

MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver *CO*
Executive Director
DATE: October 1, 2005
SUBJECT: Community Development Quota (CDQ) Program

ESTIMATED TIME
2 HOURS
(All C-2 items)

ACTION REQUIRED

(c) Update on Amendment 71 and the CDQ allocation process, action as necessary

BACKGROUND

Sally Bibb (NMFS) will report on the status of Amendment 71 to the BSAI FMP and the on-going CDQ allocation process for 2005 crab and for all CDQ allocations for 2006 and beyond.

BSAI Amendment 71

Amendment 71 was approved by the Council in June 2002. **Item C-2(c)(1)** is the Council's final action making recommendations about eight issues related to the CDQ allocation process and oversight of the program. In March 2005, NMFS implemented regulations for Issue 8 to simplify and streamline administrative regulations related to quota transfers, authorized vessels, and alternative fishing plans. However, NMFS has not been able to implement regulations for the remaining seven issues that address the purpose of the CDQ Program, the process for allocating quota among the CDQ groups, and oversight of the economic development aspects of the CDQ Program.

Item C-2(c)(2) is a June 23, 2005, letter from NMFS to Robin Samuelson (BBEDC) responding to his request for information about the status of Amendment 71. This letter provides an overview of the issues that have arisen during development of a proposed rule for Amendment 71 that led to NMFS's decision to suspend further work on Amendment 71 until it could consult further with the Council. In summary, while developing the proposed rule, NMFS identified a number of legal and policy issues that slowed progress and required repeated consultations with the Council. These issues include advice from NOAA GC: (1) that NMFS must include an administrative appeals process for decisions about the approval of allocations among the CDQ groups, the Community Development Plans (CDPs), and amendments to the CDPs; (2) that administrative determinations to approve CDQ projects in the CDPs or in amendments to the CDPs are likely Federal actions subject to the Endangered Species Act and the National Environmental Policy Act; and (3) that NMFS must establish the confidentiality status of information submitted by the CDQ groups and by the State on behalf of the CDQ groups.

Under the current structure of the CDQ Program, resolution of these issues will increase the role of NMFS in oversight of the CDQ Program; change the nature of the oversight relationship between the State and NMFS; increase the time it will take NMFS to make administrative determinations about allocations, CDPs, and CDQ

projects; and increase costs to the CDQ groups, State, and NMFS. The administrative and financial implications of these legal issues were not included in the analysis reviewed by the Council at the time it took final action on Amendment 71. In addition, a decision issued by the Alaska Region in response to an administrative appeal reversed NMFS's longstanding interpretation of its regulations that the CDQ groups may invest only in fisheries related economic development projects. Finally, at its April 2005 meeting, the Council expressed concerns about the CDQ allocation process and oversight of the CDQ Program. After the State created the Blue Ribbon Panel in response to the Council's concerns, NMFS suspended further work on Amendment 71 until the Council could review the legal and policy issues described above, as well as decide whether to add some or all of the Blue Ribbon Panel's recommendations as new alternatives to the Amendment 71 analysis.

CDQ allocation process

NMFS will update the Council on two recent actions that relate to the allocation of groundfish, prohibited species, halibut, and crab quotas among the CDQ groups. First, on August 8, 2005, NMFS issued an initial administrative determination (IAD) to extend the current CDQ allocations beyond their expiration date of December 31, 2005 (**Item C-2(c)(3)**). This action was taken by NMFS because the State did not submit its CDQ allocation recommendations for 2006 - 2008 to NMFS by the agreed upon date of April 15, 2005. NMFS has been notifying the State, the CDQ groups, and the Council since October 2003 that the addition of the required administrative appeals process would require the State to submit its 2006 - 2008 CDQ allocation recommendations to NMFS by May 1, 2005. In 2004, the State voluntarily agreed to an April 15, 2005 submission date. However, on May 31, 2005, the State notified the CDQ groups that it would not submit 2006 - 2008 CDQ allocation recommendations to NMFS until after the Blue Ribbon Panel had reported to the Governor (see **Item C-2(b)(4)**). It was necessary for NMFS to take administrative action to address this delay in order to provide CDQ allocations among the CDQ groups for 2006 and beyond. NMFS provided the CDQ groups 30 days to administratively appeal the IAD to extend the current allocations. Although NMFS received comments in opposition to this action by five of the six CDQ groups (**Item C-2(c)(4)**), none of the CDQ groups elected to file an administrative appeal. **Therefore, the IAD became final agency action on September 7, 2005, and the 2003 - 2005 CDQ allocations will remain in effect until they are replaced by a future final agency action for new CDQ allocations.**

The second recent action related to CDQ allocations is an IAD issued by the Sustainable Fisheries Division on September 19, 2005, to disapprove the State's 2005 CDQ allocation recommendations for Eastern Aleutian Islands golden king crab and Adak red king crab. The allocation of 10 percent of the EAI golden king crab and Adak red king crab TACs to the CDQ Program was established through the crab rationalization final rule in March 2005. NMFS administrative action is necessary to further allocate the two new crab CDQ reserves among the six CDQ groups. The State submitted its allocation recommendations for these two new crab species on July 14, 2005. NMFS's Sustainable Fisheries Division issued an IAD to disapprove the State's recommendations because the State did not provide a reasonable explanation for its recommendations as required by Federal regulations at 50 CFR 679.30(d). Specifically, the State's rationale did not demonstrate that the State applied all of the evaluation criteria that it said it focused on in its allocation recommendations, and the State did not provide an adequate explanation about how it used its conclusions about the evaluation criteria applied to determine the specific percentage allocations it recommended for each CDQ group. The State and the CDQ groups have until October 19, 2005, to administratively appeal this IAD to NMFS's Office of Administrative Appeals. The IAD is provided as **Item C-2(c)(5)**.

CDQ Community Eligibility

The transportation bill¹ signed by the President on August 10, 2005, includes a provision on CDQ community eligibility in Section 10206. The text of this section is provided as **Item C-2(c)(6)**. This legislation clarifies that western Alaska communities eligible to participate in the CDQ Program are those that are: (1) listed in Table 7 to part 679 of title 50, Code of Federal Regulations, as in effect on March 8, 2004; or (2) determined to be eligible to participate in such program by NMFS on April 19, 1999. In effect, the provision clarifies that the only communities eligible for the CDQ Program are the 65 communities that have been participating in the program since 1999.

Recall that CDQ community eligibility has been an ongoing issue for several years. NMFS regulations currently include the same community eligibility criteria as found in the Magnuson-Stevens Act (MSA), but the regulations also state that a community can be eligible for the CDQ Program if listed on Table 7 to 50 CFR 679. The Council reviewed a discussion paper in October 2003 that indicated that at least one community did not meet the eligibility requirements for the CDQ Program, but was authorized to participate in the program in 1992 by being listed in Table 7. In addition, in a legal opinion dated August 15, 2003, NOAA GC advised that NMFS regulations must be revised to be consistent with the MSA and that the eligibility status of all 65 communities currently participating in the program must be reviewed to ensure consistency with the MSA eligibility criteria. Upon review, the Council recommended that staff develop a draft analysis to this effect, unless an act of Congress made the review unnecessary. NMFS subsequently received a letter from Senator Lisa Murkowski (November 26, 2003) requesting that the agency refrain from further action, given that Congress would likely address the issue. The recent transportation bill keeps all of the currently participating communities eligible.

NMFS will undertake rulemaking in the near future to update Table 7 to Part 679 to include all 65 eligible communities.² Initial and final Council review of this analysis will likely be scheduled for the December 2005 and February 2006 Council meetings, respectively.

¹The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for User, H.R.3, 109th Cong. (2005) (enacted)) (SAFETEA-LU).

²The final rule to implement the CDQ Program (57 CFR 54936, 11/23/92) included a list of eligibility criteria, as well as a list (Table 7) of 55 eligible communities that appeared to meet the criteria. In 1996, NMFS published a final rule adding Akutan to Table 7. Finally, in April 1999, NMFS made an administrative determination that an additional 8 communities were eligible, based on a recommendation and supporting documentation from the State of Alaska. Table 7 has not been updated to include these final 8 communities.

**Council Motion on final action for BSAI Amendment 71 - CDQ Policy Amendment
June 7, 2002**

The Council recommends that the following policy and administrative changes be made to the CDQ Program as defined by the following issues and alternatives.

Issue 1: Determine the process through which CDQ allocations are made

The Council adopts Alternative 2 (amended), to define the process in regulation, include an expanded State hearing and comment process, but no formal appeals process.

Issue 2: Periodic or long-term CDQ allocations

The Council adopts Alternative 2, Option 2, Suboption 1: Set fixed 3-year allocations with possible mid-cycle adjustments for extraordinary circumstances.

- Alternative 2: Establish a fixed allocation cycle in regulation.
- Option 2: 3-year allocation cycle.
- Suboption 1: Allow the State to recommend reallocation of CDQ mid-cycle under extraordinary circumstances. Council and NMFS would have to approve the State's recommended reallocation.

Additionally, the Council recommends that the regulations must be revised to reflect that suspension or termination of the CDQ allocations would be an administrative determination by NMFS and that the CDQ groups involved would be allowed an opportunity to appeal NMFS's initial administrative determination on any changes in CDQ allocations. The Council also recommends removing the requirement to publish a notice in the Federal Register about suspension or termination of a CDQ allocation.

Issue 3: Role of government oversight

The Council adopts Alternative 2, amend the BSAI FMP to specify government oversight purposes as described in the analysis.

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.

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;
3. Ensure that internal investment criteria and policies are established and followed;
4. 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;
5. Ensure that training, employment, and education benefits are being provided to the communities and residents; and
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: Types of quotas

The Council adopts Alternative 1 - no action.

Issue 5: CDQ allocation process - The evaluation criteria

The Council adopts Alternative 2 (amended), to publish the following criteria in NMFS regulations:

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, past performance of the CDQ group and proposed fishing plans in promoting conservation based fisheries by taking action that will minimize bycatch, provide for full retention and increased utilization of the fishery resource, and minimize impact to the 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.

Issue 6: Extent of government oversight

The Council adopts Alternative 2 to clarify that government oversight extends to subsidiaries controlled by CDQ groups. To have effective management control or controlling interest in a company the ownership needs to be, at a minimum, 51%.

Issue 7: Allowable investments by CDQ groups: Fisheries-related projects

The Council adopts Alternative 3, amended Option 2, amended Suboption 1, and amended Supoption A.

Alternative 3: Revise NMFS regulations to allow investments in non-fisheries related projects. The following option represents the annual 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 2 (amended): Allow each CDQ group to invest up to 20% of its previous year's pollock CDQ royalties.

Suboption 1 (amended): Require that any non-fisheries related investment be made in economic development projects in the region of Alaska represented by the CDQ groups and be self-sustaining. In-region extends to the borders of the 65 communities that participate in the CDQ Program.

Suboption A (amended): The goals and purpose of the CDQ Program are to allocate CDQ to qualified applicants representing eligible Western Alaska communities as the first priority, to provide the means for investing in, participating in, starting or supporting commercial fisheries business activities that will result in an on-going, regionally based fisheries economy and, as a second priority, to strengthen the non-fisheries related economy in the region. *(The intent of this statement is that fisheries-related projects will be given more weight in the allocation process than non-fisheries related projects.)*

Issue 8: Other CDQ Administrative Issues

The Council adopted Alternative 2, all three options.

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 to 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.



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

June 23, 2005

Robin Samuelson
Bristol Bay Economic Development Corporation
P.O. Box 1464
Dillingham, Alaska 99576

Dear Mr. Samuelson:

Thank you for your letter of April 27, 2005, asking about the status of Amendment 71 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The amendment and associated regulatory revisions contain recommendations on eight issues related to the purpose of the Community Development Quota (CDQ) Program, the process for allocating quota among the CDQ groups, and oversight of the economic development aspects of the CDQ Program. The North Pacific Fishery Management Council (Council) approved Amendment 71 at its June 2002 meeting.

I apologize that it has taken so long to respond to your letter, but I determined that it was important to provide information to the Council about this action at its June 2005 meeting before responding to your letter. As NMFS reported to the Council, for reasons described in detail below, the agency has suspended further development of the FMP amendment and associated rulemaking for Amendment 71. NMFS intends to consult with the Council at its October 2005 meeting and request further direction on all of the issues in Amendment 71 related to the CDQ allocation process and government oversight of the program and the CDQ groups.

Since June 2002, NMFS has been developing a proposed rule that would implement the Council's recommendations on Amendment 71. However, a number of significant legal and policy issues have arisen that must be addressed in the action. These issues include:

1. questions about the eligibility status of the 65 communities currently participating in the CDQ Program;
2. advice from NOAA General Counsel (GC) that NMFS must revise its administrative decision making process to include an administrative appeals process for decisions about the approval of allocations among the CDQ groups, the Community Development Plans (CDPs), and amendments to the CDPs;



3. advice from NOAA GC that NMFS's administrative determinations to approve CDQ projects in the CDPs or in amendments to the CDP probably are federal actions subject to the National Environmental Policy Act, the Endangered Species Act, and other federal laws; and
4. the need for NMFS to establish the confidentiality status of information submitted by the State on behalf of the CDQ groups.

Under the current structure of the CDQ Program, resolution of these issues likely will increase the role of NMFS in oversight of the CDQ Program; change the nature of the oversight relationship between the State of Alaska (State) and NMFS; increase the time it will take NMFS to make administrative determinations about allocations, CDPs, and CDQ projects; and increase costs to the CDQ groups, the State, and NMFS. The administrative and financial implications of these legal issues were not included in the analysis reviewed by the Council at the time it took final action on Amendment 71.

NMFS notified the Council of these issues as they arose in 2003 and 2004. In April 2004, we advised the Council that the issues identified thus far were significant enough to require revisions to the analysis for Amendment 71 and additional review by the Council. NMFS recommended that the eight issues in Amendment 71 be divided into the following three actions:

- Issues 1 through 6, which address the CDQ allocation process, the role of government in oversight of the CDQ Program, and oversight of subsidiaries were grouped under Amendment 71b and identified as issues that needed further analysis and review by the Council;
- Issue 7, which addresses the purpose of the CDQ Program and would allow the CDQ groups to invest up to 20 percent of their previous year's pollock CDQ royalties in non-fisheries related investments, was identified as Amendment 71a; and
- Issue 8, which was a regulatory amendment to simplify procedures for making quota transfers, identifying CDQ eligible vessels, and proposing alternative fishing plans, was promulgated through a final rule published on March 24, 2005 (70 FR 15010).

NMFS initially determined that Issue 7 could proceed to a proposed FMP amendment and proposed rule without further analysis or consideration by the Council. Given this determination, NMFS prepared a proposed rule and FMP amendment package to address the elements of Amendment 71a. However, in November 2004, the NMFS Office of Administrative Appeals (OAA) reversed the Sustainable Fisheries Division's (SFD's) initial administrative determination that disapproved two amendments to a CDP because the CDQ projects that were the subject of the amendments were not consistent with the goals and purpose of the CDQ Program to start or support commercial fisheries business related activities." (OAA Appeal No. 03-0022; November 26, 2004). Although it agreed that the multipurpose buildings that Norton Sound Economic Development Corporation proposed to fund through the amendments were not fisheries related, the OAA

determined that NMFS regulations did not specifically require that each CDQ project must be fisheries related. Further, the OAA determined that the purpose of the CDQ Program at 50 CFR 679.1(e) could only be applied in a general sense to the CDP as a whole, but could not be applied to individual CDQ projects. In other words, in reviewing a proposed CDP or a proposed amendment to a CDP, NMFS must consider only whether the CDP as a whole is consistent with the goals and purpose of the CDQ Program. The Alaska Regional Administrator affirmed the OAA's decision in December 2004.

The SFD's interpretation that NMFS's regulations required all CDQ projects to be "fisheries related" was a significant assumption in the analysis prepared for Council action on Amendment 71. This interpretation provided the basis for the Council's recommendation to "expand" the purpose of the CDQ Program and to "allow" the CDQ groups to invest in non-fisheries related projects. Once NMFS accepted the new interpretation of its regulations under the NSEDC appeal decision, the status quo on which the Council based its recommendations about allowing non-fisheries related investments changed. NMFS now must apply a significantly more expansive interpretation of its regulations to the review of future CDPs and amendments. Therefore, the Council's belief that Amendment 71a would "expand" and "allow" a wider range of investments is no longer valid relative to the re-interpreted status quo. In fact, under the NSEDC decision, the Council's recommendations could be considered more restrictive than the status quo.

Additional issues that have arisen more recently, when combined with the issues described above, have resulted in NMFS's determination to suspend work on Amendment 71a until we can obtain further direction from the Council. These events include: (1) the Council's discussion of the CDQ allocation process at its April 2005 meeting, (2) the Council's initiative for creation of the State's blue ribbon panel to review the CDQ Program in its entirety, and (3) the indeterminate delay in the State's CDQ allocation process for 2006-2008.

Discussion at the April 2005 Council meeting: During the Council's April discussion of the State's CDQ allocation recommendations for 2006 - 2008, several Council members stated that it is nearly impossible to objectively define the term "sustainable" in the context of economic development projects. However, the Council has tasked NMFS with this exact project in the proposed rule for Amendment 71a because the Council's June 2002 recommendation would require NMFS to limit each CDQ group's annual investments in "non-fisheries related self-sustaining economic development projects in the CDQ region of Alaska." In order to monitor and enforce such a limit, NMFS must clearly define the characteristics of a non-fisheries related self-sustaining economic development project and, for every investment made by a CDQ group, NMFS would have to determine whether that investment met the criteria in NMFS regulations. Amendment 71a would increase NMFS's role in the CDQ Program by increasing the agency's responsibilities for review and approval of CDPs and CDQ projects and for monitoring and enforcing the investment limits recommended by the Council. Based on its April 2005 discussion, NMFS has determined that the Council should provide

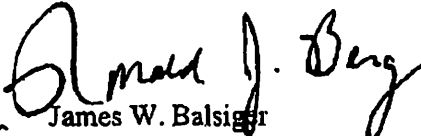
additional input on the direction NMFS is taking with the proposed rule before it is published for public comment.

The State's Blue Ribbon Panel: At its April 2005 meeting, and after a lengthy discussion about the State's initial CDQ allocation recommendations, the Council recommended that the State establish a blue ribbon panel "which, after a review of the CDQ program in its entirety, would provide a report and recommendations to the Governor." The Council recommended that the panel review current regulations, examine the CDQ groups' investments, and prioritize the types of investments and economic development projects that the CDQ groups should support. Specifically, the Council recommended that the panel review the "need to expand the opportunities for CDQ investments and developments outside fisheries businesses." In establishing the blue ribbon panel, the Governor of Alaska stated that the "panel will meet to conduct a thorough review of the CDQ program, including its regulations, investments, goals, timeline of allocations and state oversight." Allowable investments by the CDQ groups, specifically fisheries and non-fisheries related investments, is the subject of the proposed rule for Amendment 71a. NMFS has determined that it should not continue to develop the Council's 2002 recommendations on Amendment 71a while the blue ribbon panel is reviewing this issue, particularly because it is doing so specifically at the request of the Council.

The 2006-2008 CDO allocation process: In October 2003, NMFS notified the Council and the public that an opportunity for the CDQ groups to administratively appeal to NMFS would have to be added to the CDQ allocation process. A schedule developed between NMFS and the State specified that the State would submit its allocation recommendations for 2006 - 2008 to NMFS by April 15, 2005, to provide NMFS enough time to complete the administrative appeals process and issue a final decision on CDQ allocations by December 31, 2005. However, on May 31, 2005, the State notified the CDQ groups that it would not submit its allocation recommendations to NMFS until after the Blue Ribbon Panel provided its report to the Governor of Alaska, which is expected to be later this summer or early fall. This schedule will not provide time for NMFS to review the State's recommendations, hold an administrative appeals process, and make a final agency decision before the current allocations expire at the end of 2005. Although not directly related to the issues addressed by Amendment 71a, this delay in the CDQ allocation process indirectly affects all aspects of the CDQ Program and must be considered when making long term plans for oversight and administration of the program by the State and NMFS. In the likely event that NMFS cannot complete final agency action on new CDQ allocations recommended by the State, NMFS is examining an option to extend the current CDQ allocations beyond December 31, 2005. The extended allocations would remain in effect until replaced by subsequent final agency action that changes the CDQ allocations. We will provide more information about extension of the current allocations as soon as possible.

Please contact Sally Bibb at 907-586-7389 if you have any further questions about the plans that I have described in this letter or our further consultation with the Council about CDQ Program allocations and oversight.

Sincerely,

For 
James W. Balsiger
Administrator, Alaska Region

cc: NPFMC
CDQ groups
Cashen, ADCED

August 8, 2005

Larry Cotter
Aleutian Pribilof Island Community
Development Association
234 Gold Street
Juneau, Alaska 99081

CERTIFIED – RETURN RECEIPT
CERTIFIED NO: 7003-2260-0007-2185-3053

Robin Samuelson
Bristol Bay Economic
Development Corporation
P.O. Box 1464
Dillingham, Alaska 99576

CERTIFIED – RETURN RECEIPT
CERTIFIED NO: 7003-2260-0007-2185-3060

Phillip Lestenkof
Central Bering Sea
Fishermen's Association
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CERTIFIED – RETURN RECEIPT
CERTIFIED NO: 7003-2260-0007-2185-3077

Morgan Crow
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CERTIFIED – RETURN RECEIPT
CERTIFIED NO: 7003-2260-0007-2185-1585

Eugene Asicksik
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Development Corporation
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CERTIFIED – RETURN RECEIPT
CERTIFIED NO: 7003-2260-0007-2185-1592

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CERTIFIED – RETURN RECEIPT
CERTIFIED NO: 7003-2260-0007-2185-1608

Re: Extension of the 2003-2005 Community Development Plans and Community Development
Quota percentage allocations of groundfish, halibut, crab and prohibited species.

Dear Sirs:

This letter constitutes an initial administrative determination (IAD) to extend the National Marine Fisheries Service's (NMFS's) decision dated January 17, 2003, approving the 2003-2005 Community Development Plans (CDPs) and Community Development Quota (CDQ) percentage allocations of groundfish, halibut, crab and prohibited species to the Aleutian Pribilof Island Community Development Association (APICDA), the Bristol Bay Economic Development Corporation (BBEDC), the Central Bering Sea Fishermen's Association (CBSFA), the Coastal Villages Region Fund (CVRF), the Norton Sound Economic Development Corporation (NSEDC), and the Yukon Delta Fisheries Development Association (YDFDA). Specifically, this IAD removes the December 31, 2005, expiration date for both the CDPs and the CDQ percentage allocations of groundfish, halibut, crab and prohibited species approved for these six CDQ groups in the January 17, 2003 decision and extends the current CDPs and CDQ percentage allocations until December 31st of the year in which a final agency action that replaces these CDPs and CDQ percentage allocations with new CDPs and CDQ percentage allocations is issued by NMFS.

Factual background for the IAD

On January 17, 2003, NMFS approved the 2003-2005 CDPs and specific CDQ percentage allocations of groundfish, halibut, crab and prohibited species for APICDA, BBEDC, CBSFA, CVRF, NSEDC, and YDFDA (Appendix 1). In its decision, NMFS explicitly stated that the 2003-2005 CDPs and CDQ percentage allocations expire on December 31, 2005. Since the January 2003 decision, NMFS has approved modifications to both the CDPs and the percentage allocations approved on January 17, 2003. Substantial and technical amendments have been approved to all of the 2003-2005 CDPs under 50 CFR §679.30(g)(4) and (g)(5). In addition, NMFS removed through rulemaking the percentage allocations of "other species" CDQ among the six CDQ groups that were made under the January 17, 2003, decision (68 FR 69974; December 16, 2003) (Appendix 2).¹

In June 2003, NMFS informed the North Pacific Fishery Management Council (Council) that agency decisions on CDPs and CDQ percentage allocations are administrative adjudications that require an administrative appeals process prior to the issuance of a final agency decision. At the Council's October 2003 meeting, NMFS provided additional written information about the administrative appeals process which notified the Council, the CDQ groups, the State, and the public that the addition of the administrative appeals process would extend the length of time that it would take NMFS to complete its part of the CDQ allocation process (Appendix 3). During past allocation cycles, which did not include an administrative appeals process, it has taken NMFS up to three months from the date the State submitted its recommendations to the date NMFS issued a final decision. The October 2003 discussion paper prepared for the Council provided two options for the steps in an administrative appeals process. Option 1 was a four-month appeals process and Option 2 was a six-month appeals process. The Council recommended that NMFS use the six-month appeals process, which included more time for the

¹ As explained in the preamble to the final rule, the "other species" CDQ reserve is established annually and available for harvest by CDQ groups but it is not allocated in percentage amounts to each CDQ group (68 FR 69974 and 69975, December 16, 2003).

State to remedy deficiencies if any were identified by the Office of Administrative Appeals. The Council voted to recommend that NMFS use Option 2, which includes 60 days for NMFS to issue an IAD and a six-month administrative appeals process. Based on this schedule, at the April 2004 Council meeting, NMFS summarized an allocation schedule that NMFS and the State had agreed to that would result in the State submitting its allocation recommendations to NMFS on April 15, 2005 (see page 7 of Appendix 4). This submission date would provide NMFS the necessary 60 days to issue an IAD and six months for an administrative appeals process.

