote concerns proposed revisions to Pacific halibut prohibited species catch (PSC) limits for Bering Sea/Aleutian Islands (BSAI) groundfish fisheries. When initiating this action in June 2014, the Council explained that halibut PSC in the groundfish fishery had not declined in proportion to recent harvest reduction in the directed halibut fishery and that “the current low status and continued declines in the halibut resource require immediate action by the Council and industry.” EA at 37. As explained in the Council’s Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA) prepared for this action, the NPFMC’s purpose in taking this action includes to “minimize halibut PSC mortality in the commercial groundfish fisheries to the extent practicable, while preserving the potential for optimum harvest [of groundfish].”² EA at 18.

¹ The Designated Official is “an attorney designated by the NOAA General Counsel,” 50 C.F.R. § 600.235(a), to evaluate Council members’ financial interests.

² The other purpose of the action is to provide additional harvest opportunities for the directed halibut fishery.



The BSAI groundfish fishery includes the BSAI trawl limited access sector, the Amendment 80 sector, longline catcher vessels, longline catcher processors, and the Community Development Quota (CDQ) sector. The NPFMC is set to consider at its meeting beginning June 1, 2015, a suite of six management options to meet its goal of reducing halibut PSC mortality and may adopt any combination of the six proposed options. Broadly stated, those options are (1) reducing the halibut PSC limit for the Amendment 80 sector, (2) reducing the halibut PSC limit for the BSAI trawl limited access sector, (3) reducing the halibut PSC limit for the Pacific cod hook and line catcher processor sector, (4) reducing the halibut PSC limit for other non-trawl, (5) reducing the halibut PSC limit for the Pacific cod hook and line catcher vessel sector, and (6) reducing the halibut PSC limit for the CDQ sector.

In their requests for review, the parties argue that the decision of the Designated Official should be reversed on two grounds. First, the parties argue that the Designated Official should not have aggregated the members' interest in the BSAI groundfish fishery, but should have instead considered their interest in each sector separately. Second, the parties argue that the Designated Official should not have included the pollock fishery as part of the BSAI groundfish fishery that is impacted by the Council decision.³

After careful examination of the issues on the record before the Designated Official, as well as the timely and thoughtful requests for review, we conclude that the Designated Official reached the proper conclusion and affirm that determination. While we are upholding the determination that Mr. Kinneen and Mr. Long are recused from voting on this matter, both may participate in Council deliberations and may inform the Council of what their votes would have been. *See* 16 U.S.C. § 1852(j)(7)(A).

LEGAL FRAMEWORK

The MSA exempts certain members of Fishery Management Councils from 18 U.S.C. § 208, the general ethics law,⁴ provided that they comply with prescribed financial disclosure requirements. 16 U.S.C. § 1852(j)(8). Until 1996, disclosure of potential conflicts was all that the MSA required. But as part of the 1996 Sustainable Fisheries Act, Congress acted to require recusal of Council members for certain votes in which they have or their employer has a financial interest, as revealed by their financial disclosures. *See* 62 Fed. Reg. 42,474, 42,475 (Aug. 7, 1997). The MSA now requires that:

[A]n affected individual required to disclose a financial interest under paragraph (2) shall not vote on a Council decision which would have a significant and predictable effect on such financial interest. A Council decision shall be considered to have a significant and predictable effect on a financial interest if there is a close causal link between the Council decision and an expected and

³ Mr. Kinneen raised a third ground. He argues that the Designated Official should not have attributed 100% of the interest owned by subsidiaries of his employer to him. As Mr. Kinneen acknowledges, this office has already considered and rejected this argument in a decision issued April 8, 2015, and it will not be reconsidered here.

⁴ In general, 18 U.S.C. § 208 provides for criminal sanctions for federal employees who participate in decisions in which he (or his employer) has a financial interest.

substantially disproportionate benefit to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery.

16 U.S.C. § 1852(j)(7)(A).

In 1998, the National Marine Fisheries Service (NMFS) issued regulations implementing this requirement. In its proposed rule, NMFS explained that “[t]he purpose of the 1996 amendments was to address real or perceived conflicts of interest, i.e., situations where Council members might have a greater incentive to protect their own financial interests than to consider the welfare of all fishery participants and the national interest.” 62 Fed. Reg. at 42,476. In the final rule, to achieve this purpose, NMFS defined “significant and predictable effect on a financial interest” as:

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.

50 C.F.R. § 600.235(c)(2).

NMFS further defined “expected and substantially disproportionate benefit” 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.

Id. § 600.235(c)(3).

This appeal centers on the question of how the Designated Official should apply the terms “Council decision” and “fishery or sector of the fishery,” neither of which is defined by § 600.235. The term “fishery,” however, is defined in the regulations as “[o]ne or more stocks of

fish that can be treated as a unit for purposes of conservation and management and that are identified on the basis of geographic, scientific, technical, recreational, or economic characteristics, or method of catch,” as well as “any fishing for such stocks.” *Id.* § 600.10.

FACTS

In making the recusal determination, the Designated Official found that “the fishery or sector of the fishery” affected by the “Council decision” was the entire BSAI groundfish fishery except for those sectors exempted from halibut PSC limits (pot and jig groundfish fisheries) and sectors specifically excluded by the Council (sablefish fixed gear fishery).