NMFS regulations at 50 CFR 679.30(a) state that "A qualified applicant may apply for CDQ and PSQ allocations by submitting a proposed CDP to the State during the CDQ application period that is announced by the State." On August 16, 2004, the State announced that the application period for the 2006-2008 CDQ allocations for groundfish, prohibited species, halibut and crab would be open between October 1, 2004, and November 1, 2004 (Appendix 5). On February 9, 2005, Edgar Blatchford, Commissioner of the Alaska Department of Commerce, Community, and Economic Development (State), sent a letter to each of the six CDQ groups informing them of the State's initial 2006-2008 CDQ percentage allocation recommendations for that CDQ group (Appendix 6). In these letters, Commissioner Blatchford wrote that the State had received CDPs from APICDA, BBEDC, CBSFA, CVRF, NSEDC, and YDFDA. Therefore, it is evident from these letters that each of the six CDQ groups submitted a CDP application to the State during the proscribed application period.

The State consulted with the Council about its initial allocation recommendations at the April 2005 Council meeting. On April 11, 2005, the Council sent a letter to Governor Murkowski (Governor) stating that it had concerns about "the way in which the program standards and evaluation criteria in State regulations are applied by the State CDQ Team in its evaluation of the Community Development Plans and development of the allocation recommendations...." (Appendix 7). The Council recommended that the State "establish a "blue ribbon" committee to review the CDQ program, and the process by which allocations are determined..." The State did not submit the 2006-2008 CDPs and CDQ percentage allocation recommendations to NMFS on April 15, 2005, as had been agreed to under the schedule discussed above.

On April 27, 2005 the Governor of Alaska established a Blue Ribbon CDQ Review Panel (Panel) to "conduct a thorough review of the CDQ program, including its regulations, investments, goals, timeline of allocations and state oversight" (Appendix 8). The Governor asked the Panel to report back to him within three months. In a letter dated May 26, 2005, to the Governor, Edward Rasmuson, Chairman of the Panel, requested that the State not submit its 2006-2008 CDQ allocation recommendations to NMFS until the Panel sends its findings and recommended changes to the Governor (Appendix 9). On May 31, 2005, Commissioner Blatchford wrote the following to all the CDQ groups:

Accordingly, I will be holding the 2006-2008 Multi-Species Community Development Quota (CDQ) allocation . . . in my office pending the completion of the Panel's report to the Governor. After reviewing the Panel's recommendations I will forward my final allocation recommendation to the Governor. (Appendix 10)

At a meeting of the Panel on June 16, 2005, Chairman Rasmuson stated that the Panel intends to provide its recommendations to the Governor by August 31, 2005 (Appendix 11, page 1).

NMFS has not yet received the State's 2006-2008 CDPs and CDQ percentage allocation recommendations for any of the six CDQ groups that applied for such allocations by the November 1, 2004, application deadline. Based on the May 31, 2005, letter from Commissioner Blatchford to the CDQ groups, the plans of the Panel, and the current date, NMFS will not receive the State's allocation recommendations in time to complete issuance of an IAD and to hold an administrative appeals process before the current CDPs and allocations expire on December 31, 2005.

Statutory and Regulatory Authority to Extend the 2003-2005 CDPs and CDQ Percentage Allocations

Although not specifically stated, the regulations at 50 CFR 679.30(d) provide NMFS with the authority to extend approved CDPs and CDQ percentage allocations. The authority to amend or modify a license is a corollary of an agency's power to grant that license. 2 AM. JUR. 2D *Administrative Law* § 251. Regulations at 50 CFR 679.30(d) provide NMFS with the regulatory authority to approve the State's CDP and CDQ percentage allocation recommendations, thus establishing NMFS' authority to grant a "license" under the Administrative Procedure Act (APA) as explained below. The regulatory authority to grant that license inherently includes the authority to modify it, such as extending its duration. Therefore, this IAD is authorized by NMFS regulations at 50 CFR 679.30(d).

Additionally, this action is authorized and required by the APA (5 U.S.C. 551 *et seq.*). In a memorandum dated September 3, 2003, to Chris Oliver, Executive Director of the Council, NOAA General Counsel advised that "the agency's approval of the State of Alaska's CDQ allocation recommendations pursuant to 50 CFR 679.30(d) constitutes "licensing" under the APA, and that an allocation resulting from this process authorizing a CDQ group to harvest CDQ species constitutes a "license." (Attachment 2 to Appendix 3) The APA defines "license" as including "... the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission". 5 U.S.C. 551(8). The APA also defines "licensing" as including an "... agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." 5 U.S.C. 551(9).

Section 9(b) of the APA, 5 U.S.C. 558(c), delineates applicable procedures to be followed by Federal agencies engaged in licensing. The subsection contains three sentences, each applicable to a different aspect of the licensing process. The third sentence of the subsection applies to the renewal of licenses, and provides: "When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." *Id.* Final agency action, in the context of CDQ allocations, does not occur until the agency has issued a final decision subsequent to an opportunity for affected CDQ groups to appeal the initial administrative decision.

In explaining the rationale for this provision, the following statement appears in *The Attorney General's Manual on the APA*: "It is only fair where a licensee has filed his application for a renewal or a new license in ample time prior to the expiration of his license, and where the application itself is sufficient, that his license should not expire until his application shall have been determined by the agency. In such a case the licensee has done everything that is within his power to do and he should not suffer if the agency has failed, for one reason or another, to consider his application prior to the lapse of this license." *Id.*, at 91-92, reprinted in *The Federal Administrative Sourcebook*, at 157-58 (2nd Ed. 1992).

Findings and Rationale for Extending the 2003-2005 CDPs and CDQ Percentage Allocations

Pursuant to 50 CFR 679.30(d) and section 9(b) of the APA, 5 U.S.C. 558(c), I have determined that the 2003-2005 CDPs and CDQ percentage allocations must continue in full force and effect as a matter of law until final agency action changing them. Given the factual and legal background provided above, I make the following findings and provide my rationale for those findings.

1. All six CDQ groups filed CDP applications for CDQ percentage allocations with the State in a timely manner. Given the fact that the State made initial allocation recommendations for each of the six CDQ groups with the February 9, 2005, letters, it is clear that each of the six CDQ groups submitted a CDP application to the State during the proscribed application period.
2. All six CDQ groups filed sufficiently complete CDP applications with the State for it to make initial percentage allocation recommendations. Given the fact that the State made initial allocation recommendations for each of the six CDQ groups with its February 9, 2005, letters, and said it reviewed the CDPs and required revisions to each CDP, it is clear that the State evaluated each of the CDQ groups' CDPs and their requests for CDQ percentage allocations and that the State determined that the CDP applications from each of the six CDQ groups were sufficiently complete that the State was able to develop initial CDQ percentage allocation recommendations for each CDQ group.
3. NMFS no longer has sufficient time to issue a final agency decision on the State's CDP and CDQ percentage allocation recommendations prior to the expiration of the 2003-2005 CDPs and CDQ percentage allocations. According to agency statements in October 2003, NMFS must have received the State's 2006-2008 CDP and CDQ percentage allocation recommendations by May 1, 2005, in order to have sufficient time to issue a final agency decision on the State's recommendations by December 31, 2005. Because the State has publicly announced that it will not submit its CDP and CDQ percentage allocation recommendations to NMFS before the Panel reports to the Governor, and that the Panel intends to report to the Governor by August 31, 2005, I find that there is insufficient time in which to issue a final agency decision on the State's 2006-2008 CDP and CDQ percentage allocation recommendations prior to the expiration of the 2003-2005 CDPs and CDQ percentage allocations.
4. This IAD extends the current CDPs and CDQ percentage allocations until December 31st of the year in which a final agency action that replaces these CDPs and CDQ percentage allocations

with new CDPs and CDQ percentage allocations is issued by NMFS. The BSAI groundfish fishing year begins on January 1st of each year. 50 CFR 679.23(a). Final agency action that replaces the current CDPs and CDQ percentage allocations with new CDPs and CDQ percentage allocations may be issued by NMFS at any time during the fishing year. It is highly likely that such a final agency action will not occur precisely at the start of the new fishing year, but will likely occur after CDQ fishing has commenced for the year and varying amounts of CDQ have been taken by each CDQ group. Because NMFS would be unable to ensure that each CDQ group harvested no more than the amount afforded to them under the new CDQ percentage allocations prior to final agency action approving those new percentage allocations, new CDQ percentage allocations can only be effective for the beginning of a fishing year.

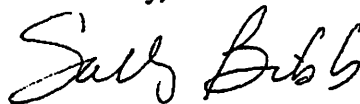
5. This IAD is limited to the removal of the expiration date in the January 17, 2003, decision. This IAD does not re-evaluate the substantive basis for the CDQ percentage allocations made by the January 17, 2003, decision. Substantive challenges to the CDQ percentage allocations that are extended by this IAD are outside of the scope of this IAD.

Conclusion

For the reasons provided above, I remove the December 31, 2005, expiration date for the CDPs and the CDQ percentage allocations of groundfish, halibut, crab and prohibited species to APICDA, BBEDC, CBSFA, CVRF, NSEDC, and YDFDA that were approved in the January 17, 2003, decision and extend the current CDPs and CDQ percentage allocations until December 31st of the year in which a final agency action that replaces these CDPs and CDQ percentage allocations with new CDPs and CDQ percentage allocations is issued by NMFS. The CDQ percentage allocations that are extended for each of the six CDQ group are provided in Attachment 1. This IAD becomes a final agency action on September 7, 2005, unless, before that date, it is appealed to the NMFS Office of Administrative Appeals. Any or all of the CDQ groups may appeal this IAD. Because 50 CFR 679.43(a) excludes IADs issued under §679.30(d) from the administrative appeals procedures at §679.43, any appeal of this IAD must be made in accordance with the enclosed administrative appeals procedure set forth in Attachment 2.

The appeal must be received by September 7, 2005. Please read Attachment 2 for a more detailed description of the procedures and rules that govern the appeal of this IAD. For additional information, you may contact the Office of Administrative Appeals by calling (907) 586-7258.

Sincerely,



Sally Bibb
CDQ Program Coordinator
Sustainable Fisheries Division

Attachments 1 and 2
Appendices 1 through 10

cc: William Noll, Commissioner

Alaska Department of Commerce, Community, and Economic Development
(with attachments and appendices)

Greg Cashen, CDQ Program Manager, ADCCED (with attachments and appendices)

NMFS Office of Administrative Appeals (with attachments and appendices)

North Pacific Fishery Management Council (with attachments, without appendices)

Attachment 1

Community Development Quota Allocations for Groundfish, Halibut, Crab and Prohibited Species That are Extended Under an Initial Administrative Determination Issued by NMFS on August 8, 2005

Species or Species Group	Community Development Quota Group					
	APICDA	BBEDC	CBSFA	CVRF	NSEDC	YDFDA
Groundfish CDQ Species						
Bering Sea (BS) Pollock	14%	21%	5%	24%	22%	14%
Aleutian Islands (AI) Pollock	14%	21%	5%	24%	22%	14%
Bogoslof Pollock	14%	21%	5%	24%	22%	14%
Pacific Cod	15%	21%	9%	18%	18%	19%
BS Fixed Gear Sablefish	15%	20%	16%	0%	18%	31%
AI Fixed Gear Sablefish	14%	19%	3%	27%	23%	14%
BS Sablefish	21%	22%	9%	13%	13%	22%
AI Sablefish	26%	20%	8%	13%	12%	21%
WAI Atka Mackerel	30%	15%	8%	15%	14%	18%
CAI Atka Mackerel	30%	15%	8%	15%	14%	18%
EAI/BS Atka Mackerel	30%	15%	8%	15%	14%	18%
Yellowfin Sole	28%	24%	8%	6%	7%	27%
Rock Sole	24%	23%	8%	11%	11%	23%
BS Greenland Turbot	16%	20%	8%	17%	19%	20%
AI Greenland Turbot	17%	19%	7%	18%	20%	19%
Arrowtooth Flounder	22%	22%	9%	13%	12%	22%
Flathead Sole	20%	21%	9%	15%	15%	20%
Alaska Plaice	14%	21%	5%	24%	22%	14%
Other Flatfish	26%	24%	8%	8%	8%	26%
BS Pacific Ocean Perch	17%	21%	6%	21%	19%	16%
WAI Pacific Ocean Perch	30%	15%	8%	15%	14%	18%
CAI Pacific Ocean Perch	30%	15%	8%	15%	14%	18%
EAI Pacific Ocean Perch	30%	15%	8%	15%	14%	18%
AI Northern Rockfish	30%	15%	8%	15%	14%	18%
AI Shortraker/Rougheye Rockfish	22%	17%	8%	17%	17%	19%
BS Other Rockfish	21%	19%	7%	17%	17%	19%
AI Other Rockfish	21%	18%	8%	17%	17%	19%
BS Northern Rockfish	Percentage allocations are not made to individual CDQ groups.*					
BS Shortraker/Rougheye Rockfish	Percentage allocations are not made to individual CDQ groups.*					
Other Species	Percentage allocations are not made to individual CDQ groups.*					
Prohibited Species						
Zone 1 Red King Crab	24%	21%	8%	12%	12%	23%
Zone 1 Bairdi Tanner Crab	26%	24%	8%	8%	8%	26%
Zone 2 Bairdi Tanner Crab	24%	23%	8%	11%	10%	24%
Opilio Tanner Crab	25%	24%	8%	10%	8%	25%
Pacific Halibut	22%	22%	9%	12%	12%	23%
Chinook Salmon	14%	21%	5%	24%	22%	14%
Non-chinook Salmon	14%	21%	5%	24%	22%	14%
Halibut CDQ						
Halibut Area 4B	100%	0%	0%	0%	0%	0%
Halibut Area 4C	15%	0%	85%	0%	0%	0%
Halibut Area 4D	0%	26%	0%	24%	30%	20%
Halibut Area 4E	0%	30%	0%	70%	0%	0%
Crab CDQ						
Bristol Bay Red King Crab	17%	19%	10%	18%	18%	18%
Norton Sound Red King Crab	0%	0%	0%	0%	50%	50%
Pribilof Red & Blue King Crab	0%	0%	100%	0%	0%	0%
St. Matthew Blue King Crab	50%	12%	0%	12%	14%	12%
Bering Sea C. Opilio Crab	8%	20%	20%	17%	18%	17%
Bering Sea C. Bairdi Crab	10%	19%	19%	17%	18%	17%

* These species will be managed at the CDQ reserve level and not as CDQ group specific allocations.
(acronyms defined on following page)

Acronyms used in Attachment 1, the CDQ percentage allocation table.

APICDA = Aleutian Pribilof Island Community Development Association

BBEDC = Bristol Bay Economic Development Corporation

CBSFA = Central Bering Sea Fishermen's Association

CVRF = Coastal Villages Region Fund

NSEDC = Norton Sound Economic Development Corporation

YDFDA = Yukon Delta Fisheries Development Association

BS = Bering Sea

AI = Aleutian Islands

EAI = Eastern Aleutian Islands

CAI = Central Aleutian Islands

WAI = Western Aleutian Islands

Attachment 2

Administrative Appeals Process



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

August 3, 2005

MEMORANDUM FOR: Ed Hein, Chief Appeals Officer
Office of Administrative Appeals

FROM: *Sue Salverson*
for James W. Balsiger
Administrator, Alaska Region

SUBJECT: Administrative Appeals Process for the Initial Administrative
Determination to Extend the 2003-2005 Community Development
Plans and Community Development Quota Percentage Allocations
of Groundfish, Halibut, Crab and Prohibited Species

Attached is the administrative appeals procedure that Alaska Region staff from the Sustainable Fisheries Division, the Office of Administrative Appeals, and NOAA General Counsel developed as appropriate for appeals of an initial administrative determination to extend the 2003-2005 Community Development Plans and Community Development Quota percentage allocations of groundfish, halibut, crab and prohibited species. This procedure was developed because 50 CFR part 679, at §679.43(a), excludes IADs issued under §679.30(d) from the administrative appeals procedures at §679.43. Approval of community development plans and allocations of quota among CDQ groups are made under §679.30(d).

Attachment



Attachment

Administrative Process for an Appeal of the Initial Administrative Determination to Extend the 2003-2005 Community Development Plans and Community Development Quota Percentage Allocations of Groundfish, Halibut, Crab and Prohibited Species

Administrative Appeals Process

The following procedure will apply to any appeal of NMFS' initial administrative determination to extend the 2003-2005 Community Development Plans (CDPs) and Community Development Quota (CDQ) percentage allocations of groundfish, halibut, crab and prohibited species.

(a) Who may appeal

Any person whose interest is directly and adversely affected by the initial administrative determination may file a written appeal. For purposes of this appeals process, such persons will be referred to as "applicant" or "appellant."

(b) Submission of appeals

Appeals must be in writing and must be mailed to:

National Marine Fisheries Service
Office of Administrative Appeals (OAA)
P. O. Box 21668
Juneau, AK 99802-1668

or delivered to:

National Marine Fisheries Service
Attention: Appeals (OAA)
709 West 9th St., Room 453
Juneau, AK 99801

Appeals may be transmitted by facsimile to (907) 586-9361. Additional information about appeals may be obtained by calling (907) 586-7258, and by accessing Office of Administrative Appeals section of the NMFS Alaska Region website <http://www.fakr.noaa.gov>.

(c) Timing of appeals

(1) If an applicant appeals the initial administrative determination, the appeal must be filed not later than 30 days after the date the determination is issued.

(2) The time period within which an appeal may be filed begins to run on the date the initial administrative determination is issued. If the last day of the time period is a Saturday, Sunday, or Federal holiday, the time period will extend to the close of business on the next business day.

(d) Address of record

NMFS will establish as the address of record the address used by the applicant in initial correspondence to NMFS concerning the application. Notifications of all actions affecting the applicant after establishing an address of record will be mailed to that address, unless the applicant provides NMFS, in writing, with any changes to that address. NMFS bears no responsibility if a notification is sent to the address of record and is not received because the applicant's actual address has changed without notification to NMFS.

(e) Statement of reasons for appeals

Applicants must timely submit a full written statement in support of the appeal, including a concise statement of the reasons the initial administrative determination has a direct and adverse effect on the applicant and should be reversed or modified. If the applicant requests a hearing on any issue presented in the appeal, such request for hearing must be accompanied by a concise written statement raising genuine and substantial issues of adjudicative fact for resolution and a list of available and specifically identified reliable evidence upon which the factual issues can be resolved. The appellate officer will limit his/her review to the issues stated in the appeal; all issues not set out in the appeal will be waived.

(f) Hearings

The appellate officer will review the applicant's appeal and request for hearing, and has discretion to proceed as follows:

(1) Deny the appeal;

(2) Issue a decision on the merits of the appeal, if the record contains sufficient information on which to reach final judgment; or

(3) Order that a hearing be conducted. The appellate officer may so order only if the appeal demonstrates the following:

(i) There is a genuine and substantial issue of adjudicative fact for resolution at a hearing. A hearing will not be ordered on issues of policy or law.

(ii) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be ordered on the basis of mere allegations or denials or general descriptions of positions and contentions.

(iii) The evidence described in the request for hearing, if established at hearing, would be adequate to justify resolution of the factual issue in the way sought by the applicant. A hearing will not be ordered if the evidence described is insufficient to justify the factual determination sought, even if accurate.

(iv) Resolution of the factual issue in the way sought by the applicant is adequate to justify the action requested. A hearing will not be ordered on factual issues that are not determinative with respect to the action requested.

(g) Types of hearings

If the appellate officer determines that a hearing should be held to resolve one or more genuine and substantial issues of adjudicative fact, he/she may order:

- (1) A written hearing, as provided in paragraph (1); or
- (2) An oral hearing, as provided in paragraph (m).

(h) Authority of the appellate officer

The appellate officer is vested with general authority to conduct all hearings in an orderly manner, including the authority to:

- (1) Administer oaths.
- (2) Call and question witnesses.
- (3) Issue a written decision based on the record.

(i) Evidence

All evidence that is relevant, material, reliable, and probative may be included in the record. Formal rules of evidence do not apply to hearings conducted under this appeals process.

(j) Appellate officers' decisions

The appellate officer will close the record and issue a decision after determining there is sufficient information to render a decision on the record of the proceedings and that all procedural requirements have been met. The decision must be based solely on the record of the proceedings. Except as provided in paragraph (n), an appellate officer's decision takes effect 30 days after it is issued and, upon taking effect, is the final agency action for purposes of judicial review.

(k) Disqualification of an appellate officer

- (1) The appellate officer will withdraw from an appeal at any time he/she deems himself/herself disqualified.
- (2) The appellate officer may withdraw from an appeal on an appellant's motion if:
 - (i) The motion is entered prior to the appellate officer's issuance of a decision; and
 - (ii) The appellant demonstrates that the appellate officer has a personal bias or any other basis for disqualification.
- (3) If the appellate officer denies a motion to withdraw, he/she will so rule on the record.

(l) Written hearing

(1) An appellate officer may order a written hearing under paragraph (g)(1) if he/she:

(i) Orders a hearing as provided in paragraph (f)(3); and

(ii) Determines that the issues to be resolved at hearing can be resolved by allowing the appellant to present written materials to support his/her position.

(2) After ordering a written hearing, the appellate officer will:

(i) Provide the appellant with notification that a written hearing has been ordered.

(ii) Provide the appellant with a statement of issues to be determined at hearing.

(iii) Provide the appellant with 30 days to file a written response. The appellant may also provide documentary evidence to support his/her position. The period to file a written response may be extended at the sole discretion of the appellate officer, if the appellant shows good cause for the extension.

(3) The appellate officer may, after reviewing the appellant's written response and documentary evidence:

(i) Order that an oral hearing be held, as provided in paragraph (g)(2), to resolve issues that cannot be resolved through the written hearing process;

(ii) Request supplementary evidence from the appellant before closing the record; or

(iii) Close the record.

(4) The appellate officer will close the record and issue a decision after determining that the information on the record is sufficient to render a decision.

(m) Oral hearing

(1) The appellate officer may order an oral hearing under paragraphs (g)(2) and (l)(3)(i) if he/she:

(i) Orders a hearing as provided in paragraph (f)(3); and

(ii) Determines that the issues to be resolved at hearing can best be resolved through the oral hearing process.

(2) After ordering an oral hearing, the appellate officer will:

(i) Provide the appellant with notification that an oral hearing has been ordered.

(ii) Provide the appellant with a statement of issues to be determined at hearing.

(iii) Provide the appellant with notification, at least 30 days in advance, of the place, date, and time of the oral hearing. Oral hearings will be held in Juneau, AK, at the prescribed date and time, unless the appellate officer determines, based upon good cause shown, that a different place, date, or time will better serve the interests of justice. A continuance of the oral hearing may be ordered at the sole discretion of the appellate officer if the appellant shows good cause for the continuance.

(3) The appellate officer may, either at his/her own discretion or on the motion of the appellant, order a pre-hearing conference, either in person or telephonically, to consider:

(i) The simplification of issues.

(ii) The possibility of obtaining stipulations, admissions of facts, and agreements to the introduction of documents.

(iii) The possibility of settlement or other means to facilitate resolution of the case.

(iv) Such other matters as may aid in the disposition of the proceedings.

(4) The appellate officer must provide the appellant with notification of a pre-hearing conference, if one is ordered, at least 30 days in advance of the conference. All action taken at the pre-hearing conference will be made part of the record.

(5) At the beginning of the oral hearing, the appellate officer may first seek to obtain stipulations as to material facts and the issues involved and may state any other issues on which he/she may wish to have evidence presented. Issues to be resolved at the hearing will be limited to those identified by the appellate officer as provided in paragraph (f)(3). The appellant will then be given an opportunity to present his/her case.

(6) During the oral hearing, the appellant has the right to present reliable and material oral or documentary evidence and to conduct such cross-examination as may be required in the interests of justice.

(7) After the conclusion of the oral hearing, the appellant may be given time by the appellate officer to submit any supplementary information that may assist in the resolution of the case.

(8) The appellate officer will close the record and issue a decision after determining that the information on the record is sufficient to render a decision.

(n) Review by the Regional Administrator

An appellate officer's decision is subject to review by the Regional Administrator, as provided in this paragraph (n).

(1) The Regional Administrator may affirm, reverse, modify, or remand the appellate officer's decision before the 30-day effective date of the decision provided in paragraph (j).

(2) The Regional Administrator may take any of these actions on or after the 30-day effective date by issuing a stay of the decision before the 30-day effective date. An action taken under paragraph (n)(1) takes effect immediately.

(3) The Regional Administrator must provide a written explanation why an appellate officer's decision has been reversed, modified, or remanded.

(4) The Regional Administrator must promptly notify the appellant(s) of any action taken under this paragraph (n).

(5) The Regional Administrator's decision to affirm, reverse, or modify an appellate officer's decision is a final agency action for purposes of judicial review.

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SUSTAINABLE FISH
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AGENDA C-2(c)(4)
OCTOBER 2005
PAC

September 2, 2005

VIA FACSIMILE
AND FIRST CLASS MAIL

Ms. Sally Bibb, CDQ Coordinator
National Marine Fisheries Service
Alaska Regional Office
P.O. Box 21668
Juneau, Alaska 99802

RE: August 8, 2005 Initial Agency Determination

Dear Ms. Bibb:

This letter will respond to your August 8, 2005 Initial Agency Determination ("IAD"), and confirms our understanding of the applicable regulations regarding NMFS's review of and approval of the State of Alaska's ("State") CDQ allocation recommendations.

The undersigned are CDQ organizations that participate in the CDQ program established under the Magnuson Stevens Act ("MSA"). Delay in determination and approval by NMFS of the State's recommendations in a timely manner will harm the undersigned, both by: 1) denying some of these groups from receiving their expected CDQ percentage increases, as initially determined by the State's CDQ team by letter of February 9, 2005; and by 2) the subjecting all of the undersigned and the program to the chaotic and unregulated atmosphere where the groups are forced to operate under expired CDPs using CDQ percentage allocations which have been found to be no longer justified under State regulations.

The IAD's "Finding and Rationale" Number 3 contains the declaration that "NMFS no longer has time to issue a final agency decision on the State's CDP and CDQ percentage allocation recommendations" prior to December 31 of this year. The basis for this determination is that "NMFS must have received the State's 2006-2008 CDP and CDQ percentage allocation recommendations by May 1, 2005 in order to have sufficient time to issue a final agency decision on the State's recommendations by December 31, 2005."

Finding and Rationale Number 3 is not founded on any law, rule or regulation and is therefore void and of no consequence to the undersigned, and in fact is adopted in contravention of clear directive to the contrary. The controlling regulation governing the actions of NMFS in regards to its role in the process of determining the program's progression from one CDP cycle to the next is set forth in 50 CFR 679.30(d):

(d) Review and approval of proposed CDPs. The State must transmit the proposed CDPs and its recommendations for approval of each of the proposed CDPs to NMFS, along with the findings and the rationale for the recommendations, by October 15 of the year prior to the first year of the proposed CDP, except in 1998, when CDPs for the 1998 through 2000 multispecies groundfish CDQs must be submitted by July 8, 1998. The State shall determine in its recommendations for approval of the proposed CDPs that each proposed CDP meets all applicable requirements of this part. Upon receipt by NMFS of the proposed CDPs and the State's recommendations for approval, NMFS will review the proposed CDPs and approve those that it determines meet all applicable requirements. NMFS shall approve or disapprove the State's recommendations within 45 days of their receipt. In the event of approval of the CDP, NMFS will notify the State in writing that the proposed CDP is approved by NMFS and is consistent with all requirements for CDPs. If NMFS finds that a proposed CDP does not comply with the requirements of this part, NMFS must so advise the State in writing, including the reasons thereof. The State may submit a revised proposed CDP along with revised recommendations for approval to NMFS.

There has been no effort by NMFS to change this regulation, and the subject IAD cannot change the NMFS obligation to process any State recommendation within 45 days, so long as the State recommendation is received by October 15, 2005. The requirements for promulgation of rules by federal administrative agencies are codified at 5 U.S.C. §553. These requirements include notice of proposed rulemaking, the opportunity to provide written comments and the publication in the Federal Register not less than thirty days before its effective date. None of these steps were followed by NMFS in its attempt through the IAD of altering the controlling code section, 50 CFR 679.30(d). Therefore, the IAD's adoption of a "finding" in contravention of the regulation without formally undertaking the rulemaking process does not amend or modify 50 CFR 679.30(d), which remains in effect and controls NMFS's actions. NMFS's is estopped from taking any other course of action.

Additionally, while the MSA makes the Secretary of Commerce responsible for the final decision about how to allocate the CDQ reserves among the CDQ groups, such a decision by NMFS is limited to a record review of the State's actions, not an independent evaluation of the CDPs. 50 CFR 679.30(d); see also *Aleutian Pribilof Island Community Development Association v. United States Department of Commerce, et al.*, No. A01-0053-CV, January 30, 2002. Therefore, NMFS's rational that it needs to afford an extensive review and appeal process while making only a record review, especially in light of the process already afforded the CDQ groups by the State which are far in excess of the State existing regulations during the 2006-2008 CDP review process, is not well founded in reality or required under constitutional due

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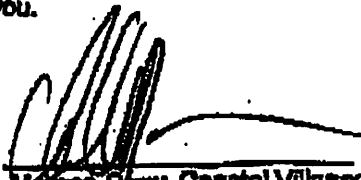
process considerations.¹ Indeed, the record NMFS must review in making its determination will be the exact same record it is currently reviewing now in approving the State's recommendations for the Eastern Aleutian Island Golden and red king crab for 2005.

Please note that under 5 U.S.C. §706(2)(A), agency action under the MSA is reversible if it is "arbitrary and capricious, an abuse of discretion, or otherwise not in accord with the law".² Additionally, agency action is arbitrary and capricious if it is not within the scope of the authority delegated to the agency by the statute.³ Delay of the State's CDQ percentage allocations by its adoption of a cumbersome and unnecessary eight-month appeal process is not in accord with existing federal and state regulations and delays the proper implementation of a federal program.


Please call if you have any questions. Thank you.

Sincerely,


Robin Samuelson, Bristol Bay Economic
Development Corporation


Morgan Crow, Coastal Villages
Region Fund


Eugene Asiotsik, Norton Sound
Economic Development Corporation


Ragnar Alstrom, Yukon Delta Fisheries
Development Association

cc: Alaska Congressional Delegation (by first class mail)
Office of the Governor, State of Alaska (by first class mail)

¹ See 50 CFR 679.20(a) (allocations of CDQ ... are harvest privileges that expire upon the expiration of the GDP). See also *Aleutian Pribilof Island Community Development Association v. United States Department of Commerce, et al.* ("The harvest privilege is not a property interest. Nor is a negative change in quota allocation from one regulatory period to the next a deprivation of property. In sum, APTCDA received as much, if not more process than it was due. Its arguments as to alleged procedural deficiencies in the allocation process fail.")

² *ABayco Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996).

³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 28, 41 (1983).

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CENTRAL BERING SEA FISHERMEN'S ASSOCIATION

Post Office Box 288 A St. Paul Island, Alaska 99660 A Phone (907) 546-2597 A Fax (907) 546-2450

September 6, 2005

Sally Bibb
CDQ Program Coordinator
Sustainable Fisheries Division
National Marine Fisheries Service
Office of Administrative Appeals (OAA)
P. O. Box 21668
Juneau, AK 99802-1668

VIA U.S. Mail and FAX: (907) 586-7465

Dear Ms. Bibb:

Central Bering Sea Fishermen's Association (CBSFA) strongly objects to NMFS's August 8, 2005 initial administrative determination (IAD) extending the 2003 -2005 Community Development Plans (CDP) and Community Development Quota (CDQ) percentage allocations of groundfish, halibut, crab and prohibited species. CBSFA would be permitted to file an appeal as it is one of the six CDQ groups directly affected by the initial administrative determination and is adversely affected by it. CBSFA is stopping short of formally appealing the IAD because an appeal may very well delay the process of reaching the final 2006 - 2008 allocations. Ironically, a primary objection to the IAD is that it indefinitely extends the current percentage allocations and further delays implementation of more equitable CDP and CDQ percentage allocations of the relevant species.

CBSFA objects to the IAD because it is at least premature, and because CBSFA believes it is wrongfully adversely affected by the decision, which further entrenches allocations that are a historical anomaly. Indefinite extension of the 2003 - 2005 CDP and CDQ percentage allocations would result in CBSFA receiving only a 5% Pollock allocation - an allocation percentage that the State is willing to increase to at least 6%. With the newest development regarding the recommendations of the Blue Ribbon Committee set to be given to the State soon, it is possible that the allocations could be made semi-permanent. If the BRC's recommendations - or something similar thereto - become the basis for NMFS's review, then CBSFA would advocate that CBSFA's Pollock percentage allocation be raised back to its original (early 1990s) level of 10%.

I. The IAD is at Least Premature

At a minimum, the August 8, 2005 IAD is premature. As the IAD notes, the North Pacific Fishery Management Council (Council) on April 11 sent a letter to Alaska Governor

Frank Murkowski (Governor) asking him to establish a "blue ribbon" committee to review the CDQ program, and the process by which allocations are determined..." (August 8, 2005 IAD at p. 3). The Governor established a Blue Ribbon CDQ Review Committee on April 27, 2005, and the Committee has announced its intention of reporting its findings and recommendations to the Governor by August 31, 2005. (*Id.* at 3, 5). NMFS stated in its IAD that because in October 2003 the Council recommended that NMFS use "Option 2" for administrative appeals, NMFS has up to two months from when the State submits its recommendation to when NMFS is to issue a final decision, followed by a six-month appeals process. (The Council made its recommendation pursuant to NMFS's direction that the Council choose between two different appeal options). NMFS thus concludes it will not have time to issue an IAD and hold an administrative appeals process before the expiration of the current allocation (2003 - 2005) cycle.

It is CBSFA's understanding, however, that there exists nothing in federal or state statutes or regulations that requires NMFS to follow such an appeals process. The directly affected entities (the CDQ groups) have issued their CDPs and the State has already long-ago issued initial recommended allocations. To delay implementing these regulations for the sake of due process concerns that are not mandated and have to a great degree been addressed does not serve to advance the interests of those directly affected, and would serve as a perpetuation of the historically displaced allocation of the resources.

Leaving aside the issue of whether NMFS is required to provide an appeals process, NMFS is prematurely concluding that the upcoming State of Alaska allocation recommendations and subsequent NMFS decision will result in resistance that would make the appeals process necessary or even logical. The State has not yet issued its 2006-2008 CDP and CDQ percentage allocation recommendations to NMFS, and to say that additional time, beyond the expiring CDP and CDQ percentage allocation date (December 31, 2005) is needed to respond to those recommendations, is at least premature. NMFS therefore not only appears to have the power to issue a final decision after the State makes its recommendations, it is also premature to conclude that the State's recommendations, and NMFS subsequent decision, would lead to any of the CDQ groups wanting to appeal the NMFS decision. In addition, NMFS could issue an interim decision for a year, and leave issuance of a final agency decision for a later time - one that might come into effect on January 1, 2007, for example. That temporary decision could be to follow the State's recommendations for a 1-year trial basis.

The State made its initial allocation recommendations for the 2006 - 2008 CDQ percentage allocations subsequent to receiving CDP applications from each of the six CDQ groups (IAD at p. 3). To simply revert to extending the existing CDP allocations due to the recent turn of events before weighing whether the soon-to-be issued State recommendations might serve as a basis for moving forward, in light of the initial State recommendations, is at least a premature decision.

II. CBSFA is Wrongfully Adversely Affected by the IAD

A. CBSFA Deserves its Original 10% Pollock Allocation

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CBSFA is prepared to accept the State's 2006 - 2008 initial allocation recommendations for the six CDQ groups. Maintaining allocations at 2003 - 2005 CDP levels, as the IAD would do, would limit CBSFA's pollock allocation at 50% of its original levels. CBSFA's original (early 1990s) allocation of pollock stood at 10% and was reduced over the years, through decisions that CBSFA considers unjustified, to 4%. In recent allocation cycles CBSFA has been able to recoup one percentage point, to 5%. Keeping CBSFA's Pollock allocation at this level would be unjust given the numerous fisheries related projects that CBSFA is pursuing which are specified below.

Based on the State's initial allocation recommendations for the 2006-2008 cycle, CBSFA's Pollock allocation would be increased to 6%. While this step toward restoration of original levels is a positive step, CBSFA aspires to end up closer to its original pollock allocation levels. Freezing allocations at the 2003 -- 2005 levels would, therefore, greatly retard progress made toward restoration of original levels. CBSFA believes that at a minimum, CDQ percentage allocations effective after December 31, 2005 should include at least a 6% Pollock allocation for CBSFA. All the CDQ groups and the State have supported CBSFA receiving at least this percentage allocation of Pollock.

The issue of allocating a fair share of a hugely important fisheries resource to a local community goes to the heart of the CDQ program. Giving local residents a stake in the sustainability of the commercial resources in their coastal areas is one of the most effective ways to assure that the resource is well managed. Unlike the distant water commercial fleet, which can move to other fishing grounds around the world if the resource is over fished, the residents of St. Paul Island, Alaska, and the other Western Alaska coastal communities, are not able to pick up their communities and move to distant grounds when a fishery declines as a result of mismanagement, or otherwise. This alone is an important benefit of the CDQ Program.

The future of St. Paul Island depends on the CDQ Program tremendously. If CBSFA receives adequate CDQ allocations, the community has a growth potential for:

- 1) expanding processing inside the St. Paul Harbor to process crab, cod, Pollock and other flat fish. This development will expand the markets for the whole Bering Sea fleet and of course, promote growth of St. Paul Islands economy;
- 2) the continued harvest and processing of crab for the benefit of CDQ groups that are not located near the resource under the newly rationalized crab fishery. CDQ crab harvesting and processing on St. Paul benefits all the CDQ groups;
- 3) the ability of the community to develop the necessary infrastructure, such as the construction of the local authorized small boat harbor, which will provide safe moorage, vessel support, and provide for expansion of the St. Paul fleet. Other groups and fishermen can take advantage of the strategic location of the St. Paul Harbor and its close proximity to the Bering Sea fisheries;

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4) the revenues to finance local fishermen's acquisition of larger vessels and additional fish quotas so that the fishermen can grow and diversify into other fisheries, and

5) the training, internship and other educational programs to allow the local residents to participate successfully in these developments.

CBSFA respectfully submits that these results are solidly within the original purpose and goals of the CDQ program and would be fostered by adequate allocations, particularly in Pollock.

At this point, CBSFA respectfully submits that it will lose significant income by an extension of the current CDQ allocation levels. The extension called for in the August 8, 2005 IAD could easily become entrenched and serve as the de facto allocations for the 2006 -2008 levels, depending on events. Implementation of the IAD would serve to perpetuate the harm suffered by CBSFA through enforcement of historically low Pollock percentage allocations for CBSFA.

B. Allocations Should be Based on Both Proximity to the Resources Along With Straight Population Ratios

CBSFA believes that part of the reason for the historically low Pollock percentage allocation is tied to how the State of Alaska makes periodic determinations on allocation levels. Population in allocating quotas, rather than the commercial fishery development potential, unfortunately appears to be the main consideration for determining allocations.

CBSFA admits that there is justification for the state concentrating to some extent on population as a criterion; however, there are other equally important criteria. These are: proximity of the community to the resource; the commercial fishery development potential in a community, the need of a community's fishermen to have access to a portion of the resource; and the infrastructure required to allow participation in the commercial fisheries in the waters around the community. These are all legitimate policy criteria, and were, CBSFA contends, the purposes for the program. They should be weighed at least equally to population considerations.

As the St. Paul halibut fleet demonstrates, access and proximity to the resource; financing vessel and fishing gear purchase; providing fishermen training and support; and infrastructure and markets are all important benefits that allow residents in western Alaska to participate in the private sector economy. The administration of the CDQ Program by current short-term periodic, competitive allocations among the CDQ groups, particularly when the principal requirement is creation of jobs (of whatever nature), undermines the program. The competition process does not further the original intent of the CDQ Program and should be reconsidered.

The result is that consideration of population and the pressure for low-end jobs ends up as a higher priority than (1) long-term investment in a sustainable business enterprise, (2) infrastructure that creates opportunities for the coastal communities to participate in a sustainable fishery, or (3) in St. Paul's case, the development of a new fleet of commercial fishermen

succeeding in a halibut and other fisheries because they have access to the fishery resource and the capital. CBSFA, for example, has suffered significant losses under the competitive allocation process (again, CBSFA at one point lost 60% of its original Pollock allocation) despite the fact that CBSFA is one of the CDQ groups that is currently developing, and has excellent and realistic prospects for continuing to develop the fishing fleet, infrastructure and the processing capacity which will also benefit all Bering Sea fishermen and other CDQ groups.

C. Additional Policy Considerations

The opportunity for coastal communities to become stakeholders in the local commercial fisheries is important and needs to have a priority role. A CDQ group that has profits and only needs subsidization should not be given greater weight in quota decisions than one that is building commercial fishing economy/infrastructure in a coastal community. CBSFA does not contend that CDQ allocations may not be used to subsidize jobs in some rural villages, even if the commercial fishery has declined or has never been significant in that village. This also may be good public policy. However, both should be balanced and administered to make long-term commercial fisheries development the most important criteria.

At present, a CDQ group receives an allocation for a two or three-year period, which is then subject to competition at the end of the cycle. The size of the allocation depends on bureaucratic discretion and whether the CDQ group has followed State objectives that are difficult to define, coupled with the group's population and number of jobs created, irrespective of what those jobs are. This is not consistent with the intent of the program and ignores the long-term need to have the allocation available so that the communities can compete in the commercial fisheries. A minimum wage job on the processing line is not the same as the captain of a community resident owned fishing boat that successfully catches and sells halibut.

The CDQ allocation is also more than just dollars. It is access to the resource. It is the opportunity of the coastal communities to participate in the Bering Sea commercial fishery. At the outset, the allocation may be converted to dollars in order to develop and maintain the infrastructure, or capitalize the business. However, the allocation ultimately is worth more. It is critical to the coastal communities' ability to participate in the commercial fisheries, just as the allocations that are currently given to harvesters or processors allow them to participate.

III. Conclusion

The CDQ Program is one of the most innovative and successful economic development programs that creates economic opportunities in rural areas in those communities adjacent to our fishery resources. Extending the 2003 - 2005 CDF allocations past December 31, 2005 would run counter to promoting the goals of the Program, and would unfairly harm CBSFA and the St. Paul Community. At a minimum, NMFS should not issue any sort of determination until after the State makes its formal 2006-2008 percentage allocation recommendations. NMFS might find at that time that a temporary decision following those recommendations for one year will be appropriate. For the reasons outlined in this objection, any Pollock percentage allocation for CBSFA after December 31, 2005 should be at or near CBSFA's original Pollock allocation.

SEP-07-2005 WED 01:50 PM CBSFA

Respectfully Submitted,



Phillip Lestenkof,
President, CBSFA

Cc:

Robin Samuelson, Bristol Bay Economic Development Corporation

Morgen Crowe, Coastal Villages Region Fund

Eugene Asiksick, Norton Sound Economic Development Corporation

Ragnar Alstrom, Yukon Delta Fisheries Development Association

Larry Cotter, APICDA

Alaska Congressional Delegation (by first class mail)

Office of the Governor, State of Alaska (by fax and first class mail)

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UNITED STATES DEPARTMENT OF
National Oceanic and Atmospheric Administration

National Marine Fisheries Service
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September 19, 2005

Frank H. Murkowski, Governor
State of Alaska
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CERTIFIED – RETURN RECEIPT
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Rc: Initial Administrative Determination about the State of Alaska's Percentage Allocation Recommendations for Eastern Aleutian Islands Golden King Crab and Adak Red King Crab and Associated Amendments to the 2003-2005 Community Development Plans under the Western Alaska Community Development Quota Program

Dear Sirs:

This letter constitutes an initial administrative determination (IAD) about the State of Alaska's (State's) July 14, 2005, percentage allocation recommendations for Eastern Aleutian Islands (EAI) golden king crab and Adak red king crab and the associated amendments to the 2003-2005 Community Development Plans (CDPs) under the Western Alaska Community Development Quota (CDQ) Program. The State and any and all of the CDQ groups may administratively appeal this IAD to the National Marine Fisheries Service (NMFS) Office of Administrative Appeals by October 19, 2005, following the procedures described in Attachment 1.

For the reasons described below, NMFS *initially disapproves* the State's recommendations about the 2005 percentage allocations of these two crab CDQ reserves to the Aleutian Pribilof Island Community Development Association (APICDA), the Bristol Bay Economic Development Corporation (BBEDC), the Central Bering Sea Fishermen's Association (CBSFA), the Coastal Villages Region Fund (CVRF), the Norton Sound Economic Development Corporation (NSEDC), and the Yukon Delta Fisheries Development Association (YDFDA), and proposed amendments to the 2003-2005 CDPs for these six CDQ groups. This initial determination is based on my findings that the State did not provide a reasonable explanation for its recommendations as required by 50 CFR 679.30(d). Specifically, the State's rationale does not demonstrate that the State applied all of the evaluation criteria that it said that it focused on in its allocation recommendation, and the State did not provide an adequate explanation about how it used its conclusions about the evaluation criteria it applied to determine the specific percentage allocations it recommended for each CDQ group.

Introduction

The 2003-2005 percentage allocations for groundfish, crab, halibut and prohibited species and the associated CDPs were approved by NMFS on January 17, 2003. On March 2, 2005, NMFS published a final rule that added two new crab species allocations to the CDQ Program: EAI golden king crab and Adak red king crab (70 FR 10174). The final rule provided for a 10 percent allocation of the annual total allowable catch of these two crab species to the CDQ Program as "CDQ reserves." On July 29, 2005, the State announced the total allowable catch (TAC) and season dates for EAI golden king crab and established the 2005 CDQ reserve for EAI golden king crab as 300,000 pounds. The State has not yet issued an announcement about whether a TAC and fishing season will be established for Adak red king crab in 2005. Although the allocation of 10 percent of the EAI golden king crab and Adak red king crab TACs to the CDQ Program is established through federal regulation, further allocation of the CDQ reserves among the CDQ groups requires administrative action by the State and NMFS under 50 CFR part 679 and other applicable federal law.

On July 14, 2005, the State submitted to NMFS its recommendations about (1) approval of percentage allocations of EAI golden king crab and Adak red king crab among the six CDQ groups for 2005¹, and (2) approval of “all six Community Development Plans (CDPs) submitted to the State for the new 2005 crab species.”

The State recommended the following percentage allocations among the CDQ groups:

CDQ Group	State's Recommended Percentage Allocations	
	EAI Golden King Crab	Adak Red King Crab
APICDA	8%	8%
BBEDC	18%	18%
CBSFA	21%	21%
CVRF	18%	18%
NSEDC	21%	21%
YDFDA	14%	14%

Standard of Review for the State's Recommendations

NMFS's role in the CDQ Program allocations is defined by the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (groundfish FMP), the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (crab FMP), and regulations at 50 CFR part 679 implementing the CDQ Program. The MSA requires that the North Pacific Fishery Management Council (Council) and NMFS establish the CDQ Program and allocate a portion of the quotas from Bering Sea fisheries to the program. In addition, the MSA provides the criteria for communities to be eligible for the CDQ Program. However, the MSA does not specifically instruct the Secretary to allocate CDQ to eligible communities or to CDQ groups, nor does it contain requirements about how allocations of quota to the eligible communities should be made.

The groundfish FMP states that the CDQ Program is a joint program of the Secretary and the Governor of the State of Alaska. It also requires that portions of the quota allocated to the CDQ Program are to be released by NMFS to “eligible Alaska communities who submit a plan, approved by the Governor of Alaska, for its wise and appropriate use.” The crab FMP provides for an allocation of crab to the CDQ Program and states that the “program will be patterned after the pollock CDQ program.”

Regulations at 50 CFR Part 679 implementing the CDQ Program were developed by the Council based on recommendations by the State. As intended by the FMPs, these regulations place the primary responsibility with the State for recommending CDQ allocations and day-to-day

¹ The 2005 crab fishing year is from July 1, 2005, to June 30, 2006. The 2005 season for EAI golden king crab is August 15, 2005, through May 15, 2006. Whether a 2005 Adak red king crab fishery will occur and, if it does, the season dates, have not yet been announced by the Alaska Department of Fish and Game

administration of the CDQ Program. Additionally, should NMFS determine that a regulatory requirement has not been met by the State in developing its CDQ allocation recommendations or that the State's rationale is not reasonable or does not support the State's recommendations, NMFS is not provided the regulatory authority to implement CDQ allocations on its own. The allocation recommendations must be returned to the State for further development or revision. For these reasons, NMFS interprets its standard for reviewing State CDP and allocation recommendations as an abuse of discretion standard rather than an independent or *de novo* review of the record.

The role of NMFS in review and approval of the CDPs and the allocation of quota to the eligible communities is limited by regulatory design to conducting a careful inquiry of the record provided by the State for its recommendations and to determining whether the State considered relevant factors and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the recommendations made by the State. NMFS must approve the State's recommendations if it finds that the State followed the requirements described in the regulations and provided a rationale that demonstrates that the State considered relevant evaluation criteria and provided a reasonable explanation for its allocation recommendations given those criteria.

Regulatory Requirements

NMFS's review of CDQ allocation recommendations submitted by the State is governed by 50 CFR 679.30(d) when such recommendations are made as part of recommendations about approval or disapproval of a proposed CDP:

NMFS will review the proposed CDPs and approve those that it determines meet all applicable requirements. NMFS shall approve or disapprove the State's recommendations within 45 days of their receipt. In the event of approval of the CDP, NMFS will notify the State in writing that the proposed CDP is approved by NMFS and is consistent with all requirements for CDPs. If NMFS finds that a proposed CDP does not comply with the requirements of this part, NMFS must so advise the State in writing, including the reasons thereof. The State may submit a revised proposed CDP along with revised recommendations for approval to NMFS.