The Designated Official made this determination based on the nature of the action before the Council. The Council is considering two alternatives: Alternative 1 (no action) and Alternative 2, which includes all six options discussed above. The Designated Official concluded that “[r]ecusal analysis by individual sector would not be consistent with the action being considered by the Council or the structure of Alternative 2 because the only action alternative includes all of the specified sectors.”

In correspondence with Mr. Kinneen, the Designated Official further explained that non-CDQ pollock was included as part of the analysis even though the halibut PSC limit is not currently constraining (that is, unlike other fisheries, the non-CDQ pollock fishery is not required to shut down after its halibut PSC limit is reached). The Designated Official explained that this decision was reached because (1) unlike sablefish or the jig and pot fisheries, the Council did not specifically exclude the non-CDQ pollock fishery from the action, (2) a halibut PSC limit is set for non-CDQ pollock (even though it is not constraining), and (3) that limit directly affects the other fishery categories within the BSAI groundfish fishery. The Designated Official further explained that exclusion of the non-CDQ pollock fishery from the analysis would not change the outcome, as both Mr. Kinneen and Mr. Long would still have an interest above a 10% threshold if non-CDQ pollock catch were excluded from the calculations.

DISCUSSION

A. Aggregation of the BSAI Groundfish Fishery

The parties argue that the Designated Official was required to conduct the recusal analysis on a sector-by-sector basis. As an initial matter, Mr. Cotten argues that the regulations at 50 C.F.R. § 600.235(c)(3) compel the Designated Official to “determin[e] a disqualifying benefit . . . based on the sector of the fishery in question.”

The regulations, however, do not require a sector-by-sector approach in every instance. Instead, the regulations explicitly state that the decision should be based on “the fishery *or* sector of the fishery in question.” 50 C.F.R. § 600.235(c)(3) (emphasis added). And the term “fishery” can include more than one stock or gear type, depending on the circumstances. *See id.* § 600.10. This language demonstrates that the appropriate level of subdivision will depend on the nature of the decision before the Council.

In this case, the decision before the Council is the reduction of the halibut PSC limit for the groundfish fishery as a whole. The text of the EA prepared by the Council in advance of the meeting and the statements of the Council in preparing to address this issue both support this understanding of the decision before the Council. To achieve this goal, the Council will have to consider how to reduce that limit across each sector of the groundfish fishery, but that does not change the nature of the decision as a whole. A decision to take reductions from one sector could achieve the purpose for the action, and fewer reductions could be required from other sectors to meet the Council's overall goal. As a result, the decisions with respect to each option are so interrelated that attempts to segment the decision by sector would not be meaningful.

Furthermore, when the Council votes on this matter, it will be voting on all six options as a whole. For example, if the Council were to vote on a motion adopting a specific reduction amount for options 1 and 2, it would effectively determine the specific reduction amount on options 3, 4, 5, and 6 (*i.e.*, a vote to reduce the halibut PSC limit in one or more sectors could govern the reduction amounts in other sectors to achieve the Council's overall objective for the BSAI groundfish fishery). Accordingly, we conclude that there is a "close causal link between the decision" and a financial interest in the BSAI groundfish fishery as a whole.

Mr. Kinneen and Mr. Cotten question relying on the Council's construction of the alternatives as a basis for determining the fishery or sector of the fishery at issue. Our decision is not solely based on the way the Council has structured the alternatives, but also on the overall nature of the Council decision at issue (*i.e.*, reduction of halibut PSC across the groundfish fishery *as a whole*). It is the broad purpose of the action that leads to a broad definition of the fishery at issue for purposes of the recusal determination.

Mr. Kinneen and Mr. Cotten also argue that it is unfair that an individual with a greater than 10% interest in the entire BSAI groundfish fishery must recuse while those with a greater than 10% interest in individual sectors are not required to recuse. In evaluating whether recusal is appropriate, the Office of General Counsel must look to the nature of the Council decision at issue. Given the specific Council action at issue here and the purpose of that action (addressing halibut PSC for the entire groundfish fishery), looking at the action as a whole is appropriate.

B. Inclusion of the Pollock Fishery


The parties also object to the Designated Official's inclusion of the pollock fishery as a component of the fishery in question. As noted above, the Designated Official indicated that even if non-CDQ pollock catch were excluded from the calculations Mr. Kinneen and Mr. Long would still have an interest above a 10% threshold, although the Designated Official did not communicate the specific basis for this conclusion. Based on our review of the record before the Designated Official, including Magnuson Act confidential information, we compute 753,635 metric tons (mt) as the total 2014 groundfish catch, excluding the sectors not considered by the Designated Office (sablefish fixed gear fishery and the pot and jig groundfish fisheries) and all non-CDQ pollock catch.

We further compute the total amount of 2014 catch attributed to Mr. Kinneen and Mr. Long, excluding catch in the categories listed above, as exceeding a threshold of 10 percent of

this amount (75,364 mt).⁵ As the outcome of the recusal determination is the same whether or not pollock is included in the analysis, we do not reach this second issue.

While we are affirming the recusal determination by the Designated Official, we underscore again that Mr. Kinneen and Mr. Long may participate in Council deliberations on this matter and may inform the Council of how you would vote. *See* 16 U.S.C. § 1852(j)(7)(A).

Sincerely,


Mary Beth Ward
Deputy General Counsel

⁵ In a May 27, 2015 email sent to Mr. Kinneen, Mr. Long and Mr. Cotten, we provided these computations; Mr. Kinneen replied that he had no disagreement with the computations, Mr. Long and Mr. Cotten did not respond with any identified basis for disagreement with them.