On January 17, 2003, NMFS approved 2003-2005 CDPs for APICDA, BBEDC, CBSFA, CVRF, NSEDC, and YDFDA and allocations of CDQ reserves for groundfish, prohibited species, halibut, and the crab species that were part of the CDQ Program on that date. At that time, NMFS determined that the 2003-2005 CDPs contained all of the information required by §679.30(a), that the CDPs were consistent with the "purpose and scope of the CDQ Program" at §679.1(e), and that the 65 communities represented by the CDPs were eligible to participate in the CDQ Program.

Although the State recommends approval of "all six Community Development Plans (CDPs) submitted to the State for the new 2005 crab species," the documents submitted by the CDQ groups requesting percentage allocations for EAI golden king crab and Adak red king crab are

amendments to the 2003-2005 CDPs and will be reviewed as such by NMFS for this IAD. Further information about this issue is provided later in the IAD.

Because the State's recommendations apply to both CDQ allocations and proposed amendments to the 2003-2005 CDPs, NMFS considered the following requirements of 50 CFR part 679 in making determinations in this IAD:

1. §679.30(a) requires that the State announce an application period for CDQ allocations.
2. §679.30(a) requires that qualified applicants apply for CDQ allocations by submitting a proposed CDP to the State during its CDQ application period. Qualified applicants are defined at §679.2.² For this IAD, NMFS will determine whether qualified applicants applied for the 2005 allocations of EAI golden king crab and Adak red king crab by submitting proposed amendments to their 2003-2005 CDPs to the State during its application period.
3. §679.30(b) requires the State to hold a public hearing to obtain comments on the proposed CDPs from all interested persons. The hearing must cover the substance and content of the proposed CDPs so that the general public, particularly the affected parties, have a reasonable opportunity to understand the impact of the proposed CDPs. The State must provide reasonable public notification of the hearing date and location. At the time of public notification of the hearing, the State must make available for public review all State materials pertinent to the hearing. For this IAD, NMFS will determine whether the State held a public hearing to obtain comments on the proposed amendments to the 2003-2005 CDPs in accordance with the requirements at §679.30(b).
4. §679.30(c) requires the State to consult with the Council before the State submits its recommendations about CDQ allocations and proposed CDPs to NMFS. For this IAD, NMFS will determine whether the State consulted with the Council before it submitted its recommendations about the 2005 crab CDQ allocations and approval of proposed amendments to the 2003-2005 CDPs to NMFS.
5. §679.30(d) requires the State to transmit the proposed CDPs and its recommendations for approval of each of the proposed CDPs to NMFS, along with the findings and the rationale for the recommendations. In its findings, the State must make determinations about whether each proposed CDP meets all applicable requirements of 50 CFR part 679. For this IAD, NMFS will determine whether the State transmitted proposed amendments to the 2003-2005 CDPs along with its recommendations, findings, and rationale for its CDQ allocation recommendations and whether the State made determinations that the proposed amendments met all applicable requirements of 50 CFR part 679.

² The term "qualified applicant" for purposes of the CDQ Program is defined at §679.2 as a local fishermen's organization or a local economic development organization that: (i) represents an eligible community or group of eligible communities; (ii) is incorporated under the laws of the State of Alaska or under Federal law; and (iii) has a board of directors composed of at least 75 percent resident fishermen of the community (or group of communities).

6. Because NMFS is reviewing proposed amendments to the 2003-2005 CDPs, NMFS must determine whether the 2003-2005 CDPs, if amended as proposed by the CDQ groups, would continue to provide the information required to be contained in a CDP by §679.30(a) and would continue to be consistent with the goals and purpose of the CDQ Program at §679.1(e).

7. Finally, under §679.30(d), NMFS must determine that, in making its recommendations, findings, and rationale, the State demonstrated that it considered relevant evaluation criteria and provided a reasonable explanation for its 2003-2005 crab CDQ allocation recommendations given those criteria.

Determinations about the State's Recommendations

Pursuant to 50 CFR part 679, I make the following determinations about the State's recommendations as submitted in its July 14, 2005, letter from Governor Murkowski and described in the "CDQ Team's Final Recommendations" dated June 22, 2005, and I provide my rationale for these determinations.

1. Did the State announce an application period as required by §679.30(a)?

Appendix 2 to the State's July 14, 2005, letter, contains three different letters dated August 16, 2004, and addressed to "Dear Interested Party." The first letter dated August 16, 2004, is the first page of Appendix 2. The second and third letters dated August 16, 2004, are on the first page of the application packets for the 2006-2008 CDP applications and the 2005 Crab Addendum CDP application. The first letter dated August 16, 2004, stated that two application packets were sent to each CDQ group. A copy of mailing labels and e-mails in Appendix 2 indicate that the State also sent the application packets to representatives of each of the 65 communities currently participating in the CDQ Program. The third letter dated August 16, 2004, which is included in the 2005 Crab Addendum CDP application packet, stated that the application period for the 2005 crab CDQ allocations opened on October 1, 2004, and closed on November 1, 2004. In Appendix 2 to the State's July 14, 2005, letter to NMFS, the State provided copies of public notices announcing the application period that it placed in the Anchorage Daily News, Juneau Empire, Nome Nugget, Bristol Bay Times, Dutch Harbor Fisherman, and Tundra Drums and on the State's website. *Based on this information, I determine that the State did announce an application period for the 2005 crab CDQ allocations as required by §679.30(a).*

2. Did qualified applicants submit applications for CDQ allocations to the State as required by §679.30(a)?

On page 2 of its June 22, 2005, of its letter to Governor Murkowski regarding the CDQ Team's final allocation recommendations (Appendix 1), the State wrote that "[D]uring this application period, the CDQ Team received six CDPs requesting allocations of the two new crab species for the 2005 Crab CDP allocation cycle." The State forwarded to NMFS seven binders, one each from APICDA, BBEDC, CVRF, NSEDC, and YDFDA and two binders from CBSFA. The binders from five CDQ groups are titled "2005 Crab Addendum." The binder from NSEDC is titled "Application for Community Development Quota Program." Each of these applications

bears a State of Alaska, Department of Commerce stamp indicating that the applications were received by the State on or before the State's November 1, 2004, deadline.

APICDA, BBEDC, CBSFA, CVRF, NSEDC, and YDFDA all are operating under CDPs approved by NMFS for 2003 through 2005. When these CDPs were approved on January 17, 2005, NMFS determined that each of the CDQ groups were qualified applicants because they are local economic development organizations that meet the definition of qualified applicants at §679.2. No revisions have been made to the 2003-2005 CDPs since January 17, 2005, that have changed (1) the eligible communities participating in each CDQ group, (2) the fact that all of the CDQ groups are incorporated as non-profit corporations under the laws of Alaska, and (3) the fact that the board of directors of each CDQ group is composed of at least 75 percent resident fishermen of the community or group of communities. No such revisions to the 2003-2005 CDPs are proposed in the applications submitted to the State by the six CDQ groups.

The eligibility status of each of the 65 communities participating in the 2003-2005 CDPs and represented by the CDQ groups submitting applications for the 2005 crab CDQ allocations recently was confirmed by Congress in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (H.R.3, 109th Cong., Title X, Subtitle B, Sec. 10206, 2005, enacted). This legislation, which was signed by the President on August 10, 2005, confirms that the 65 communities that are listed in the 2003-2005 CDPs are eligible to participate in the CDQ Program.

Based on this information, I determine that APICDA, BBEDC, CBSFA, CVRF, NSEDC, and YDFDA are qualified to apply for the 2005 crab CDQ allocations of EAI golden king crab and Adak red king crab and that each of the six CDQ groups submitted an application for these allocations to the State as required by §679.30(a).

3. Did the State hold a public hearing as required by §679.30(b)?

In Appendix 2 to its July 14, 2005, letter to NMFS, the State provided copies of several documents related to public hearings it held on the 2005 crab CDQ allocations and the 2006-2008 groundfish, prohibited species, halibut, and crab CDQ allocations.³ These documents include (1) a September 10, 2004, letter to each of the CDQ groups notifying the groups of the November 30, 2004, public hearing in Anchorage; (2) a December 1, 2004, letter to each of the CDQ groups notifying the groups of the additional public hearings that the State held on December 15, 16, and 17, 2004, in Anchorage; and (3) copies of public notices about both the November and December 2004 public hearings that were published in the Anchorage Daily News, Juneau Empire (notice for December 2004 hearing only), Nome Nugget, Bristol Bay Times, Dutch Harbor Fisherman, and Tundra Drums and on the State's website. The public notices identified that the hearings were about both the 2005 crab CDQ allocations and the 2006-2008 multispecies CDQ allocations.

In Appendix 3 to its July 14, 2005, letter to NMFS, the State provided transcripts from the November 30, 2004, public hearing and the December 15 through December 17, 2004, public

³ The 2006-2008 groundfish, prohibited species, halibut, and crab CDQ allocations also may be referred to by NMFS in this IAD as the 2006-2008 multispecies CDQ allocations.

hearings. The transcript of the November 30, 2004, hearing indicates that teleconference hook-ups were provided in St. Paul, Nome, Unalaska, Dillingham, and Bethel. At the beginning of the hearing, Commissioner Blatchford stated that the hearing was about "the 2006-2008 CDP, and 2005 crab, CDP Application cycle." Each of the CDQ groups provided an overview that generally described the communities they represented; the board of directors and managing organization for the CDQ group; current social and economic conditions in their communities; investments, projects, and employment programs that the group had undertaken in current and past CDQ allocation cycles; and plans for the future. These presentations generally constituted an overview of much of the information in the current 2003-2005 CDPs and the proposed 2006-2008 CDPs. Two groups (YDFDA and CBSFA) specifically mentioned the 2005 crab CDQ allocations in their presentations. However, most of the presentations focused on the allocations of groundfish, prohibited species, halibut, and crab for the 2006-2008 allocation cycle.

At the conclusion of the CDQ groups' presentations at the November 30, 2004, public hearing, the State provided an opportunity for public comment. No comments were received from people via the teleconference hook-ups. One person provided public testimony in Anchorage. In addition, a statement by Commissioner Blatchford on page 82 of the transcript of the November 30, 2004, public hearing indicates that the State provided copies of the executive summaries from the proposed CDPs at the hearing and that the State would provide copies upon request to anyone who was not able to get a copy at the hearing. However, the transcript does not indicate whether executive summaries of both the 2005 crab CDQ allocation applications and the proposed 2006-2008 CDPs were provided at the meeting.

Based on this information, and my own attendance at the November 30, 2004, public hearing, I determine that the State held a public hearing to obtain comments on the 2005 allocations of EAI golden king crab and Adak red king crab, and that the State provided reasonable public notification of the hearing dates and locations. I also determine that the November 30, 2004, hearing covered the substance and content of the 2003-2005 CDPs and provided the public with the opportunity to comment on the 2005 crab CDQ allocations. Finally, I determine that the State did not provide sufficient information for NMFS to make a determination about whether the State made available for public review prior to the hearing all State materials pertinent to the 2005 crab CDQ allocations. However, I also determine that this deficiency in the information submitted by the State is not, on its own, a reason to disapprove the State's 2005 crab CDQ allocation recommendations. NMFS has no indication from public comment at the hearing, or from any other source, that any person was unable to obtain the required information about the 2005 crab CDQ allocations prior to the public hearing.

4. Did the State consult with the Council as required by §679.30(c)?

In Appendix 4 to its July 14, 2005, letter to NMFS, the State provided copies of several documents related to its consultation with the Council about the 2005 allocations of EAI golden king crab and Adak red king crab at the Council's April 2005 meeting. These documents include (1) a March 31, 2005, letter from the State to Stephanie Madsen, Chair of the Council, summarizing the State's 2006-2008 multispecies CDQ allocation recommendations and 2005 crab CDQ allocation recommendations; (2) an April 11, 2005, letter from the Council to Governor Frank H. Murkowski about the State's consultation with the Council at the Council's

April 2005 meeting; and (3) a partial transcript of the State's April 8, 2005, consultation with the Council. *Based on this information, and my own attendance at the Council meeting while the State's consultation occurred, I determine that the State consulted with the Council about its recommendations for the 2005 crab CDQ allocations and associated amendments to the 2003-2005 CDPs before the State submitted those recommendations to NMFS for approval, as required by §679.30(c).*

The State described its consultation with the Council on page 5 of its June 22, 2005, rationale. In that discussion, the State wrote:

“More specifically, concern was expressed relating to the way the CDQ program standards and evaluation criteria are applied by the CDQ Team in its evaluation of CDPs and development of the allocation recommendations. The Council also expressed concern regarding the ability of the CDQ groups to understand the most important factors for consideration and relative weighting of the criteria in each new allocation cycle.”

In the next paragraph, the State wrote “[M]any of the issues raised during this consultation were previously addressed in Amendment 71 passed by the Council in June of 2002. However, for reasons beyond the control of the State, much of Amendment 71 has not yet been codified into regulations.”

The Council's recommendations for revisions to regulations governing the CDQ allocation process were made through its recommendations about Issue 1, Issue 2, Issue 4, and Issue 5 in the Amendment 71 analysis. For Issue 1, the Council recommended that NMFS continue to make CDQ allocation recommendations through an administrative process, which is the process that is currently described in NMFS regulations and the process that is now being used to consider the State's 2005 crab CDQ allocation recommendations. For Issue 2, the Council recommended that a 3-year allocation cycle be adopted in NMFS regulations. For Issue 4, the Council recommended that the State and NMFS continue to make periodic, competitive allocations among the CDQ groups. For Issue 5, the Council recommended that essentially the same evaluation factors currently in State regulations, and being used by the State in this 2005 crab CDQ allocation process, be added to federal regulations. The Council's recommendations for the CDQ allocation process under Amendment 71 generally reflect the CDQ allocation process that the State followed in developing its 2005 crab CDQ allocation recommendations. The fact that NMFS has not made these revisions in its regulations does not prevent the State from providing CDQ allocation recommendations and rationale that address what the State identified as the Council's concern: the ability of the CDQ groups to understand the most important factors for consideration and relative weight of these factors.

5. Did the State transmit the proposed CDPs and its recommendations for approval of each of the proposed CDPs to NMFS, along with the findings and the rationale for the recommendations as required by §679.30(d), and did the State make determinations about whether the proposed amendments to the 2003-2005 CDPs met all applicable requirements of 50 CFR part 679?

On July 14, 2005, NMFS received a letter from the State, with attachments, that contained the State's recommendations about approval of "all six Community Development Plans (CDPs) submitted to the State for the new 2005 crab species" and percentage allocations among the six CDQ groups for the 2005 CDQ reserves for EAI golden king crab and Adak red king crab. The July 14, 2005, letter further stated that the "state's findings and rationale in support of these recommendations are contained in the enclosed appendices." Appendix 1 to the July 14, 2005, letter contains the June 22, 2005, "Final 2005 Crab CDQ allocation recommendations" with the State CDQ Team's findings and rationale supporting its recommendations. The July 14, 2005, letter from Governor Murkowski stated that on June 24, 2005, "he concurred with the CDQ Team's 2005 Crab CDQ recommendations, findings, and rationale." The July 14, 2005, letter also stated that the "six 2005 CDPs have been fully reviewed by the State," and that "[E]ach of the six CDPs met the requirements of 50 C.F.R. 679 and 6 AAC 93."⁴

The State refers to the applications for the 2005 crab CDQ allocations as "CDPs" in its July 14, 2005, letter and its June 22, 2005, findings and rationale. However, on page 2 of its August 16, 2004, application packet, the State wrote that the "CDQ groups may submit an Addendum Application to the 2003-2005 CDPs to request CDQ allocations for EAI golden king crab and Adak red king crab added to the CDQ program started in 2005." On page 3 of the application packet, the State instructed the CDQ groups to "provide a detailed set of binder instructions on where these documents are to be included in the 2003-2005 CDPs."

Based on the information submitted by the State in its July 14, 2005, letter to NMFS, I determine that the State did transmit proposed revisions to the 2003-2005 CDPs, its recommendations for approval of these proposed revisions, its recommendations for 2005 allocations of EAI golden king crab and Adak red king crab among the CDQ groups, and the findings and rationale supporting these recommendations to NMFS as required by §679.30(d). I also determine that the State made a determination that the information submitted by the six CDQ groups to the State meets the requirements of 50 CFR part 679 as required by §679.30(d). Finally, I determine that the State notified the CDQ groups that the applications for the 2005 allocations of EAI golden king crab and Adak red king crab were amendments to the 2003-2005 CDPs.

6. If amended as proposed, would the 2003-2005 CDPs continue to provide the information required to be contained in a CDP by §679.30(a) and continue to be consistent with the goals and purpose of the CDQ Program at §679.1(e)?

The State forwarded to NMFS seven binders, one each from APICDA, BBEDC, CVRF, NSEDC, and YDFDA and two binders from CBSFA. These binders constituted the CDQ groups' applications for allocations of the 2005 CDQ reserves for EAI golden king crab and Adak red king crab. For reasons described in paragraph (5) above, NMFS is considering these applications as proposed amendments to the 2003-2005 CDPs.

⁴ On page 13 of this IAD, NMFS identifies a comment on page 8 of the State's rationale that indicates that the State has some concerns about whether APICDA's "CDP" is consistent with §679.1(e). However, it is unclear from this comment whether the State is referring to the proposed amendments to APICDA's 2003-2005 CDP for the 2005 crab allocations or is referring to APICDA's proposed 2006-2008 CDP.

NMFS interprets its regulations at §679.30 for review of amendments to the 2003-2005 CDP in light of decision 03-0022 issued by NMFS's Office of Administrative Appeals (OAA) on November 26, 2004 (OAA 03-0022). This decision was affirmed by NMFS on December 7, 2004. OAA 03-0022 states that the "general CDQ regulations of §679.30 should be construed in light of the goals and purpose of the CDQ program stated in §679.1(e)," but that the language of §679.1(e) is not "a substantive requirement that each CDQ project in itself must be intended to achieve the goals and purpose of the program." Therefore, a CDP on the whole must be consistent with the goals and purpose of the CDQ Program and any changes to an approved CDP must not cause the CDP as a whole to become inconsistent with the goals and purpose of the CDQ Program.

The applications generally contained proposed revisions, deletions, and additions to executive summaries; description of investments and employment; descriptions of target fisheries; fishing plans; budgets; and additions of draft contracts with business partners. The applications for APICDA, BBEDC, NSEDC, and YDFDA contain proposed revisions, additions, and deletions to text currently contained in the 2003-2005 CDP. In addition, BBEDC, NSEDC, and YDFDA provided specific instructions for how to incorporate the proposed amendments into the 2003-2005 CDPs, as requested in the State's application packet. However, the applications for CBSFA and CVRF do not clearly indicate that they intended to amend their 2003-2005 CDP. Neither application provides specific instructions about amending the 2003-2005 CDP and some of the information in the applications indicate that the CDQ group might be basing its amendments on information submitted to the State at the same time in their proposed 2006-2008 CDPs rather than on information in the 2003-2005 CDPs.

The applications submitted by APICDA, BBEDC, CBSFA, NSEDC, and YDFDA do not contain any new proposed CDQ projects. The application submitted by CVRF contains descriptions of nine CDQ projects, but only one of them, a non-profit training project, appears to be a CDQ project that is not contained in CVRF's 2003-2005 CDP. None of the proposed amendments would remove information from the 2003-2005 CDPs that formed the basis of NMFS's January 17, 2003, determinations that the 2003-2005 CDPs contained all of the information required by §679.30(a) or that the 2003-2005 CDPs were consistent with the goals and purpose of the CDQ Program at §679.1(e). In addition, none of the proposed amendments would revise or add information to the 2003-2005 CDPs that would change NMFS's January 17, 2003, determination that the 2003-2005 CDPs were consistent with §679.1(e).

After review of the information submitted by the six CDQ groups in their applications for the 2005 crab CDQ allocations, I determine that, if the 2003-2005 CDPs were amended as proposed in these applications, the 2003-2005 CDPs would continue to meet the information requirements at §679.30(a) and would continue to be consistent with the goals and purpose of the CDQ Program at §679.1(e). However, if NMFS were approving the State's 2005 crab CDQ allocation recommendations, I would consult with each CDQ group before actually amending its 2003-2005 CDP to ensure that any revisions to the group's CDP did not conflict with amendments approved by NMFS between November 1, 2004, and today.

7. Did the State consider relevant evaluation criteria and provide a reasonable explanation for its 2005 crab CDQ allocation recommendations given those criteria?

The State's findings and rationale for its 2005 crab CDQ allocation recommendations are described in the June 22, 2005, letter from Commission Blatchford to Governor Murkowski. This document describes the evaluation criteria⁵ considered by the State in making its 2005 crab CDQ allocation recommendations and provides the State's findings and explanation for its recommendations. This document will subsequently be referred to as the State's rationale.

(i) Did the State consider relevant evaluation criteria as a basis for its 2005 crab CDQ allocation recommendations?

On page 3 of the State's rationale, the State wrote that it considered the CDQ program standards in 6 AAC 93.017 and all 20 evaluation factors set forth in 6 AAC 93.040(b) "when reviewing the proposed CDPs."⁶ In addition, in the first paragraph of page 4 of its rationale, the State wrote that it "the CDQ Team's allocation recommendation focused on" a subset of these program standards and evaluation factors. NMFS assumes that the term "focused on" for purposes of competitive evaluation of the CDQ groups means that the State based its 2005 crab allocation recommendations on this subset of program standards and evaluation factors. The State also wrote, in the second paragraph on page 4, that when the sum of allocation requests exceed 100%, the State applies 6 AAC 93.040(g), which requires the State to "seek to maximize the benefits of the CDQ program to the greatest number of participating communities."⁷

NMFS regulations at 50 CFR 679.30 describe the process that the State must follow in making its allocation recommendations and identify the CDP as the document that must be submitted by the applicants to the State and NMFS to apply for CDQ allocations. The regulations include specific information that must be supplied in the CDP, but they do not specify that only the information in the CDP may be used as a basis for CDQ allocations. Specific guidelines setting forth the criteria the State should use in evaluating the CDQ groups or in making CDQ allocation recommendations are not contained in the MSA, the FMPs, or 50 CFR Part 679. Therefore, the State appropriately developed program standards, evaluation factors, and the guidance for its allocation recommendations and implemented them under 6 AAC 93.

The program standards and evaluation factors in State regulations include population, social and economic conditions; past performance of a CDQ group in using allocations to provide benefits to eligible communities consistent with the goals and purpose of the program; plans described in the CDP to provide benefits to eligible communities in the future; and the conduct of the CDQ fisheries. These program standards and evaluation factors are related to the information that must be submitted in the CDPs under Federal regulations and are relevant to the State's responsibility to recommend appropriate CDQ allocations to the eligible CDQ communities. *Therefore, I determine that the program standards in 6 AAC 93.017, the evaluation factors in 6*

⁵ The State refers to program standards and evaluation factors in its regulations. When NMFS uses the more general term "evaluation criteria" in this IAD, it is referring to the combination of all criteria used by the State as a basis for its allocation recommendations, including program standards and evaluation factors.

⁶ A copy of the State regulations at 6 AAC 93 is in Attachment 2 to this IAD.

⁷ The quoted text is from 6 AAC 93.040(g), see Attachment 2 to this IAD.

AAC 93.040(b), and the direction of 6 AAC 93.040(g) are relevant evaluation criteria for the State to consider as a basis for its 2005 crab CDQ allocation recommendations.

(ii) Did the State provide a reasonable explanation for its 2005 crab CDQ allocation recommendations?

On pages 3 and 4 of the State's rationale, the State described the program standards and evaluation factors at 6 AAC 93.017 and 6 AAC 93.040(b) it relied on (1) to make determinations about the "proposed CDPs," and (2) as a basis for its 2005 crab allocation recommendations. Although the State refers to "CDPs" and "proposed CDPs," the applications for 2005 crab CDQ allocations are proposed amendments to the 2003-2005 CDPs. The proposed 2006-2008 CDPs that were submitted by the CDQ groups to the State are applications for the 2006-2008 multispecies CDQ allocations.

In the fourth paragraph on page 3 of the State's rationale, the State found that all six CDPs demonstrated consistency with two of the nine program standards (#3 and #4), and four of the 20 evaluation factors (#7, #8, #18, and #19), so these program standards and evaluation factors "were given little weight in the allocation recommendation." In the last paragraph on page 3, the State identified two additional evaluation factors on which it placed little weight. One of these factors is 6 AAC 93.040(b)(7), which addresses "the coordination or cooperation with other applicants or CDQ groups on CDQ projects."⁸ However, NMFS notes that in the State's more detailed explanation of its allocation recommendations for the individual CDQ groups, the State specifically identifies concerns with cooperation between APICDA (page 9) and CBSFA (page 12) on CDQ projects in St. George and St. Paul. Identification of these concerns in the part of the rationale that explains the State's recommended percentage allocations for APICDA and CBSFA implies that this evaluation factor played some role in the State's allocation recommendations. However, the State does not explain what it means by "little weight" and what role, if any, the program standards and evaluation criteria it identified as having little weight actually played in the State's 2005 crab allocation recommendations.

In the first paragraph on page 4 of the State's rationale, the State wrote that its allocation recommendation "focused on" program standards "(1)-(2), and (5)-(9)" and evaluation factors "(1)-(6), (9), (11-17)." The State then wrote that it "roughly distilled" the program standards and evaluation factors it focused on into three broad categories it used to competitively evaluate each group. These three broad categories included the extent to which each CDQ group: (1) sought to maximize the benefits of the CDQ Program to the greatest number of participating communities, (2) did well in terms of overall performance, and (3) proposed a CDP that was consistent with the goals and purposes of the CDQ Program.

In the third paragraph on page 4 of the State's rationale, the State explained that it "measured overall performance by reviewing to what extent each CDQ group: (1) expanded investment in (a) profitable Bering Sea fishing vessels and quota, and (b) onshore processing projects that were sustainable; (2) provided measurable benefits to their residents through in-region projects (including employment, education, and training programs); and (3) achieved these results with

⁸ The State's citation for this program standard in paragraph 5 on page 3 of its rationale is incorrectly identified as 6 AAC 93 017(7).

reasonable administrative expenses (including compensation of senior level management as compared to other non-profit corporations, for-profit corporations, and high level government officials in Alaska.)”

In the fifth paragraph on page 4 of the State’s rationale, the State provided two additional broad categories that evaluate to what extent: (1) each CDP is geared toward transition to a self sufficient, regionally based, fisheries related economy; and (2) each group has promoted, to the greatest extent possible, conservation-based fishing of their CDQ allocations.

NMFS concludes from the explanation provided on pages 3 and 4 of the State’s rationale that the State divided the seven program standards and 14 evaluation factors that it said it focused on in making its 2005 crab allocation recommendations into the following five general categories:

- (1) The extent to which each CDQ group sought to maximize the benefits of the CDQ Program to the greatest number of participating communities;
- (2) The extent to which each CDQ group did well in terms of overall performance;
- (3) The extent to which each CDQ group proposed a CDP that was consistent with the goals and purposes of the CDQ Program;
- (4) The extent to which each CDP is geared toward transition to a self sufficient, regionally based, fisheries related economy; and
- (5) The extent to which each group has promoted, to the greatest extent possible, conservation-based fishing of their CDQ allocations.

The State then provided an explanation of its 2005 crab CDQ allocations of EAI golden king crab and Adak red king crab among the six CDQ groups on pages 6 through 18 of the State’s rationale. For each CDQ group, the State first listed information about the CDQ group’s population, unemployment rate, median household income, and poverty rate. Based on this information, the State provided conclusions about the standard of living and economic need for the region represented by each CDQ group. The State used three general terms to describe its conclusions: high, mid-range, and low. For BBEDC and CBSFA, the State also provided an additional statement about the adverse affect low salmon prices and a downturn in the opilio crab harvests on the CDQ communities represented by those two CDQ groups.

The State then provided conclusions about the following evaluation criteria for each CDQ group: past performance of offshore investments; past performance of employment, education, and training projects; the potential for in-region projects; quality of the long range transition plan; administrative expenses; the design of milestones for determining progress of projects; business plans; investments in the crab sector; and employment benefits with industry partners. Relative to the other CDQ groups, the State provided a much more lengthy explanation of its conclusions that APICDA was not performing as well as the other five CDQ groups with respect to these evaluation criteria. However, for the other five CDQ groups, the State provided relatively short, fairly general, and almost identical conclusions with respect to each CDQ group’s performance

for several evaluation criteria. For example, in the sections addressing each CDQ group on pages 6 through 18 of the State's rationale, the State wrote that BBEDC, CBSFA, CVRF, NSEDC, and YDFDA all had in-region projects "that appear to have the likelihood of developing a self-sustaining local fisheries economy and a viable schedule for transition from reliance on an allocation to self-sufficiency." In another example, the State wrote that each of these five CDQ groups had in-region projects that "appear to be designed with realistic measurable milestones for determining progress for their projects." The State also provided identical paragraphs about each of the five CDQ groups, except APICDA, with regard to their future plans. For the evaluation criteria related to past performance of existing offshore CDQ projects State provided conclusions using the terms "successful" and "very successful" for each of the CDQ groups, except APICDA. For APICDA, the State concluded that its "past performance of existing offshore CDQ projects have, for the most part, been successful," but that "APICDA, in contrast with the other five CDQ groups, has not been actively investing in additional for-profit investments..." (page 6 of the State's rationale). For the evaluation criteria related to past performance of in employment, education, and training, the State provided conclusions using the terms "successful" and "very successful" for each of the six CDQ groups.

After summarizing its conclusions about each CDQ group's with respect to population; standard of living; economic need; past performance of offshore investments; past performance of employment, education, and training projects; the potential for in-region projects; quality of the long range transition plan; administrative expenses; and the design of milestones for determining progress of projects, the State provided its specific percentage allocation recommendations for the 2005 allocations of EAI golden king crab and Adak red king crab. Then, for all of the CDQ groups except APICDA, the State wrote that it recommended the particular allocation based on the "factors and findings above." For APICDA, the State did not write that its 2005 crab allocation recommendations were based on "factors and findings above," but rather "[T]he State's 2005 allocation recommendations for the two new species of crab are consistent with APICDA's current opilio crab CDQ allocation percentage." (page 10 of the State's rationale).

For all six of the CDQ groups, the State concluded each section with additional statements listing specific evaluation criteria that the State considered in making its recommendation about the 2005 crab allocations. The statements for each CDQ group are as follows:

APICDA (page 10): "The State took into consideration APICDA's business plan and investment in the crab sector in making this recommendation."

BBEDC (page 11): "In making this recommendation, the CDQ Team considered BBEDC's business plan, investment in the crab sector, the success of their business agreements, their commitment to employment agreements for their residents with industry partners, and long-range business plan for self-sufficiency." Later on page 11, the State also wrote "[T]he State took into consideration BBEDC's business plan, investment in the crab sector, and employment benefits with industry partners in making this recommendation."

CBSFA (page 13): "In making this recommendation, the CDQ Team considered CBSFA's business plan, investment in the crab sector, the success of their business agreements, their

commitment to employment agreements for their residents with industry partners, and long-range business plan for self-sufficiency.”

CVRF (page 15): “In making this recommendation, the State took into consideration CVRF’s business plan, investment in the sector, and employment and training benefits provided by vessels harvesting and processing crab.” Again, in the same paragraph the State then wrote: “[I]n making this recommendation, the CDQ Team considered CVRF’s business plan, investment in the crab sector, the success of their business agreements, their commitment to employment agreements for their residents with industry partners, and their long-range business plan for self-sufficiency.” Later on page 15, the State also wrote “[T]he State took into consideration CVRF’s business plan, investment in the crab sector, and employment benefits provided by industry partners in making this recommendation.”

NSEDC (page 17): “In making this recommendation, the CDQ Team considered NSEDC’s business plan, the success of their business agreements, investment in the crab sector, and employment benefits provided by industry partners harvesting and processing crab.”

YDFDA (page 18): “The State took into consideration YDFDA’s business plan, investment in the crab sector, and employment benefits provided by industry partners in making this recommendation.”

A general concern that NMFS identified in reviewing the State’s rationale is that much of the rationale provided for its recommendations for the 2005 crab CDQ allocations is identical to the State’s March 14, 2005, rationale supporting its initial, combined recommendations for 2005 crab and 2006-2008 multispecies CDQ allocations. In its rationale for its 2005 crab CDQ allocations, the State removed specific reference to the 2006-2008 allocation recommendations, added text to document the April 2005 Council consultation, and added further explanation for its allocation recommendations for APICDA. However, the State provided the same explanation of the evaluation criteria it considered, much of the same conclusions for each CDQ group, and the same references to “the CDPs” or the “proposed CDPs”.

This approach to segregate its final 2005 crab CDQ allocation recommendations and rationale from the combined initial recommendations and rationale creates confusion about what documents the State reviewed and considered as a basis for its 2005 crab allocation recommendations. For example, in the third full paragraph on page 7 of the its rationale, the State wrote “[T]he CDQ Team is concerned with the overall strategy expressed in APICDA’s CDP for this allocation cycle based on the group’s past performance and future plans. ... This lack of forward thinking reflects on the fact that the 2005 Crab CDP is very similar to prior CDPs for other allocation cycles.” The CDP “for this allocation cycle” is the 2003-2005 CDP and the application submitted by APICDA for the 2005 crab CDQ allocations is a proposed amendment to the 2003-2005 CDP. This paragraph is almost identical to the fourth paragraph on page 7 of the State’s March 14, 2005, initial allocation recommendations and rationale for the combined 2005 crab allocations and 2006-2008 multispecies CDQ allocations.⁹ The primary difference is that, in the sentence that starts out “[T]his lack of forward thinking.,” the State

⁹ The State’s initial recommendations and rationale are in a March 14, 2005, letter from Edgar Blatchford to Governor Murkowski. A copy of this letter is in Exhibit A of the State’s July 14, 2005, letter to NMFS.

refers to "the 2005 Crab CDP" in its rationale for the 2005 crab CDQ allocations, but refers to the "2006-2008 CDP" in its combined initial allocation recommendations. The revision of the document referenced between the initial and final recommendations without making any other significant changes in the conclusion creates confusion about whether the State's rationale for its 2005 crab allocation recommendations were based on the documents submitted as applications for the 2005 crab CDQ allocations, on the 2003-2005 CDP as a whole, or on the proposed 2006-2008 CDPs.

My review of the State's rationale for its recommendations for the 2005 allocations of EAI golden king crab and Adak red king crab identified the following deficiencies:

(1) The State's rationale does not demonstrate that the State applied all of the evaluation criteria it said (on pages 3 and 4 of the State's rationale) that it focused on in its allocation recommendation.

The State provided a lengthy explanation of how it initially considered all program standards and evaluation factors in 6 AAC 93, identified two program standards and six evaluation factors that it gave little weight to in its allocation recommendations, then categorized the remaining seven program standards and 14 evaluation factors into five broad categories of evaluation criteria that it focused on in making its 2005 crab allocation recommendations. The five broad categories of evaluation criteria that NMFS identified in the State's rationale are listed on page 14 of this IAD. The State wrote on page 4 of its rationale that "the CDQ Team's allocation recommendation focused on the remaining factors set forth in 6 AAC 93.040(b)(1)-(6), (9), (11)-(17) and program standards in 6 AAC 93.017(1)-(2), and (5)-(9)." Therefore, because the State explained how it categorized the evaluation criteria that it focused into five broad categories, NMFS expected the State's rationale to provide the State's evaluation of each of the six CDQ groups with respect to these five broad categories of evaluation criteria. However, the State's explanation of its allocation recommendations for each CDQ group, on pages 6 through 18 of its rationale, addressed population; standard of living; economic need; past performance of offshore investments; past performance of employment, education, and training projects; the potential for in-region projects; quality of the long range transition plan; administrative expenses; the design of milestones for determining progress of projects; business plans; investments in the crab sector; and employment benefits with industry partners. Some of these evaluation criteria clearly are components of two of the five broad categories of evaluation criteria that the State said, on page 4 of its rationale, that it considered in making its 2005 crab CDQ allocation recommendations (i.e. the extent to which each CDQ groups did well in terms of overall performance, and the extent to which each CDP is geared toward transition to a self sufficient, regionally based, fisheries related economy.) However, it does not appear that the State's rationale addresses each of the five broad categories of evaluation criteria that it said it focused on.

One of the five broad categories of evaluation criteria that the State said, on page 4 of its rationale, that it focused on was the extent to which each CDQ group sought to maximize the benefits of the CDQ Program to the greatest number of participating communities. The State's rationale provided its conclusions about population, standard of living, and economic need for each CDQ group. However, in its rationale, the State did not list the number of communities represented by each CDQ group or provide specific conclusions about how its 2005 crab

allocation recommendations would maximize benefits of the program to the greatest number of participating communities. As a result, it is unclear in the State's rationale whether or how it addressed the first of the five broad categories of evaluation criteria that it said it focused on.

Another of the five broad categories was the extent to which each group has promoted, to the greatest extent possible, conservation-based fishing of their CDQ allocations. However, the State did not address, in its explanation of its 2005 crab allocation recommendations, whether or how the CDQ groups had promoted conservation-based fishing. If the performance of all six CDQ groups with respect to conservation-based fishing was similar, if this evaluation factor was not directly relevant to allocation the 2005 crab CDQ reserves, or if this evaluation criteria did not assist the State in competitively evaluating the groups in relation to each other, then the State should have included this evaluation factor on the list of factors that the State placed little weight on in its evaluation. Because the State did not include this evaluation factor in the list of evaluation factors that it placed little weight on, the State's record indicates that this factor played some role in the State's 2005 crab allocation recommendations, but the State provided no explanation of that role.

Another of the five broad categories of evaluation criteria that the State said it focused on was the extent to which each CDQ group proposed a CDP that was consistent with the goals and purposes of the CDQ Program. On page 6 of the State's rationale, it wrote that "each of the six proposed CDPs met the requirements of 6 AAC 93 and 50 C.F.R. 679." NMFS interprets §679.30(d) to require that the CDP be consistent with the goals and purpose of the CDQ Program at §679.1(e). Although the State did provide a general statement about the consistency of the "six proposed CDPs" with 50 CFR part 679, the State did not specifically provide a determination about the impact of the proposed amendments to the 2003-2005 CDPs on the consistency of those CDPs with respect to the goals and purpose of the CDQ Program at §679.1(e). Making such a determination about the consistency of "the CDPs" was one of the five broad categories of evaluation criteria that it said it focused on in making its 2005 crab allocation recommendations. If all the proposed amendments to the 2003-2005 CDPs were consistent with the goals and purpose of the CDQ Program, then the State should have included this evaluation factor on the list of evaluation factors that the State placed little weight on in its evaluation of the CDQ groups. Again, because the State did not include this evaluation factor in the list of evaluation factors that it placed little weight on, the State's record indicates that this factor played some role in the State's 2005 crab allocation recommendations, but its record provided no explanation of that role.

Although the State generally asserted that all six of the proposed CDPs were consistent with 50 CFR part 679, on page 8 of its rationale the State wrote that "[I]n the CDQ Team's view, APICDA's long-range business plan sets forth in the CDP submitted for this allocation cycle will have difficulty in accomplishing the purpose of the CDQ program which is to invest in income producing commercial fisheries business investments that will result in a self-sustaining fisheries related economy in western Alaska." This statement presents contradictory opinions or conclusions by the State with respect to the consistency of APICDA's CDP with the goals and purpose of the CDQ Program at §679.1(e) that are not explained in the State's record.

The evaluation criteria that the State did focus on in its rationale on pages 6 through 18 all are legitimate evaluation criteria that can be linked to the program standards and evaluation factors in State regulations. NMFS regulations do not instruct the State about the evaluation criteria to consider or how to weigh or balance its conclusions about the CDQ groups' performance against the evaluation criteria to determine its allocation recommendations. The deficiency identified by NMFS is not that the State based its 2005 crab allocation recommendations on inappropriate evaluation criteria. Rather, the State presented a lengthy explanation of the evaluation criteria it focused on in making its CDQ allocation recommendations and then followed that explanation with conclusions about evaluation criteria that appear to be only a subset of those that it said it considered. The list of the five broad categories of evaluation criteria that the State said it considered on page 4 is not the same list of evaluation criteria that it provided discussion and conclusions about on pages 6 through 18. Therefore, the State's rationale does not demonstrate that the State applied all of the evaluation criteria that it said that it focused on in its allocation recommendation.

(2) The State did not provide an adequate explanation about how it used its conclusions about the evaluation criteria it applied to determine the specific percentage allocations it recommended for each CDQ group.

The State's 2005 crab CDQ allocation recommendations first provided a series of general conclusions about each CDQ group's population, standard of living, economic need, and past performance. Next, the State presented its specific percentage allocation recommendations for the 2005 allocations of EAI golden king crab and Adak red king crab. Finally, the State concluded its rationale for each CDQ group by stating that its 2005 crab CDQ allocation recommendations were "based on the factors and findings above," followed by a list of additional factors that the State considered in making its 2005 crab allocation recommendations. (These additional factors are listed on pages 15 and 16 of this IAD). For BBEDC, the State provided two different statements of the specific factors it considered in making its 2005 crab CDQ allocation recommendations (page 11 of the State's rationale), and for CVRF, the State provided three different statements about the specific factors it considered (page 15 of the State's rationale).

The State's rationale provided no information about the importance of population, standard of living, economic need, past performance, and future plans evaluation criteria relative to the more specific evaluation criteria of business plans, investments in the crab sector, and employment benefits. In addition, the organization of rationale, separately presenting both the general conclusions and a list of specific factors considered, also implies that there is something more important or relevant about the evaluation criteria that the State listed after its statement of its percentage allocation than the conclusions it summarized prior to the statement of its percentage allocation. The State wrote that it considered these specific factors, but it doesn't explain whether it further narrowed the evaluation criteria it considered for the 2005 crab allocations or how these considerations are related to its specific percentage allocation recommendations.

The State also did not provide any information about how it combined its various conclusions about each CDQ group to determine its percentage allocation for that CDQ group, with the possible exception of APICDA. The State did recommend a lower crab allocation for APICDA

than the other five groups, which is consistent with the State's conclusions about APICDA's low population, high standard of living, low economic need, poor past performance, and deficient future plans. The State recommended the same percentage allocation for 2005 crab for CBSFA and NSEDC (21%) and the same percentage allocation for 2005 crab for BBEDC and CVRF (18%). However, the State's rationale does not explain specifically why a 21% allocation is appropriate for both CBSFA and NSEDC, why an 18% allocation is appropriate for both BBEDC and CVRF, or why a 14% allocation is appropriate for YDFDA. How did the State use its conclusions about the population, standard of living, economic need, past performance, and future plans of the CDQ groups to develop its specific percentage allocation recommendations? What was similar about BBEDC and CVRF that led to the 18% allocation recommendation? What was different about BBEDC and CVRF versus NSEDC and CBSFA that resulted in a 3% difference in allocations among these groups? What led to the 14% allocation recommendation for YDFDA versus the other five CDQ groups? Finally, why did the State recommend identical percentage allocations of EAI golden king crab and Adak red king crab for each CDQ group for 2005?

On page 4 of the State's rationale, the State wrote that 6 AAC 93.040(g) guides the State to maximize the benefits of the CDQ Program to the greatest number of participating communities. The State also specifically listed this regulation as one of the five broad categories of evaluation criteria that it used to competitively evaluate the CDQ groups. However, the State's rationale does not explain how it balanced this requirement with the other evaluation criteria it applied to determine its allocation recommendations for each CDQ group. For example, the State did not explain why it recommended one of the highest 2005 crab CDQ allocation to CBSFA (21%), which is a CDQ group that represents one community, while it also recommended an allocation of 21% to NSEDC, a CDQ group that represents 15 communities, or an allocation of 18% to CVRF and BBEDC, CDQ group's that represent 20 and 17 communities respectively. The State listed a number of positive conclusions about CBSFA's performance relative to the other CDQ groups and listed several factors that the State considered in making its allocation recommendation, but it did not explain how it used its conclusions to determine the specific percentage allocations it recommended for CBSFA relative to the other CDQ groups.

The State provided one very specific reason why it recommended that APICDA receive an 8% allocation of the EAI golden king crab CDQ reserve. APICDA currently is allocated 8% of the opilio crab CDQ reserve. However, in drawing this link, the State did not explain why it was appropriate for APICDA to receive the same percentage allocation of EAI golden king crab as it currently receives for opilio crab. In addition, the State did not explain how this fact was combined with all of the other conclusions that it drew about APICDA's population, standard of living, economic need, past performance, and future plans to result in the 8% allocation recommendation. Was the current percentage allocation of opilio the primary factor in its 2005 crab allocation recommendations or were the other factors more important? The State's rationale does not provide this explanation.

NMFS is not asserting that the State has made the wrong recommendations about the 2005 crab CDQ allocations or that the State's recommendations cannot be supported. However, the explanation necessary to provide that support is not contained in the rationale that the State submitted to NMFS on July 14, 2005. To provide adequate support for its recommendations, the

State must explain how it combined or balanced the conclusions it reached in its competitive evaluation of the CDQ groups to determine the specific percentage allocations it recommended for each CDQ group. Failure to provide such an explanation makes it impossible for NMFS to understand why the State determined it appropriate for each CDQ group to receive the specific allocations recommended by the State.

For the reasons described above, I determine that the State did not provide a reasonable explanation for its recommendations about the 2005 crab CDQ allocations, as required by 50 CFR 679.30(d). Specifically, the State's rationale does not demonstrate that the State applied all of the evaluation criteria that it said that it focused on in its allocation recommendation, and the State did not provide an adequate explanation about how it used its conclusions about the evaluation criteria it applied to determine the specific percentage allocations it recommended for each CDQ group.

Requests for Reconsideration and Other Supplemental Information

On page 5 of its rationale, the State reported that it provided an opportunity for the CDQ groups to request reconsideration of the State's combined initial recommendations for the 2005 crab and the 2006-2008 multispecies CDQ allocations. The State wrote that:

Two of the CDQ groups filed a request for reconsideration with the State. See Exhibit A. The CDQ Team found that neither of these requests for reconsideration revealed any factual or legal errors in the initial allocation recommendations that would warrant an adjustment to the CDQ Team's initial allocation recommendations. See Exhibit B.

Exhibit A to the State's 2005 crab allocation recommendations contained requests for reconsideration from APICDA and CVRF, correspondence between the State and APICDA, and the State's initial allocation recommendations. Exhibit B contains the State's response to CVRF and the State's response to APICDA.

CVRF's request for reconsideration, dated March 31, 2005, addresses only the State's initial recommendations for the 2006-2008 multispecies CDQ allocations. Therefore, NMFS does not consider this request or the State's response further for purposes of this IAD, which is focused only on the State's 2005 crab allocation recommendations.

APICDA's April 1, 2005, request for reconsideration addresses the State's draft initial allocation recommendations in the State's February 9, 2005, letters to the CDQ groups and Commissioner Blatchford's March 14, 2005, letter to Governor Murkowski. The majority of APICDA's challenges are focused on the State's 2006-2008 allocation recommendations and rationale, particularly its initial recommendations for 2006-2008 allocations of pollock, Pacific cod, yellowfin sole, and Bristol Bay red king crab. On page 21 of its request for reconsideration, APICDA addresses the State's initial recommendation for EAI golden king crab, but does not differentiate between the State's recommendations for 2005 versus 2006-2008. APICDA did not challenge the State's final recommendations for the 2005 crab allocations in the ten day reconsideration period provided by the State following release of its June 22, 2005, final 2005

crab allocation recommendations. However, NMFS finds that APICDA's request for reconsideration does address the State's 2005 crab allocation recommendations because most of the State's rationale for its final 2005 crab CDQ allocation recommendations was part of its initial rationale for the combined 2005 crab and 2006-2008 multispecies allocations. In addition, the State's final 2005 percentage allocation recommendations for EAI golden king crab and Adak red king crab are the same as its initial percentage allocation recommendations for these two crab species for 2006-2008.

APICDA's request for reconsideration (dated April 1, 2005), and its response to the State (dated May 31, 2005), provide numerous challenges to the State's decision making process and its conclusions. These challenges range from disagreement with specific facts in the State's rationale (population), presentation of information rebutting conclusions that the State made in its rationale for which the State had not presented any facts, challenges to conclusions that the State made with respect to APICDA's past performance, challenges to conclusions the State made about relative performance among the CDQ groups, and challenges to the State's decisions about what evaluation criteria to consider most important.

Additionally, in its request for reconsideration, APICDA asserted that the State relied on confidential information in evaluating the CDPs and in developing its CDQ allocation recommendations. APICDA correctly stated that NMFS advised the State that it may not rely on confidential information as a basis for its CDQ allocation recommendations because procedural due process requires that applicants for CDQ allocations be able to examine the information used by NMFS in making its CDQ allocation decisions. If the State were to rely on confidential information as the basis for its CDQ allocation recommendations, the State could not provide that information in its rationale and could not reveal that information to the CDQ groups and NMFS could not use that information as a basis for its determinations.

On page 2 of its April 1, 2005 request for reconsideration, APICDA wrote that "[D]iscussions of the groups' 'past performance' and 'generat[ion of] capital,' [and] their 'steady income streams[s]'" make it plain that the Team consulted with groups' balance sheets which they have all treated as proprietary information or trade secrets under 6 AAC 93.040." APICDA provided additional examples of confidential documents that it believes the State must have relied on to develop the conclusions about past performance. On page 5 of its April 22, 2005, response to APICDA's request for reconsideration, the State wrote that APICDA submitted its first request for information on March 1, 2005. The State released about 2,500 pages of documents to APICDA on March 11, 2005. However, the State does not identify the specific documents it released. On March 18, 2005, APICDA requested that "[I]n the interest of due process, we ask that the Department furnish all information, confidential and nonconfidential, not already provided to APICDA, on which it based any part of its recommendations." The State and APICDA exchanged numerous e-mails and letters discussing APICDA's request, primarily debating the terms "used" and "relied on" and the process through which APICDA must make its request for information from the State. On page 8 and 9 of its April 22, 2005, response to APICDA, the State wrote "[T]he State gathered and considered information as required by state and federal regulations. If NMFS finds fault in the information the State considered and relied on in rendering the allocation recommendation, NMFS has the authority to disapprove these recommendations."

In its July 14, 2005, letter to NMFS, the State wrote that it “arrived at these recommended quota allocations following a thorough review of each application, prior-period financial and compliance reviews, public hearings with each applicant, consultation with the North Pacific Fishery Management Council, and a determination of consistency with applicable state and federal regulations.” Although this letter identifies “prior-period financial and compliance reviews” as documents that the State considered in developing its 2005 crab allocation recommendations, the State’s rationale does not specifically mention these documents nor does the State indicate that it based its conclusions about any of the CDQ group’s past performance on these specific documents. In paragraph 2 on page 2 of its rationale, the State wrote that “the CDQ Team received six CDPs requesting allocations of the two new crab species for 2005 crab CDP allocation cycle.” However, throughout most of the rest of the State’s rationale, it refers to “the CDPs” and “the proposed CDPs” as the basis for its allocation recommendations. As identified earlier in this IAD, it is unclear to NMFS which documents the State reviewed as a basis for its 2005 crab CDQ allocation recommendations and rationale: the proposed amendments to the 2003-2005 CDPs, which were the applications for the 2005 crab CDQ allocations, or the proposed 2006-2008 CDPs which appear to have been the primary basis for the State’s March 14, 2005, initial allocation recommendations.

The State responded to APICDA’s questions and assertions about the information on which the State relied in making its allocation recommendations by stating “the CDQ Team needs to be able to review publicly available documents to properly assess factors such as past performance.” And “[I] have attached to this letter just a sample of publicly available information that supports the portions of the CDQ Team’s allocation recommendation letter to the Governor that you cited in your letter.”¹⁰ In addition, on page 9 of its April, 22, 2005, response to APICDA, the State asserts that nothing in federal regulations “precludes the State from considering information that is ‘confidential’ under state law” and that “federal regulations give NMFS the authority to disapprove the State’s allocation recommendations if they do not comply with the applicable federal requirements.” On pages 20 through 53, the State refutes, point by point, the assertions made by APICDA in its request for reconsideration. However, the State does not specifically identify the facts or documents that support each of the conclusions that the State made in the competitive evaluation of the CDQ groups that it describes on pages 6 through 18 of its rationale. The State’s response to APICDA refutes assertions made by APICDA, but does not provide NMFS with sufficient information and analysis to determine if each of the conclusions reached by the State in its rationale and used as a basis for its 2005 crab CDQ allocation recommendations are based on confidential information. Therefore, NMFS can neither confirm nor refute APICDA’s assertion that the State relied on confidential information. In addition, regardless of whether the State actually relied on confidential information or not, the State’s response does not provide sufficient additional information about its rationale to address the deficiency noted by NMFS in this IAD: that the State did not provide an explanation about how it used its conclusions about the evaluation criteria it applied to determine the specific percentage allocations it recommended for each CDQ group.

¹⁰ March 29, 2005, letter from Chris Poag, Alaska Department of Law, to Leslie Longenbaugh, re: Public Records Request dated March 18, 2005. Exhibit 16 to the State’s April 22, 2005, response to APICDA.

APICDA also disputed the population figure that the State cited for APICDA in its rationale. This issue was raised by APICDA on page 9 of its April 1, 2005, request for reconsideration. However, after arguing that this fact was incorrect, APICDA accepted the population figure used by the State for APICDA, but rebutted how the State used population as an evaluation criterion. APICDA also rebuts the figures the State used for the unemployment rate and the conclusions that the State made about APICDA's income and poverty rates, standard of living, and economic need. As described earlier in this IAD, the State cited statistics for population, unemployment rate, median household income, and poverty rate and drew conclusions from these statistics about each CDQ group's standard of living and economic need. However, the State did not explain what role these statistics or conclusions played in the 2005 crab CDQ allocations the State recommended for each CDQ group.

APICDA specifically challenged the State's 2005 crab allocation recommendations on pages 21 and 22 of its April 1, 2005, request for reconsideration, presenting several reasons why it thought that the State should allocate 50% of the EAI golden king crab allocation to APICDA. Specifically, APICDA stated that "the Team should recognize Atka's proximity to the resource and Atka's intended use of the CDQ to develop the local economy." In addition, APICDA asserted that the State's EAI golden king crab allocation recommendations "would give a significant share to CDQ groups that have CDQ harvesting and processing arrangements with catcher-processors," which APICDA believed was in conflict with earlier State policy. These assertions are disagreements with how the State balances and weighs the evaluation criteria it considers to determine its CDQ allocation recommendations. If the State adequately responds to a CDQ group's disagreements and provides a reasonable explanation for its recommendations, then NMFS's standard of review does not allow NMFS to substitute its judgment for the State's judgment about how to apply specific evaluation criteria to information about the CDQ groups to determine its CDQ allocation recommendations. As noted earlier in this IAD, while I determined that the State considered relevant evaluation criteria, I also determined that the State did not adequately explain how it used these evaluation criteria and conclusions about the CDQ groups' performance to determine its 2005 crab CDQ allocation recommendations.

Based on my review of the issues raised by APICDA and the State's response, I determine that the State's response to APICDA's request for reconsideration does not provide adequate additional information about the State's rationale for its 2005 crab CDQ allocation recommendations to address the deficiencies noted above in this IAD.

Conclusion

Based on the findings and rationale above, NMFS initially disapproves the State's recommendations for percentage allocations of 2005 crab because the State did not provide a reasonable explanation for its recommendations as required by 50 CFR 679.30(d). Specifically, the State's rationale does not demonstrate that the State applied all of the evaluation criteria that it said that it focused on in its allocation recommendation, and the State did not provide an adequate explanation about how it used its conclusions about the evaluation criteria it applied to determine the specific percentage allocations it recommended for each CDQ group. Although the State followed the process required in NMFS regulations for its 2005 crab allocation recommendations, and it considered relevant evaluation criteria, the deficiencies in its

explanation of how it applied those evaluation criteria to determine its specific percentage allocations recommendations for EAI golden king crab and Adak red king crab for 2005 resulted in a rationale that is not reasonable.

This IAD becomes a final agency action on October 19, 2005, unless, before that date, it is appealed to the NMFS Office of Administrative Appeals. The State and any or all of the CDQ groups may appeal this IAD. Because 50 CFR 679.43(a) excludes IADs issued under §679.30(d) from the administrative appeals procedures at §679.43, any appeal of this IAD must be made in accordance with the enclosed administrative appeals procedure set forth in Attachment I. The appeal must be received by October 19, 2005. Please read Attachment I for a more detailed description of the procedures and rules that govern the appeal of this IAD. For additional information, you may contact the Office of Administrative Appeals by calling (907) 586-7258.

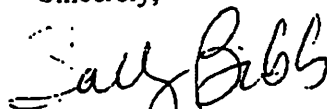
Options and Recommendations

This IAD will become final agency action if no administrative appeal is filed or, if an administrative appeal is filed, the Office of Administrative Appeals and Regional Administrator uphold this IAD. If either of these situations occur, no percentage allocations will exist to allocate the two new crab CDQ reserves among the CDQ groups for the 2005 crab fishing year.

If this IAD becomes final agency action, the State may resubmit recommendations and rationale that address the deficiencies identified in this IAD. NMFS will review any new recommendations and rationale following the same procedure used for review of the recommendations submitted on July 24, 2005. If the State decides not to resubmit 2005 allocation recommendations for these two crab species, NMFS will recommend that the Council initiate rulemaking to establish percentage allocations of EAI golden king crab and Adak red king crab among the six CDQ groups. If rulemaking to establish the percentage allocations is pursued, it is unlikely that the rulemaking could be completed prior to the end of the 2005 season for EAI golden king crab on May 15, 2006. However, such a rulemaking may still be necessary to establish the percentage allocations of the two new crab CDQ reserves for 2006 and beyond.

If this IAD is appealed by the State or any of the CDQ groups, NMFS may approve a settlement that is agreed to among all six CDQ groups and the State, as described in the attached procedure for an administrative appeal of this IAD. If such a settlement is agreed to by the State and all of the CDQ groups and is approved by NMFS, the administrative appeals process directs the appeals officer to dismiss all appeals. The percentage allocations established through the settlement would become final agency action on the CDQ allocations. This settlement option would provide the opportunity to establish percentage allocations of the two new crab CDQ reserves without requiring NMFS to approve or disapprove the State's rationale.

Sincerely,



Sally Bibb
CDQ Program Coordinator
Sustainable Fisheries Division

Attachment 1 (administrative appeals process)
Attachment 2 (State of Alaska CDQ Program regulations)

cc: William Noll, Commissioner
Alaska Department of Commerce, Community, and Economic Development

Greg Cashen, CDQ Program Manager, ADCCED
NMFS Office of Administrative Appeals
North Pacific Fishery Management Council

Attachment 1

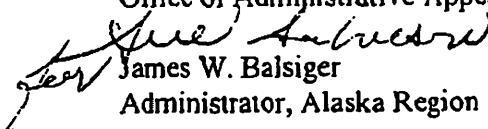
NMFS's Administrative Appeals Process



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

August 31, 2005

MEMORANDUM FOR: Ed Hein, Chief Appeals Officer
Office of Administrative Appeals

FROM:  James W. Balsiger
Administrator, Alaska Region

SUBJECT: Administrative Appeals Process for the Initial Administrative
Determination about the State of Alaska's Recommendations for
2005 Allocations of Two Species of Crab under the Western
Alaska Community Development Quota Program

Attached is the administrative appeals procedure that Alaska Region staff from the Sustainable Fisheries Division, the Office of Administrative Appeals, and NOAA General Counsel developed as appropriate for appeals of an initial administrative determination about the State of Alaska's recommendations for allocations of Eastern Aleutian Islands golden king crab and Adak red king crab for 2005. Allocations of these two crab species were added to the Community Development Quota (CDQ) Program in 2005 under the crab rationalization program.

This administrative appeals procedure was developed because 50 CFR part 679, at §679.43(a), excludes IADs issued under §679.30(d) from the administrative appeals procedures at §679.43. Allocations of quota among CDQ groups are made under §679.30(d).



Procedure for an Administrative Appeal of the Initial Administrative Determination
about the State of Alaska's Recommendations for Percentage Allocations of
Two Species of Crab for 2005

Administrative Appeals Process

The following procedure will apply to any appeal of NMFS's initial administrative determination (IAD) about the State of Alaska's recommendations for percentage allocations of Eastern Aleutian Islands golden king crab and Adak red king crab for 2005.

Who May Appeal

A CDQ group identified in the IAD or the State of Alaska may appeal the IAD.

Submission of an Appeal

An appellant may appeal this IAD by submitting an appeal in writing to:

National Marine Fisheries Service (NMFS)
Office of Administrative Appeals
P. O. Box 21668
Juneau, AK 99802

or delivering the appeal to:

National Marine Fisheries Service (NMFS)
Federal Building
709 West 9th St., Room 453
Juneau, Alaska

or transmitting the appeal by facsimile to (907) 586-9361.

Additional information about appeals may be obtained by calling (907) 586-7258.

Scope of Review for Appeals of NMFS Determinations about CDQ Allocations

The Office of Administrative Appeals will limit its review to the record developed by NMFS to support the IAD, written arguments in support of an appeal, and written responses by parties to the appeal. There will be no discovery or evidentiary hearings during the administrative appeals process.

Timing of Appeals

The appeal must be filed not later than 4:30 p.m. Alaska Time on [INSERT DATE 30 days after the date the IAD is issued].

Address of Record

NMFS will establish as the address of record the address used by the appellant in initial correspondence to NMFS concerning the appeal. Notifications of all actions affecting the appellant after establishing an address of record will be mailed to that address, unless the appellant provides NMFS, in writing, with any changes to that address. NMFS bears no responsibility if a notification is sent to the address of record and is not received because the appellant's actual address has changed without notification to NMFS.

Statement of Reasons for Appeal

Appellants must timely submit a full written statement in support of the appeal. The appellate officer will review only the issues stated in the appeal. All issues not set out in the appeal will be waived.

Participants in the Appeal Process

If one or more CDQ groups or the State of Alaska file an appeal of the IAD, the Office of Administrative Appeals will join all the CDQ groups as parties to the appeal. The State of Alaska and NMFS also will be provided an opportunity to submit a written response to any appeal.

Authority of the Appellate Officer

The appellate officer is vested with general authority to issue a written decision to uphold or reverse the IAD.

Settlement

If an appeal is submitted by any or all CDQ groups or by the State of Alaska, NMFS may approve a settlement that would establish percentage allocations of the 2005 CDQ reserves for EAI golden king crab and Adak red king crab among the CDQ groups identified in the IAD, if such settlement is agreed to and signed by a representative of each of the CDQ groups and the State of Alaska. If such a settlement is approved by NMFS, the OAA shall dismiss all appeals of the IAD and the percentage allocations approved through the settlement will constitute final agency action.

Appellate Officers' Decisions

The appellate officer will close the record and issue a decision after determining there is sufficient information to render a decision on the record of the proceedings and that all procedural requirements have been met. The decision must be based solely on the record of the proceedings. Unless reversed, modified, or remanded by the Regional Administrator as provided

below, an appellate officer's decision takes effect 30 days after it is issued and, upon taking effect, is the final agency action for purposes of judicial review.

Review by the Regional Administrator

An appellate officer's decision is subject to review by the Regional Administrator.

- (1) The Regional Administrator may affirm, reverse, modify, or remand the appellate officer's decision before the 30-day effective date of the decision.
- (2) The Regional Administrator may take any of these actions on or after the 30-day effective date by issuing a stay of the decision before the 30-day effective date. An action taken under (1) of this section takes effect immediately.
- (3) The Regional Administrator must provide a written explanation why an appellate officer's decision has been reversed, modified, or remanded.
- (4) The Regional Administrator must promptly notify the appellant(s) of any action taken under (1) of this section.
- (5) The Regional Administrator's decision to affirm, reverse, or modify an appellate officer's decision is a final agency action for purposes of judicial review.

Attachment 2

State of Alaska CDQ Program Regulations



CHAPTER 093
WESTERN ALASKA COMMUNITY
DEVELOPMENT QUOTA PROGRAM

6 A.C. 93.010 PURPOSE OF REGULATIONS

The purpose of this chapter is to implement the state's role in the Western Alaska Community Development Quota Program (CDQ Program) for the Bering Sea and Aleutian Islands Area under 50 C.F.R. 679.

History - Df. 11/18/92, Register 124, am 4/10/93, Register 126, am 8/13/94, Register 131, am 1/1/98, Register 144, am 8/19/99, Register 151, Nushomein - A. Const., art III, sec. 1, A. Const., art III, sec. 24, § 44 33,929 (11)

6 A.C. 93.012 REFERENCES TO FEDERAL LAW

In this chapter, each reference to a provision of 50 C.F.R. 679 refers to that provision as revised as of June 9, 1999

History - Df. 8/19/99, Register 151, Nushomein - A. Const., art III, sec. 1, A. Const., art III, sec. 24, § 44 33,929 (11)

6 A.C. 93.015 CDQ TEAM; RESPONSIBILITIES; LEAD STATE AGENCY.

(a) To carry out the state's role in the CDQ program under 50 C.F.R. 679, a CDQ team shall perform functions as directed in and under this chapter. The CDQ team consists of

- (1) the commissioner of the Department of Community and Economic Development, or one or more of the commissioner's representatives from that department, including one person to act as CDQ manager;
 - (2) the commissioner of the Department of Fish and Game, or one or more of the commissioner's representatives from that department; and
 - (3) one or more other state employees or state officials designated jointly by those commissioners, if additional members of the team would be beneficial
- (h) The Department of Community and Economic Development is the lead agency. CDQ program material submitted under this chapter shall be submitted to the lead agency.
- (c) To fulfill the purpose of this chapter, including providing accountability to the CDQ program, the CDQ team shall
- (1) solicit submittals of community development plans (CDP) from eligible communities,
 - (2) review and evaluate proposed CDPs;
 - (3) make recommendations regarding CDQ allocations and changes to allocations,
 - (4) review and make recommendations regarding amendments to approved CDPs,
 - (5) monitor the performance of each CDQ group in achieving the group's milestones and objectives in its CDP,

6 A.C. 93.020 CDQ APPLICATION PERIOD

- (a) Within a reasonable time before an application period is to begin, the CDQ team shall
- (1) establish the application period by scheduling a deadline for receipt of proposed CDPs from qualified applicants and by scheduling a projected time frame for
 - (A) initial evaluation;
 - (B) holding a public hearing to discuss all CDPs received;

(6) seek to ensure consistency between the CDQ program standards in 6 A.C. 93.017 and a CDQ group's activities that are subject to this chapter and 50 C.F.R. 679; and

(7) based on reports and other information obtained under this chapter, prepare and submit to the governor, for the governor's review, approval, and necessary action, the state's annual progress report described in 50 C.F.R. 679.30(g) and (h)

(d) The governor will, in the governor's discretion, delegate in writing the responsibility for carrying out one or more duties of the governor under this chapter to the CDQ team.

History - Df. 11/18/92, Register 124, am 4/10/93, Register 126, am 8/13/94, Register 131, am 1/1/98, Register 144, am 8/19/99, Register 151, Nushomein - A. Const., art III, sec. 1, A. Const., art III, sec. 24, § 44 33,929 (11)
Editor's Note - The mailing address for submitting material under this chapter is CDQ Team, Office of the Commissioner, Department of Community and Economic Development, P.O. Box 110803, Juneau, Alaska 99811-0803

6 A.C. 93.017 CDQ PROGRAM STANDARDS.

To carry out the state's role under 50 C.F.R. 679 and this chapter, the CDQ team shall apply the standards listed in (1)

- (9) of this section, as applicable. The CDQ team shall determine whether
 - (1) a CDP provides specific and measurable benefits to each community participating in the CDP;
 - (2) as part of a CDP, a CDQ project provides benefits to individual residents of a participating community, to a single participating community, or to all participating communities;
 - (3) a proposed CDP has the support of all participating communities,
 - (4) each CDQ project listed in a CDP has the support of the applicant's or CDQ group's board of directors, reflected by official action of the board;
 - (5) before initiating a proposed CDQ project, a CDQ group exercised a level of due diligence that reflects the value of the investment, the risk involved, and the type of project,
 - (6) a reasonable likelihood exists that a for-profit CDQ project will earn a financial return to the CDQ group;
 - (7) the CDQ group has minimized legal and financial risk,
 - (8) the CDQ group has clearly demonstrated how a proposed CDQ project will further the goals and purpose of the CDQ program as stated in 50 C.F.R. 679.1(e), and
 - (9) 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

History - Df. 8/19/99, Register 151, Nushomein - A. Const., art III, sec. 1, A. Const., art III, sec. 24, § 44 33,929 (11)

and

- (C) final review;
- (2) publish a notice that announces the CDQ application period, states the allocation cycle, and states the deadline for submitting a proposed CDP; the notice must be published in at least one newspaper of general circulation in Western Alaska and in at least one newspaper of general circulation in the state, and



- (3) mail a copy of the notice to each eligible community
- (b) Except as provided in 6.A.A.C. 93.025 (b), the deadline for submission of a proposed CDP set by (a)(1) of this section may not be less than 14 days after publication of the notice under (a) of

6 AAC 93 025 REQUIREMENTS FOR SUBMITTING A PROPOSED CDP.

(a) To apply for an allocation under 50 C.F.R. 679, a qualified applicant must submit to the CDQ team, on or before the deadline set under 6.A.A.C. 93.025, a complete proposed CDP that contains the information required by 50 C.F.R. 679.30(a), including

(1) a statement that the applicant is a qualified applicant as defined in 50 C.F.R. 679.2, this statement must be accompanied by a certificate of incorporation showing that the applicant is a nonprofit corporation formed under AS 10.20;

(2) a statement as to whether the applicant is also the managing organization for the proposed CDP;

(3) a statement that each community participating in the proposed CDP is an eligible community as defined in 50 C.F.R. 679.2;

(4) with the list of communities participating in the CDP required by 50 C.F.R. 679.30(a)(1)(iv),

(A) the population of each community;

(B) the economic conditions in each community; and

(C) evidence that the applicant has developed an effective outreach project to keep participating communities informed about the CDQ group's activities and to facilitate community input throughout the course of the CDP;

(5) for each member of the applicant's board of directors, a letter of support or election results from the board member's eligible community and a statement of support from the governing body of each community participating in the proposed CDP, the statement of support may be a copy of a resolution, letter, or other appropriate expression of support;

(6) for each species allocation, evidence, such as a contract with a business partner, that the applicant has not obligated, and does not intend to obligate, further allocations to a third party;

(7) for an applicant that is also a managing organization,

(A) evidence that the managing organization has a board of directors with a membership composed of at least 75 percent resident fishermen from the community or group of communities participating in the CDP, with at least one member from each community; and

(B) a statement of support from the governing body of each community that the organization represents; the statement of support may be a copy of a resolution, letter, or other appropriate expression of support;

(8) for a managing organization that will participate in a fishery on behalf of the applicant, but is not the applicant, a statement

of support from the governing body of each community that the organization represents; the statement of support may be a copy of a resolution, letter, or other appropriate expression of support;

(9) information regarding the particular benefits that an allocation under the CDP would generate for the Bering Sea and Aleutian Islands region; in addition, the applicant may provide

this section

(c) If, after publication of the notice under (a) of this section, the CDQ team determines that it is necessary to change the allocation cycle, the CDQ team shall notify all applicants and eligible communities and publish notice of the change.

History - Eff 11/16/92, Register 124 Jan 4/10/93, Register 126 Jan 1/1/98, Register 144, Jan 8/19/99, Register 151 Auburn - Ak Comm., art III, sec. 1.Ak Const., art III, sec 24 11.13.02P (11)

information regarding any benefits to the state or the United States;

(10) the applicant's existing and foreseeable business relationships; to meet the requirement of this paragraph, the applicant shall

(A) provide copies of any contractual service arrangements dealing with legal, lobbying, audit, accounting, allocation management, investment research, fund management, and similar services;

(B) provide copies of profit sharing arrangements,

(C) provide copies of funding and financing plans; and

(D) describe each type of relationship, including joint ventures, loans, partnerships, corporations, and, if applicable, distribution of proceeds;

(11) a copy of the investment policies that the applicant will follow for

(A) for-profit CDQ projects;

(B) infrastructure CDQ projects,

(C) fund and cash management CDQ projects; and

(D) other applicable CDQ projects;

(12) as part of the detailed description of each CDQ project required by 50 C.F.R. 679.30(a)(1)(i), information that

(A) identifies the project as an active or proposed CDQ project;

(B) describes the project's normal scope of operations; and

(C) indicates whether an active project should be classified as a core or noncore CDQ project;

(13) a milestone table that sets out specific and measurable objectives for each CDQ project and dates for achieving each objective;

(14) budgets, including

(A) a general budget for the proposed CDP that identifies all allocation revenue, project revenue, and project expenditures for the entire period for the proposed CDP;

(B) an annual budget listing detailed expenses for each CDP project for the first year of the proposed CDP; and

(C) an annual comprehensive budget for the allowable administrative expenses, as previously determined by the CDQ team, specifically indicating the expenses that are chargeable to the managerial, general administrative, and policy phases of a CDQ group and the group's projects;

(15) a description of how the applicant plans to report financial and audit information to the CDQ team throughout the course of its CDP, in accordance with 6.A.A.C. 93.050; and

(16) any additional information that the CDQ team finds is necessary to determine whether to recommend approval of the proposed CDP under 6.A.A.C. 93.040(c)

(b) An eligible community may not

(1) submit more than one proposed CDP during a single CDQ application period; or

(2) participate in more than one CDP, this paragraph does not prevent an eligible community from participating in halibut allocations that are restricted by regulatory areas of the



International Pacific Halibut Commission and 50 C.F.R. 679.30.

(c) Except for circumstances that the CDQ team finds were beyond the applicant's control, the CDQ team may not evaluate a proposed CDP received after the deadline set under 6 A.A.C. 93.021.

History - LR 11/18/92, Register 124, am 4/10/93, Register 126, am 8/13/94, Register 131, am 1/1/98, Register 144, am 8/19/99, Register 151 Authority - 16 C.F.R., art III, sec 1.16 C.F.R., art III, sec 24.35 13.33.021(11)
Editor's Note - The mailing address for the CDQ team is set out in the editor's note at 6 A.A.C. 93.012.

6 AAC 93.030 INITIAL EVALUATION OF PROPOSED CDPS.

6 AAC 93.035 PUBLIC HEARING

(a) The CDQ team shall schedule at least one public hearing on all pending complete proposed CDPs, providing for a teleconference site in each geographical area that is subject to a proposed CDP.

(b) The CDQ team shall provide notice of the date and location of a public hearing

(1) to each applicant whose proposed CDP is the subject of the hearing;

(2) through newspaper publication; in addition, notice

(a) The CDQ team shall perform an initial evaluation of a proposed CDP submitted under 6 A.A.C. 93.025 to determine whether the CDP is complete. Within 15 days after a proposed CDP is received, the CDQ team shall notify the CDP applicant of any information needed to make the CDP complete. The applicant must submit the needed information within 10 days after being notified by the CDQ team. If, after the initial evaluation period, the CDQ team finds that additional information is needed for completeness, the applicant will have 10 days after notification to provide the information.

(b) After the initial CDP evaluation, the CDQ team shall schedule a public hearing under 6 A.A.C. 93.035 as required by 50

C.F.R. 679.30(b).

History - LR 11/18/92, Register 124, am 4/10/93, Register 126, am 8/13/94, Register 131, am 1/1/98, Register 144, am 8/19/99, Register 151 Authority - 16 C.F.R., art III, sec 1.16 C.F.R., art III, sec 24.35 13.33.029(11)

may be provided through other media, and

(3) to any other person the CDQ team believes will be interested in a pending CDP.

(c) A public hearing under this section must be recorded and transcribed. The transcript of the public hearing will be made available to the public, upon request, at the same time that the transcript is submitted under 6 A.A.C. 93.045

(d) Repealed 8/19/99.

History - LR 11/18/92, Register 124, am 4/10/93, Register 126, am 8/13/94, Register 131, am 1/1/98, Register 144, am 8/19/99, Register 151 Authority - 16 C.F.R., art III, sec 1.16 C.F.R., art III, sec 24.35 13.33.029(11)

6 AAC 93.040 FINAL EVALUATION OF PROPOSED CDPS [COMPLETE CDP APPLICATIONS]

(a) After the public hearing under 6 A.A.C. 93.035, the CDQ team shall evaluate all complete proposed CDPs to determine whether the CDPs are consistent with the standards in 6 A.A.C. 93.017 and meet the applicable requirements of this chapter and 50 C.F.R. 679.

(b) The CDQ team shall consider the following factors when reviewing a complete proposed CDP

(1) the number of participating eligible communities and

(A) the population of each community; and

(B) the economic conditions in each community,

(2) the size of the allocation requested by the applicant and the proper allocation necessary to achieve the milestones and objectives as stated in the proposed CDP,

(3) the degree, if any, to which each CDQ project is expected to develop a self-sustaining local fisheries economy, and the proposed schedule for transition from reliance on an allocation to economic self-sufficiency;

(4) the degree, if any, to which each CDQ project is expected to generate

(A) capital or equity in the local fisheries economy or infrastructure; or

(B) investment in commercial fishing or fish processing operations;

(5) the applicant's contractual relationship, if any, with joint venture partners and the managing organization;

(6) the applicant's and the applicant's harvesting and processing partners', if any, involvement and diversity in all facets of harvesting and processing,

(7) the coordination or cooperation with other applicants or CDQ groups on CDQ projects,

(8) the experience of the applicant's industry partners, if

any;

(9) the applicant's CDQ projects for employment, education, and training that provide career track opportunities;

(10) the benefits, if any, to the state's economy or to the economy of communities that are not eligible to participate in the CDQ program that are in addition to the benefits generated by the proposed CDP for participating communities;

(11) a demonstration, through the information submitted under 6 A.A.C. 93.025(a)(11), that the applicant has a formal, effective administrative process that sets out sound business principles and examples of due diligence that the applicant will exercise;

(12) the development, if any, of innovative products and processing techniques as well as innovation in harvesting gear for conservation and maximum utilization of the fishery resource;

(13) the applicant's ability to maintain control over each of its allocations,

(14) the capital or equity generated by the applicant's CDQ projects for fisheries-related business investment;

(15) the past performance of the applicant and the applicant's industry partners, as appropriate;

(16) the applicant's transition plan, including the objectives set out in the milestone table submitted under 6 A.A.C. 93.025(a)(13),

(17) for each CDQ project, the inclusion in the proposed CDP of realistic measurable milestones for determining progress;

(18) the degree of participating community input in developing the proposed CDP;

(19) the likely effectiveness of the outreach project described in 6 A.A.C. 93.025(4)(C); and

(20) comments provided by other agencies, organizations, and the public.



(c) After evaluation under this section, the CDQ team shall transmit to the governor for the governor's review and necessary action each proposed CDP and the CDQ team's evaluation and recommendation regarding each CDP. The governor will then make a written finding that a proposed CDP either

(1) meets the requirements of this chapter and 50 C.F.R. 679 and will be recommended to the National Marine Fisheries Service (NMFS) for approval for an allocation in the amount requested by the applicant;

(2) meets the requirements of this chapter and 50 C.F.R. 679 and will be recommended to the NMFS for approval with a reduced allocation from the amount initially requested by the applicant; or

(3) does not meet the requirements of this chapter and 50 C.F.R. 679 and will not be recommended to the NMFS for approval.

(d) If there is a sufficient quota of fishery resource available to meet the combined total allocations requested in all of the complete proposed CDPs that meet the requirements of this chapter and 50 C.F.R. 679, the governor will, in the governor's discretion, recommend all of those CDPs to the NMFS for approval.

(e) If there is an insufficient quota of fishery resource available to meet the combined total allocations requested in all of the complete proposed CDPs that meet the requirements of this chapter and 50 C.F.R. 679, the governor will, in the governor's discretion and after consultation by the CDQ team under (f) of this section,

(1) apportion the available quota among the applicants whose CDPs will be recommended for approval and will recommend the apportionment to the NMFS for approval; or

(2) select those complete proposed CDPs that the governor believes best satisfy the objectives, requirements, and criteria of the CDQ program and will recommend those CDPs to the NMFS for approval; a recommendation under this paragraph may also include a recommendation for an apportionment under (1) of this subsection.

(f) Before the CDQ team recommends an apportionment of the quota under (e) of this section, it shall consult with the applicants that might be affected by the proposed apportionment. The CDQ team may request an applicant to submit a revised CDP to assist the CDQ team in determining the

(1) economic feasibility and likelihood of success of the proposed CDP with an allocation of fishery resource less than that requested; and

(2) particular benefits that may be derived by participating communities affected by an allocation of fishery resource less than that requested.

(g) In apportioning the quota of fishery resource under (e) of this section, the governor will consider the information specified in this chapter and 50 C.F.R. 679 and seek to maximize the benefits of the CDQ program to the greatest number of participating communities.

(h) Before forwarding recommendations to the NMFS under 6 A.C. 93.045, the governor will, or, at the governor's direction, the CDQ team shall, consult with the North Pacific Fishery Management Council regarding the proposed CDPs to be recommended by the governor for allocations and incorporate

any comments from the council into the written findings required under (c) of this section and 50 C.F.R. 679.30(d)
History - Eff. 11/18/92, Register 124, am. 4/10/93, Register 126, am. 8/13/94, Register 131, am. 1/1/98, Register 144, am. 8/19/99, Register 151. Authority - Al. Const., art. III, sec. 1. Al. Const., art. III, sec. 24. 52,11,31,02 (11)

6 A.C. 93.045 RECOMMENDATIONS TO THE NMFS REGARDING PROPOSED CDPs

After making written findings under 6 A.C. 93.040 regarding the complete proposed CDPs, the governor will

(1) forward the proposed CDPs to the NMFS with written findings, rationale, and recommendations for approval of

proposed CDPs and CDQ allocations, and

(2) notify in writing each CDP applicant as to whether the applicant's proposed CDP was recommended to the NMFS for approval, including whether any reduction of allocation was recommended under 6 A.C. 93.040.

History - Eff. 11/18/92, Register 124, am. 4/10/93, Register 126, am. 1/1/98, Register 144, am. 8/19/99, Register 151. Authority - Al. Const., art. III, sec. 1. Al. Const., art. III, sec. 24. 52,11,31,02 (11)

6 A.C. 93.050 QUARTERLY AND ANNUAL REPORTS.

(a) In order for the CDQ team to monitor a CDP as required under 50 C.F.R. 679.30, a CDQ group shall submit to the CDQ team a quarterly report for each calendar quarter in which that group's CDP is in effect, and an annual report as described in

(d) of this section. Each quarterly report must be submitted by the deadline stated in (b) of this section and must contain the information required by (c) of this section

(b) A CDQ group shall submit a quarterly report to the CDQ team, to be received or postmarked on or before

(1) April 30 for a CDP in effect during the preceding January, February, or March,

(2) July 30 for a CDP in effect during the preceding April, May, or June;

(3) October 30 for a CDP in effect during the preceding July, August, or September, and

(4) January 30 for a CDP in effect during the preceding October, November, or December

(c) A quarterly report submitted under this section must

include

(1) information describing how, during the period covered by the report, the CDP group has met the milestones and objectives of the CDP as set out in the CDP;

(2) a year-to-date report of all CDQ harvesting and processing activities of the CDQ group;

(3) comprehensive financial statements if required by the CDQ team; a statement required under this paragraph must include, as applicable,

(A) a consolidated balance sheet;

(B) a consolidated income statement that clearly identifies, by CDQ project, revenue and expenditures;

(C) a cash flow statement; and

(D) financial statements for the CDQ group's subsidiaries;

(4) complete year-to-date data regarding training, education, and employment under the CDP, provided in a format specified by the CDQ team,

(5) minutes for any CDQ group board or directors meetings



that were held during the quarter, and

(6) any other information that the CDQ team determines is necessary to carry out the state's role in the administration of the CDQ program, if the CDQ team requires additional information under this paragraph, the CDQ team shall notify the CDQ group in writing at least 15 days before the report is due

(d) The quarterly reports submitted under this section for a calendar year are subject to an independent audit performed by a reputable accounting firm. The CDQ group's selection of an accounting firm is subject to the CDQ team approval. The independent audit constitutes a CDQ group's annual report and must be submitted by the CDQ group to the CDQ team, to be received or postmarked no later than May 31 of the year following the calendar year covered by the audit. The audit must include

(1) a report that indicates whether the CDQ group is meeting the milestones and objectives of the CDP as set out in its CDP, the CDQ group shall meet with an auditor to develop agreed-upon procedures for the content of this report;

(2) consolidated financial statements, reported according to generally accepted accounting principles and, if determined necessary by the CDQ team, supplemental schedules reporting the financial position and results of operations for each of the CDQ

group's consolidated for-profit subsidiaries classified in the CDP as a core CDQ project;

(3) a note to the financial statements in which the auditor details how financial results were determined and any other relevant information,

(4) a supplemental schedule detailing the CDQ group's general and administrative expenses;

(5) except for fund and cash management CDQ projects, a budget reconciliation between all CDQ projects and administrative budgets, and actual expenditures,

(6) a management report or letter, and

(7) any other information that the CDQ team determines is necessary to carry out the state's role in the administration of the CDQ program; if the CDQ team requires additional information under this paragraph, the CDQ team shall notify the CDQ group in writing at least 15 days before the group's annual report is due.

(e) In this section, "postmarked" means the

(1) United States Postal Service postmark,

(2) the date of placement with a courier-type delivery service as evidenced on the shipping documents;

(3) the date the document is delivered to the CDQ team by facsimile; or

(4) the date the document is delivered to the CDQ team by electronic mail

History: Eif 11/18/92, Register 124, am 4/10/93, Register 126, am 8/13/94, Register 131, am 1/1/98, Register 144, am 8/19/99, Register 151. Authored: AL Const., art. III, sec. 13A (Const., art. III, sec. 24.334-33.023) (11)
Editor's Note: The mailing address for the CDQ team is set out in the editor's note at 6 AAC 93.025.

6 AAC 93.055 AMENDMENTS TO AN APPROVED CDP.

(a) General requirements. A CDP is a working business plan that must be kept current. A CDQ group that seeks to amend a CDP under this section and 50 C.F.R. 679.30 shall submit to the CDQ team a written request for approval of the amendment under the appropriate process described in this section. A CDQ group may not engage in an activity that requires an amendment to the group's CDP until the amendment is recommended for approval by the state and approved by the NMFS.

(b) Submittal requirements. When submitting a proposed CDP amendment under (c) or (d) of this section, in addition to the information that is required to be submitted under 50 C.F.R. 679.30(g)(4) or (5), the CDQ group shall describe how the amendment

(1) is consistent with the standards in 6 AAC 93.017, the group's investment policies submitted under 6 AAC 93.25(a)(11), and the requirements of 50 C.F.R. 679; and

(2) will affect the CDQ group's ability to meet the milestones and objectives in its CDP

(c) Substantial amendments. A substantial amendment to a CDP is subject to (f) and (h) of this section and 50 C.F.R. 679.30(g)(4). A substantial amendment requires the commissioner to make a recommendation for approval or disapproval before the proposed amendment can be forwarded to the NMFS under 50 C.F.R. 679.30(g)(4). A substantial amendment is required if a CDQ group intends to

(1) make a change described in 50 C.F.R. 679.30(g)(4)(iv),
(2) pursue a proposed CDQ project that will be classified in the amended CDP as a core CDQ project,

(3) add a new proposed CDQ project;

(4) make a substantial variation in the normal scope of operations for an active core CDQ project described under 6 AAC 93.025 (a)(12)(B); or

(5) engage in a CDQ activity that would result in an active noncore CDQ project being classified as a core CDQ project under 6 AAC 93.057.

(d) Technical amendments for noncore projects. A technical amendment under this subsection is subject to 50 C.F.R. 679.30(g)(5). If a CDQ group intends to pursue an activity described in this subsection, the group shall send a letter of notification to the CDQ manager, describing the activity and seeking a technical amendment to the CDP. With the letter of notification, the CDQ group shall include the information required by (b) of this section. An activity under this subsection is subject to (g) and (i) of this section and requires the CDQ manager to make a recommendation for approval or disapproval before the proposed amendment can be forwarded to the NMFS under 50 C.F.R. 679.30(g)(5). Subject to (g)(2) of this section, the CDQ manager will make a decision under this subsection within 10 days after a letter of notification is received. Notification under this subsection is required when a CDQ group intends to

(1) pursue a proposed noncore CDQ project that is clearly identified in the CDP text and budget, if the CDQ team advises the CDQ group that notification under this section is required, or

(2) make a substantial variation in the normal scope of operations of an active noncore CDQ project, if the variation will impact the CDQ project performance measures described in the milestone table submitted under 6 AAC 93.025 (a)(13),

(e) Other technical amendments. A technical amendment to a CDP is subject to 50 C.F.R. 679.30(g)(5). A technical



amendment requires the CDQ manager to review the materials submitted by the CDQ group and make a recommendation for

- (1) make a change in its board of directors or key administrative staff;
 - (2) make a change in a contract dealing with a business relationship described under 6 A.A.C. 93.025 (a)(10)(A),
 - (3) add a harvesting or processing contract that is substantially similar to an existing contract in the group's approved CDP; the CDQ group shall provide a copy of the contract, or
 - (4) make any other change that the CDQ team determines is technical in nature.
- (f) Review process for substantial amendments. The CDQ team shall use the following process in its review for a substantial amendment proposed under (c) of this section:
- (1) the CDQ team shall determine within 30 days whether the amendment
 - (A) is consistent with the standards, policies, and requirements discussed under (b)(1) of this section; or
 - (B) will reduce the CDQ group's ability to meet the milestones and objectives in its CDP;
 - (2) if the CDQ team finds an amendment to be inconsistent under (1)(A) of this subsection or will reduce the CDQ group's ability to meet the milestones and objectives in its CDP,
 - (A) the CDQ team shall notify the CDQ group; the group will have 10 days to respond with more information;
 - (B) within 10 days after the CDQ group's response is received, the CDQ manager shall repeat the process described in (2) of this subsection until the CDQ manager recommends
- (h) Recommendation for disapproval of a substantial

amendment If the CDQ team finds that a substantial amendment proposed under (c) of this section is inconsistent with the standards, policies, or requirements referred to in (b) of this section, or that the amendment will reduce the CDQ group's ability to successfully meet the milestones and objectives in its CDP, the CDQ team shall recommend that the commissioner forward the amendment to the NMFS with a recommendation for disapproval. If the commissioner decides to recommend disapproval under this subsection, the commissioner will notify the CDQ group, advising the group that it may request reconsideration under 6 A.A.C. 93.090.

(i) Recommendation for disapproval of a technical amendment for a noncore project. If the CDQ manager finds that a technical amendment for a noncore project proposed under (d) of this

6 A.A.C. 93.057 RECLASSIFICATION OF CORE AND NONCORE PROJECTS.

(a) If the annual progress report prepared by the CDQ team under 6 A.A.C. 93.015 will address a CDQ project classified in the CDP as a noncore CDQ project that has been found by the CDQ team to meet the criteria for a core CDQ project in 6 A.A.C. 93.010, the CDQ team may reclassify a noncore CDQ project as a core CDQ project in that report and shall request the CDQ group to seek a substantial amendment to its CDP under 6 A.A.C. 93.055 (c). For the purposes of this subsection, the criteria in the definition of "core CDQ project" at 6 A.A.C. 93.010 (13)(C)(i) may not be considered

approval or disapproval before the proposed amendment can be forwarded to the NMFS under 50 C.F.R. 679.30(g)(5). A technical amendment to the CDP under this subsection is required when a CDQ group intends to

- received, the CDQ team shall repeat the review under (1) of this subsection; and
 - (3) the CDQ team shall repeat the process described in (2) of this subsection until the CDQ team recommends approval of the amendment or makes a determination under (h) of this section
- (g) Review process for technical amendments for noncore projects. The CDQ manager shall use the following process in the review of a technical amendment for a noncore project proposed under (d) of this section.
- (1) the CDQ manager shall determine within 10 days whether the amendment
 - (A) is consistent with the standards, policies, and requirements discussed under (b)(1) of this section; or
 - (B) will reduce the CDQ group's ability to meet the milestones and objectives in its CDP;
 - (2) if the CDQ manager finds that an amendment is inconsistent under (1)(A) of this subsection or will reduce the CDQ group's ability to meet the milestones and objectives in its CDP,
 - (A) the CDQ manager shall notify the CDQ group; the group will have five days to respond with more information;
 - (B) within 10 days after the CDQ group's response is received, the CDQ manager shall repeat the review under (1) of this subsection, and
- approval of the amendment or makes a determination under (i) of this section.

section is inconsistent with the investment policies or federal requirements referred to in (b) of this section, or that the amendment will reduce the CDQ group's ability to successfully meet the milestones and objectives in its CDP, the CDQ manager shall recommend disapproval of the amendment. If the CDQ manager finds that the amendment is inconsistent with the standards in 6 A.A.C. 93.017, the CDQ manager may recommend disapproval of the amendment. The CDQ group may request reconsideration of the CDQ manager's decision under 6 A.A.C. 93.090.

History - Eff. 11/18/92, Register 124; am. 4/10/93, Register 126; am. 8/13/94, Register 131; am. 1/1/98, Register 144; am. 8/19/99, Register 151. Authority - Ak. Const., art. III, sec. 1 Ak. Const., art. III, sec. 24; 12 AAC 53.020 (11)

Editor's Note - The mailing address for the CDQ team is set out in the editor's note at 6 AAC 93.015

- (b) If a CDQ group believes that a project classified in the group's CDP as a core CDQ project should instead be classified as a noncore CDQ project, the CDQ group may petition the CDQ team to reclassify the project. A CDQ group may submit a petition under this subsection only between June 15 and August 15
- (c) The CDQ team shall consider the following factors in its review of a petition submitted under (b) of this section:
 - (1) the maturity of the business cycle, the stability of management, and the profitability of the project;
 - (2) the success of the project in meeting the milestones and objectives in the CDP;
 - (3) whether the majority of activities of the project are occurring in, or in proximity to, an eligible CDQ community; and
 - (4) the overall impact the project has on the success of



(d) If the CDQ team approves a petition submitted under (b) of this section, the petition will be treated as a technical amendment that is recommended for approval by the NMFS under 50 C.F.R. 679.30(g)(5).

History - 12/8/19/99, Register 151 Authority - Al. Const., art. III, sec. 1, Al. Const., art. III, sec. 24, AS 16.05.020 (1) Editor's Note - The mailing address for the CDQ team is set out in the editor's note at 6 AAC 93.013

6 AAC 93.060 SUSPENSION OR TERMINATION OF A CDP; DECREASE IN ALLOCATION.

(a) The governor will, in the governor's discretion, recommend to the NMFS in writing that a CDP be partially suspended, or terminated or that allocations under CDP be decreased if, as part of the annual progress report prepared under 6 AAC 93.013 or in response to an allegation under (c) of this section, the CDQ team notifies the governor that the CDQ team has determined that a CDQ group

- (1) has failed to comply with (A) this chapter; or (B) 50 C.F.R. 679, (2) has failed to meet its milestones or objectives; or (3) appears unlikely to meet its milestones or objectives.

(b) Nothing in (a) of this section precludes the governor from including a recommendation for a decreased allocation with a recommendation for a partial suspension.

(c) If, at any time during the course of a CDP, the CDQ team is advised that a CDQ group has failed to comply with 50 C.F.R. 679 or with this chapter, the CDQ Team will send a written notice of the allegation to the CDQ group at the address on file at the department for the group. The CDQ group may, within 10 days after receipt of the notice, submit to the CDQ team a written response to the allegation. The CDQ team shall consider the CDQ group's written response, if any, in deciding whether to make a recommendation to the governor under (a) or (b) of this section. If the CDQ team decides to make a recommendation under (a) or (b) of this section, the CDQ team shall include the CDQ group's written response, if any, with the recommendation transmitted to the governor.

(d) Before sending the governor's recommendation under (a) or

(b) of this section to the NMFS, the CDQ team shall inform the CDQ group of the governor's decision. The CDQ group may request reconsideration of the governor's decision under 6 AAC

93.090. History - 1/11/18/92, Register 124, am 4/10/93, Register 126, am 8/13/94, Register 131, am 1/1/98, Register 144, am 8/19/99, Register 151 Authority - Al. Const., art. III, sec. 1, Al. Const., art. III, sec. 24, AS 16.05.020 (1)

6 AAC 93.070 CONFIDENTIAL RECORDS

(a) Except as provided in (b) and (c) of this section, records submitted under this chapter by an applicant or a CDQ group that are in the possession of the governor or the CDQ team are subject to AS 09.25.110 - 09.25.120 and are open to inspection by the public during regular office hours

(b) A participating community, applicant, CDQ group, or

managing organization wishing to protect a record that was provided to the state under this chapter may file with the governor or CDQ team a written petition identifying the record

to be protected and showing good cause to classify the record as confidential. If, at the time of submission, a participating community, applicant, CDQ group, or managing organization wishes to protect a record being submitted under this chapter, the community, applicant, group, or organization shall mark the record as "confidential" and show good cause to classify the record as confidential.

(c) Good cause to classify a record as confidential under this section includes a showing that

(1) disclosure of the record to the public might competitively or financially disadvantage or harm the participating community, applicant, CDQ group, or managing organization with the confidentiality interest, or might reveal a trade secret or proprietary business interest; and

(2) the need for confidentiality outweighs the public interest in disclosure.

(d) If the governor or CDQ team determines that good cause exists under (c) of this section, the governor or CDQ team will, in writing, classify the records as "confidential" and restrict access to them.

(e) Except as provided in Alaska Rules of Court, a record classified as confidential under this section will not be made public or furnished to any person other than the United States Secretary of Commerce, the North Pacific Fishery Management Council, the Alaska Region of the National Marine Fisheries Service, the governor, the CDQ team and staff, or other authorized representatives of the governor.

History - 1/11/18/92, Register 124, am 4/10/93, Register 126, am 1/1/98, Register 144, am 8/19/99, Register 151 Authority - Al. Const., art. III, sec. 1, Al. Const., art. III, sec. 24, AS 16.05.020 (1) Editor's Note - The mailing address for the CDQ team is set out in the editor's note at 6 AAC 93.013

6 AAC 93.075 GENERAL PROVISIONS

(a) The governor will, in the governor's discretion, consider other factors not identified in this chapter if those factors are relevant to the decision or recommendation in question.

(b) The governor will, in the governor's discretion, relax or reduce the notice requirements of 6 AAC 93.020 - 6 AAC

93.040 if the governor determines that a shortened or less expensive method of public notice is reasonably designed to reach all interested persons.

History - 1/11/18/92, Register 124, am 4/10/93, Register 126 Authority - Al. Const., art. III, Sec. 1, Al. Const. Art III, Sec. 24, Al. Const.

6 AAC 93.080 REPORTING OF CDQ PROGRAM FISHERY HARVEST.

A buyer of fish that, under AS 16.05.690 and 5 AAC 50.130, is

required to record and report a purchase of fish shall also record and report the buyer's purchases of fishery resources that are harvested through a CDQ program. This shall be done in the manner required by AS 16.05.690 and 5 AAC 50.130 and other



6 A.A.C. 93.090 RECONSIDERATION PROCESS.

(a) A CDQ group may submit to the CDQ team a request for reconsideration of a decision under 6 A.A.C. 93.055 or a decision under 6 A.A.C. 93.060. Subject to (c) of this section, the request for reconsideration must be submitted within 20 days after the CDQ group receives notice of the decision. For a decision to be reconsidered, the request for reconsideration must include additional information that was not provided for consideration in the initial decision.

(b) For reconsideration of a decision under

(1) 6 A.A.C. 93.055 (h), the CDQ team shall review the additional information submitted with the request for reconsideration and make a recommendation to the commissioner regarding a reconsideration decision;

(2) 6 A.A.C. 93.055 (i), the CDQ manager shall review the additional information submitted with the request for reconsideration and make a reconsideration decision; or

(3) 6 A.A.C. 93.060, the CDQ team shall review the additional information submitted with the request for reconsideration and make a recommendation to the governor regarding a reconsideration decision

(c) Within 20 days after a request for reconsideration is received, notification to the CDQ group of the reconsideration decision will be made by

(1) the commissioner, for a decision under 6 A.A.C. 93.055

(b),

(2) the CDQ manager, for a decision under 6 A.A.C. 93.055

(i); or

(3) the governor, for a decision under 6 A.A.C. 93.060

(d) Findings regarding a reconsideration decision will be submitted to the NMFS along with the final recommendation regarding the amendment, suspension, termination, or decrease in allocation. The CDQ team shall shorten the time within which a request for reconsideration may be submitted under (a) of this section if the CDQ team determines that a participating community will be competitively or financially harmed by a delay in issuing the decision.

History - Eff. 8/19/99, Register 151. Authority - M. Const., art. III, sec. 1. M. Const., art. III, sec. 24. Editor's Note - The mailing address for the CDQ team is set out in the editor's note at 6 A.A.C. 93.015.

6 A.A.C. 93.900 DEFINITIONS.

In this chapter

(1) "active CDQ project" means a CDQ project that was initiated under an approved CDP or through the amendment process in 6 A.A.C. 93.055, and that continues its status as a CDQ project;

(2) "allocation" includes a CDQ allocation and a PSQ allocation under 50 C.F.R. 679,

(3) "allocation cycle" means the time of duration of a CDP as designated at the onset of the CDQ application period;

(4) "application period" means the time between the date of publication of the notice under 6 A.A.C. 93.020 (a) and the forwarding of the final CDP recommendation to the NMFS,

(5) "CDP" means community development plan,

(6) "CDQ" means community development quota;

(7) "CDQ activity" means an activity pursued by the

CDQ group that is paid for, directly or indirectly, through CDQ assets;

(8) "CDQ asset" means property of a CDQ group;

(9) "CDQ liability" means a debt of a CDQ group;

(10) "CDQ manager" means the department employee designated by the commissioner;

(11) "CDQ team" means the state officials designated in or under 6 A.A.C. 93.015,

(12) "commissioner" means the commissioner of the department,

(13) "core CDQ project" means a CDQ project that (A) has a collective ownership by the applicant or CDQ group that is in excess of 49 percent;

(B) has a level of involvement by the applicant or CDQ group that demonstrates effective managing control, as determined by the CDQ team; or

(C) meets at least two of the following criteria:

(i) the applicant's or CDQ group's equity interest in the CDQ project constitutes at least 25 percent of the applicant's or group's assets;

(ii) the CDQ project has total indebtedness that the applicant or CDQ group is directly liable for in excess of 25 percent of the applicant's or group's assets;

(iii) the CDQ project has total indebtedness that the applicant or CDQ group is directly liable for in excess of 25 percent of the applicant's or group's assets,

(iv) the CDQ project has been determined by the annual progress report prepared under 6 A.A.C. 93.015 to not meet the milestones and objectives in the CDP for three consecutive years;

(v) the CDQ project receives funding from the applicant or CDQ group in a calendar year;

(14) "department" means the Department of Community and Economic Development;

(15) "fisheries-related" means to have a direct or indirect link to the commercial fisheries industry;

(16) "for-profit CDQ project" means a CDQ project with a central activity that involves an ongoing exchange of goods or services for compensation between two or more parties;

(17) "governing body" means a city council, traditional council, or Indian Reorganization Act (IRA) Council;

(18) "NMFS" means the federal National Marine Fisheries Service,

(19) "noncore CDQ project" means a CDQ project that is not a core CDQ project;

(20) "proposed CDQ project" means a CDQ project that is yet to be initiated;

(21) "substantial variation" means a significant change in the normal scope of operations of an active CDQ project as stated in the CDP; a "substantial variation" includes a change that could result in a determination of inconsistency with the standards in 6 A.A.C. 93.017 and a change that could affect a CDQ group's ability to meet the milestones and objectives in the CDP

History - Eff. 11/18/92, Register 124, am. 4/10/93, Register 126, am. 8/11/94, Register 131, am. 1/3/98, Register 144, am. 8/19/99, Register 151. Authority - M. Const., art. III, sec. 1. M. Const., art. III, sec. 24. Editor's Note - Definitions of other terms under 6 A.A.C. 93 are found at 50 C.F.R. 679.2

H. R. 3

One Hundred Ninth Congress
of the
United States of America

AT THE FIRST SESSION

*Begun and held at the City of Washington on Tuesday,
the fourth day of January, two thousand and five*

An Act

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the “Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users” or “SAFETEA-LU”.

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. General definitions.

TITLE I—FEDERAL-AID HIGHWAYS

Subtitle A—Authorization of Programs

- Sec. 1101. Authorization of appropriations.
- Sec. 1102. Obligation ceiling.
- Sec. 1103. Apportionments.
- Sec. 1104. Equity bonus program.
- Sec. 1105. Revenue aligned budget authority.
- Sec. 1106. Future Interstate System routes.
- Sec. 1107. Metropolitan planning.
- Sec. 1108. Transfer of highway and transit funds.
- Sec. 1109. Recreational trails.
- Sec. 1110. Temporary traffic control devices.
- Sec. 1111. Set-asides for Interstate discretionary projects.
- Sec. 1112. Emergency relief.
- Sec. 1113. Surface transportation program.
- Sec. 1114. Highway bridge program.
- Sec. 1115. Highway use tax evasion projects.
- Sec. 1116. Appalachian development highway system.
- Sec. 1117. Transportation, community, and system preservation program.
- Sec. 1118. Territorial highway program.
- Sec. 1119. Federal lands highways.
- Sec. 1120. Puerto Rico highway program.
- Sec. 1121. HOV facilities.
- Sec. 1122. Definitions.

Subtitle B—Congestion Relief

- Sec. 1201. Real-time system management information program.

Subtitle C—Mobility and Efficiency

- Sec. 1301. Projects of national and regional significance.
- Sec. 1302. National corridor infrastructure improvement program.
- Sec. 1303. Coordinated border infrastructure program.
- Sec. 1304. High priority corridors on the National Highway System.
- Sec. 1305. Truck parking facilities.
- Sec. 1306. Freight intermodal distribution pilot grant program.
- Sec. 1307. Deployment of magnetic levitation transportation projects.

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- Sec. 7202. Responsibilities of Secretary of Health and Human Services.
- Sec. 7203. Department of Transportation requirements.
- Sec. 7204. Effective date.

Subtitle C—Research and Innovative Technology Administration

- Sec. 7301. Administrative authority.

TITLE VIII—TRANSPORTATION DISCRETIONARY SPENDING GUARANTEE

- Sec. 8001. Discretionary spending limits for the highway and mass transit categories.
- Sec. 8002. Adjustments to align highway spending with revenues.
- Sec. 8003. Level of obligation limitations.
- Sec. 8004. Enforcement of guarantee.
- Sec. 8005. Transfer of Federal transit administrative expenses.

TITLE IX—RAIL TRANSPORTATION

- Sec. 9001. High-speed rail corridor development.
- Sec. 9002. Capital grants for rail line relocation projects.
- Sec. 9003. Rehabilitation and improvement financing.
- Sec. 9004. Report regarding impact on public safety of train travel in communities without grade separation.
- Sec. 9005. Welded rail and tank car safety improvements.
- Sec. 9006. Alaska Railroad.
- Sec. 9007. Study of rail transportation and regulation.
- Sec. 9008. Hawaii port infrastructure expansion program.

TITLE X—MISCELLANEOUS PROVISIONS

Subtitle A—Sportfishing and Recreational Boating Safety

- Sec. 10101. Short title.

CHAPTER 1—DINGELL-JOHNSON SPORT FISH RESTORATION ACT AMENDMENTS

- Sec. 10111. Amendment of Dingell-Johnson Sport Fish Restoration Act.
- Sec. 10112. Authorization of appropriations.
- Sec. 10113. Division of annual appropriations.
- Sec. 10114. Maintenance of projects.
- Sec. 10115. Boating infrastructure.
- Sec. 10116. Requirements and restrictions concerning use of amounts for expenses for Administration.
- Sec. 10117. Payments of funds to and cooperation with Puerto Rico, the District of Columbia, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Virgin Islands.
- Sec. 10118. Multistate conservation grant program.
- Sec. 10119. Expenditure of remaining balance in Boat Safety Account.

CHAPTER 2—CLEAN VESSEL ACT OF 1992 AMENDMENTS

- Sec. 10131. Grant program.

CHAPTER 3—RECREATIONAL BOATING SAFETY PROGRAM AMENDMENTS

- Sec. 10141. Technical correction.
- Sec. 10142. Availability of allocations.
- Sec. 10143. Authorization of appropriations for State recreational boating safety programs.

Subtitle B—Other Miscellaneous Provisions

- Sec. 10201. Notice regarding participation of small business concerns.
- Sec. 10202. Emergency medical services.
- Sec. 10203. Hubzone program.
- Sec. 10204. Catastrophic hurricane evacuation plans.
- Sec. 10205. Intermodal transportation facility expansion.
- Sec. 10206. Eligibility to participate in western Alaska community development quota program.
- Sec. 10207. Rail rehabilitation and bridge repair.
- Sec. 10208. Rented or leased motor vehicles.
- Sec. 10209. Midway Island.
- Sec. 10210. Demonstration of digital project simulation.
- Sec. 10211. Environmental programs.
- Sec. 10212. Recission of unobligated balances.
- Sec. 10213. Tribal land.

Subtitle C—Specific Vehicle Safety-related Rulings

- Sec. 10301. Vehicle rollover prevention and crash mitigation.

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1986, within Alaska, Hawaii, or any territory or possession of the United States outside the 48 contiguous States.”

SEC. 10204. CATASTROPHIC HURRICANE EVACUATION PLANS.

(a) **IN GENERAL.**—The Secretary and the Secretary of Homeland Security (referred to in this section as the “Secretaries”), in coordination with the Gulf Coast States and contiguous States, shall jointly review and assess Federal and State evacuation plans for catastrophic hurricanes impacting the Gulf Coast Region and report its findings and recommendations to Congress.

(b) **CONSULTATION.**—In carrying out this section, the Secretaries shall consult with appropriate Federal, State, and local transportation and emergency management agencies.

(c) **CONTENTS.**—In conducting the review, the Secretaries shall consider, at a minimum—

(1) all practical modes of transportation available for evacuations;

(2) the extent to which evacuation plans are coordinated with neighboring States;

(3) methods of communicating evacuation plans and preparing citizens in advance of evacuations; and

(4) methods of coordinating communication with evacuees during plan execution.

(d) **REPORT.**—The Secretaries shall submit to Congress a report of their findings under this section and recommendations not later than October 1, 2006.

SEC. 10205. INTERMODAL TRANSPORTATION FACILITY EXPANSION.

Any funds provided for the Federal share, and any funds provided for the non-Federal share, for an intermodal transportation maritime facility at the Port of Anchorage, Alaska, or for access to that facility shall be transferred to and administered by the Administrator of the Maritime Administration.

SEC. 10206. ELIGIBILITY TO PARTICIPATE IN WESTERN ALASKA COMMUNITY DEVELOPMENT QUOTA PROGRAM.

A community shall be eligible to participate in the western Alaska community development quota program established under section 305(i) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1855(i)) if the community—

(1) is listed in table 7 to part 679 of title 50, Code of Federal Regulations, as in effect on March 8, 2004; or

(2) was determined to be eligible to participate in such program by the National Marine Fisheries Service on April 19, 1999.

SEC. 10207. RAIL REHABILITATION AND BRIDGE REPAIR.

There are authorized to be appropriated to the Secretary of Transportation for rail rehabilitation and bridge repair in the State of Alabama for the period encompassing fiscal years 2006 through 2010 such sums as may be necessary, for work on—

(1) the Luxapalila Valley Railroad from the Mississippi and Alabama State line east to Belk, Alabama;

(2) the Meridian and Bigbee Railroad from the Mississippi and Alabama State line east to Burkeville, Alabama;

(3) the Three Notch Railroad from Georgiana, Alabama, to Andalusia, Alabama;



State of Alaska

Department of Fish and Game

THE BLUE RIBBON FISHERMAN'S REPORT

ON THE COMMUNITY DEVELOPMENT PROGRAM (CDQ)

SID NELSON
10-6-05

RATIONALIZATION and CDQ stole my job

Part one, Norton Sound Herring

When I first started herring fishing, the State of Alaska said I needed a permit to fish Norton Sound, and then I would be "equal" to everybody else. So I bought one. I paid \$28,000 . That was in 1991, before CDQ came along. Back then the State managed the fishery through the Limited Entry Program.

Now the State, through the CDQ Program, pays a herring subsidy in Norton Sound for locals only. The market was so poor that no buyers showed up in 2004, when no subsidy was paid. The herring market for 2005 got a little worse, but Norton Sound Economic Development Corporation (NSEDC) got the fishery back on track with a record breaking subsidy of \$100 per ton.

Norquest was the main buyer and they paid \$150 per ton with their own money. The total price for locals was \$250 per ton. That is a workable price, if you have very little competition.

I can't afford to go to Norton Sound for a non-subsidized price of \$150 per ton, and compete with a fleet that gets \$250 per ton. It's likely Norquest promised to not buy from outside fishermen anyway. It's also likely some other subsidies were paid to Norquest, that we don't know about, to encourage them to drive all the way to Norton Sound.

Icicle went up too. I don't know if they were on "herring" welfare" or if they used their own money to buy with.

NSEDC, Norquest, and maybe Icicle "own" the fishery now. No changes were made at the Limited Entry Commission. No proposals were brought to the Board of Fish. The incredible wealth given to the CDQ groups and their industry partners, with the crab and pollock "rationalization", just spilled over into our state managed fishery, and swamped us.

Small boat fishermen, like myself, never get any subsidies. NSEDC has an income stream of over 8 million dollars a year! They paid a herring subsidy of about \$170,000 on the 1,764 tons the locals caught in 2005. It's nothing to them. They can lose \$170,000 year after year and never even notice.

The rest of us can not go backward, for even one year. All we can do is park the boats and hope the market turns around. Meanwhile NSEDC keeps on fishing at a loss. Herring don't die when they spawn. The herring NSEDC killed this spring could easily come back in 5 or 6 years, when permit holders like myself might be able to harvest them for a profit.

NSEDC does not own those herring. The fish just spawn in Norton Sound. During the rest of the year they travel as far as Dutch Harbor. The Dutch Harbor food and bait fishery comes

from the same biomass. These herring are the basis of the food chain for the entire Bering Sea. All the crab and halibut fishermen depend on that food chain being healthy. Sea mammals and birds depend on the herring too.

Some politicians have recently been claiming- that since farmers get subsidies all the time- fishermen should get them too. It's not the same deal at all. Farmers produce food on private land. Fishermen kill fish that are swimming in the ocean. The ocean belongs to everybody and everybody should have a say in how these harvests are conducted. If the public knew we were getting taxed to kill herring for no economic reason at all, they would not stand for it.

One cornerstone of the U.S. farm program is that you must operate within strict conservation guidelines, or you don't get the subsidies. If you drain a swamp, for example, you will get kicked out of the program forever.

The CDQ herring subsidy operates exactly opposite of that goal.

Imagine 1,764 one ton pickups, rolling down the Parks Highway, full of herring. At 100 foot spacing, that would be a convoy 33 miles long. That's how much fish NSEDC managed to kill last spring at a cost to the taxpayers of \$170,000 . It's like we put a bounty on herring.

When the Norton Sound herring fishery first got started some local elders were opposed to selling an important subsistence food for any price, even for \$1,000 per ton.

Now the CDQ leaders start with cash in the bank, that could be used for schools, hospitals, police protection, or real dentists. Then they pay the locals \$100 per ton to kill the herring and it gets sent off to Japan.

All that Norton Sound herring goes on the market at less than the harvest cost. It drags the price down at Togiak, and for other herring fishermen all over the state.

The NSEDC leaders with the gravy jobs in Anchorage have an election coming up. They created a fishery that would never occur in the normal economic world, just to make themselves look good.

If they need to create jobs in the villages, then they need to figure out some useful projects that don't involve killing off 1,700 tons of fish.

We need some new rules on these CDQ subsidies. If the market does not justify killing those fish. then let the herring go on their way and contribute to the food chain...

The NSEDC herring subsidy amounts to wanton waste.

Regards,
Sid Nelson
F.V. Teal
Box 564
Homer, Ak.
99603

RATIONALIZATION and CDQ stole my job

Part two, Norton Sound Crab

Have you ever gone to a North Pacific Fishery Management Council meeting and wondered what would happen to a small boat fisherman that didn't have the money to hire Ben Stevens, Clem Tillion, or Henry Mitchel as a consultant? I think I can answer that question.

I have fished Norton Sound crab for most of the years since 1993. Those were the qualifying years for Bering Sea Crab Rationalization. All the big boat owners got the federal buyback money plus they were given free catcher quota. Most of them are retired now, with their quota either sold or leased to the big players that stayed in the game.

The small boat crabbers, like myself, have the same problems that the big boats do. We have increased fuel and insurance costs. We fish the Bering Sea too, only we use 32 ft. boats. Our crab competes on the same market that the big boats sell to.

Curiously, we got cut out of all the benefits of rationalization. We got no buyback and we got no quota. I did get a LLP permit good to 37 ft., but it's worth next to nothing because 32 ft. and under boats don't need a permit anyway. We sure didn't get any "sideboards".

What we did get was about 80 million dollars of CDQ money dropped off at Nome, with no State oversight whatsoever, and some vague plan about developing a fishing economy for locals only.

Since I am a "bad" fisherman from Homer, I now have to compete with a 1.2 million dollar CDQ loan program with no interest due for 3 years, if ever. That brought about 20 free boats into a fishery that has averaged about 250,000 lbs. of crab a year since 1993. The CDQ money also built a new seafood processing plant at Nome that cost around 4 million dollars when they stopped counting. they also bought a couple tenders and they built a buying station in Golovin. All this is off limits for fishermen like myself.

We can't buy ice or bait from them or rent their crane or sell crab to them.

In 2001 we thought we could sell crab to them. Construction was just getting started on their new seafood plant and NSEDC had hired a floating processor to process the crab with. Their fleet manager, Tom Magwire, promised us a market with fuel and bait. He encouraged us to join them so we could all catch the quota fairly fast. In 2000 the daily rate on the processor lease had cut into the profits as the season dragged on. Tom said he didn't want to repeat that mistake in 2001.

2001 was the worst Bristol Bay salmon season since I started in 1981. We spent all our reserves, getting ready for Nome crab, trying to offset what we knew was going to be a bad salmon season.

It was a trap. Three weeks before the season was to start, NSEDC cut us out of the market deal, leaving us with no bait and nowhere to sell our crab. We were too far along to quit. I had crew hired and pots headed for Nome and a lot of new expensive equipment bought. We scrambled to bring in bait and find new markets. That is all possible to do, but not in three weeks.

Nine boats got tricked by their lie. It was a long season. We caught crab, but we had bad shipping and market problems.

We heard NSEDC lost over \$300,000 on the processor they hired. It would park right outside the Nome harbor, running at maybe 20% capacity, just spurting out red ink. They refused to buy our crab, right to the seasons end.

They hoped to bankrupt us. When it was over, three out of our group had to sell their boats. Two sold their salmon permits. One sold his house in Homer and moved to Washington State.

One local crabber, Dr. Jim Lewis, had a great season in 2001. He had moved to Nome, from Oklahoma, around 1998. He had a successful medical practice on Front Street. He had no fishing experience at all, but he did buy a crab LLP so he qualified for an \$80,000 NSEDC loan package. He bought a nice boat and crab gear with the loan.

According to the CDQ theory, Dr. Lewis is a "victim" because the lucrative crab and pollock fisheries were developed, practically at his doorstep, by big Seattle fish companies, and he got left out. To compensate Dr. Lewis, it's now O.K. for a branch of Alaska State government (CDQ), to lie to me and try to bankrupt me, in order to put Dr. Lewis in the fishing business.

I bought my boat and all my equipment with my own money. I have never gotten any government subsidies, after fishing in Alaska for over 25 years. I paid federal, state, and local taxes during all those years.

The NSEDC "BIG LIE" in 2001 was the worst treatment I have ever gotten from a State Agency or a fish buyer or whatever you want to call them.

I dropped out of Nome crab this year. The last straw was when I heard what fuel prices were going to be, and I heard that NSEDC had been giving out "fuel rebates".

Only three non-subsidized "outsider" boats fished Nome crab in 2005, and they are close to giving up too.

So NSEDC "won". Now what? They have a 4 million dollar seafood plant in the wrong town that probably loses \$500,000 a year on crab. It costs them \$170,000 a year to pretend to have a herring fishery. They have a 1.2 million dollar boat loan portfolio that will never be paid back. They lost about \$400,000 in a bad lawsuit a couple years ago, when they ran the last private crab buyer out of town. Before that, they lost over \$100,000 in a similar lawsuit. Now another big lawsuit is looming, brought by two local fishermen with a whole series of complaints. In a nutshell, it's just like Adak!

It's a world class Clemdoggle. It's right in there with the Delta Barley Project and the pink salmon hatcheries.

And the governor's Blue Ribbon CDQ Panel just went to Nome to look around, and they came back saying everything was wonderful.

Things are not wonderful. The party is over for CDQ, but they might not know it yet. Stove oil costs 3 dollars a gallon in Nome. Western Alaska villages need that CDQ money for schools, hospitals, police protection, flood control and real dentists.

We can not afford make-believe industries like the Nome Seafood Plant anymore.

Remember the CDQ Program is not exactly enshrined in the Alaska Constitution.

Regards,
Sid Nelson
Box 564
Homer, Ak.
99603

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10. That on June 28, 1999, a written response was received from Linda M. Orr, M.D., Lawton, Oklahoma, stated Lewis sought medical care from her on April 28, 1997 and May 2, 1997, and that she "thought" he suffered from cluster headaches and depression, that he "probably had a bi-polar disorder and recommended he seek psychological care for that" but that she never received any report confirming that Lewis followed her recommendations. She says she recommended he "seek psychological counseling for his depression."

11. On July 13, 2001, documents pertaining to Medical Board Investigation 2801.98 2 and 2802.98.7 were forwarded to Irwin S. Dreiblatt, Ph.D., Seattle, Washington for review and opinion. Dr. Dreiblatt is considered an expert in the evaluation and treatment of adult and adolescent sexual offenders. In connection with this matter, Dreiblatt consulted with Lawrence J. Greenblatt, D.O., Issaquah, Washington for the purpose of determining the appropriateness of osteopathic procedures utilized by Lewis.

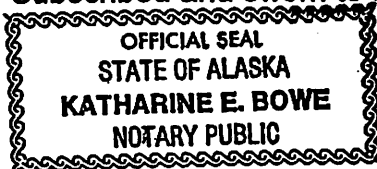
12. On October 5, 2001, a report was received from Greenblatt, stating in part "The record shows a consistent pattern of 1). inappropriate touching, 2). failure to adequately explain and formally document informed consent, 3). insensitivity to patient's requests to stop performing his techniques, and. 4). failure to take adequate precautions to prevent spread of disease. A copy of Greenblatt's written report and curriculum vitae are attached.

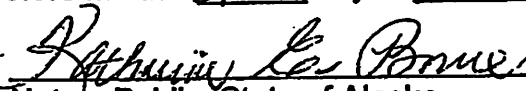
13. On October 17, 2001, a written report was received from Dreiblatt, stating in part, "It is my opinion, based on the information currently available, that Dr. Lewis likely engaged in professional sexual misconduct with some of his female patients" and that "In addition to the allegations regarding sexual misconduct in Alaska, Dr. Lewis has a long history of such allegations." In addition, Dreiblatt recommends that Lewis undergo a "complete specialized psychological examination with an examiner who has expertise in working with health care providers where there is a concern about sexual misconduct, practice boundaries violations and standard of care." He also recommends that given Lewis' past history that he undergo re-evaluation of his substance abuse status. Dr. Dreiblatt also says "The information presently available supports an opinion that Dr. Lewis likely presents a danger to female patients he examines and treats." A copy of Dreiblatt's report and curriculum vitae are attached.

Further, your Affiant sayeth naught.


Colin Matthews, Investigator

Subscribed and sworn to before me this 25th day of October, 2001




Notary Public, State of Alaska
My commission expires : October 17, 2002

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Division of Occupational Licensing
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