

MEMORANDUM

TO: Council and AP Members
FROM: Chris Oliver *Chris*
Executive Director
DATE: October 1, 2006
SUBJECT: Community Development Quota (CDQ) Program

ESTIMATED TIME
4 HOURS

ACTION REQUIRED

Report on 2006 Coast Guard Act (P.L. 109-241)

BACKGROUND

At the June meeting, staff provided the Council with a status report of pending Congressional legislation that would make significant changes to the western Alaska Community Development Quota (CDQ) Program. The Council subsequently recommended that staff wait for the outcome of this legislation before doing further work on BSAI Amendment 71, as many primary issues currently under consideration would be determined by Congress and negate the need for further analysis or development of alternatives. In addition, the Council requested, should the bill pass over the summer, that staff provide a detailed report at the October 2006 Council meeting on the implications for the CDQ Program and non-CDQ fisheries. The Council's action at this meeting is to receive such a report. **This report will be handed out at the Council meeting.**

On July 11, 2006, the President signed the Coast Guard and Maritime Transportation Act of 2006 (the Coast Guard Act). Section 416(a) of the Coast Guard Act revises section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) by replacing all of the existing language in this section with new language. The MSA amendments and associated legislative history are attached as **Item C-2(a)**.

The MSA amendments address all aspects of management and oversight of the CDQ Program, as outlined in Table 1 below. Some of the provisions of the Act are relatively complicated and require significant analysis and/or legal interpretation from NOAA GC. Most of these MSA amendments will require revisions to Federal regulations that will be implemented through proposed and final rulemaking. The Council will also need to amend the BSAI Groundfish FMP and BSAI King and Tanner Crab FMP. For the purpose of this report, staff has divided the provisions in the Act into four general categories (allocations, fisheries management, decennial review, administrative/oversight) that staff proposes be implemented through six separate FMP and/or regulatory amendments. See Table 1 below for details. Each of the issues described below, including the plan for implementation, is detailed further in the status report that will be handed out at this meeting.

Table 1. Sub-paragraph reference and subject of amendments to section 305(i)(1) of the MSA made through the 2006 Coast Guard Act

Sub-paragraph of section 305(i)(1)	Subject of MSA requirements	Issue category	Federal vehicle for implementation
(A)	Purpose of the CDQ Program.	Admin & oversight	Am. 71/22
(B)(1)(i)	Current allocations to the CDQ Program and how those allocations are managed.	Allocations	No regulatory revisions needed
(B)(1)(ii)	Allocations to the program under future sector allocation and rationalization programs or upon the establishment of new BSAI fisheries.	Allocations	BSAI Am. 85 BSAI Am. 80
(B)(iii)	Processing and other rights related to CDQ allocations.	Allocations	No regulatory revisions needed
(B)(iv)	Restrictions on the regulation of harvest of halibut, fixed gear sablefish, pollock, and crab CDQ allocations.	Fisheries management	Regulatory amendment
(C)	Percentage allocations of groundfish, halibut, and crab among the CDQ entities (CDQ groups).	Allocations	FR notice
(D)	Specific list of the 65 eligible villages and the six CDQ groups through which each may participate in the program.	Admin & oversight	Am. 71/22
(E)(i)	Requirements for CDQ entity's board of directors.	Admin & oversight	Am. 71/22
(E)(ii), (vi)	CDQ entities must elect CDQ Panel representatives and comply with requirements established by CDQ Panel.	Admin & oversight	Am. 71/22
(E)(iii)-(v)	Allowable investments, limits on non-fisheries investments, statement of compliance.	Admin & oversight	Am. 71/22
(F)(i)	Excessive share ownership, harvesting, or processing limitations in BSAI fisheries.	Fisheries management	FMP/Regulatory amendment #2 ¹
(F)(ii)-(iv)	Compliance with and exemptions from certain State laws.	Admin & oversight	No Federal regs needed
(G)	CDQ Panel membership, functions, and decision making.	Admin & oversight	No Federal regs needed
(H)	Decennial review and adjustment of entity allocations.	Decennial review	FMP/Regulatory amendment #3 ¹
(I)	Approval of community development plans and amendments not required.	Admin & oversight	Remove current regulations through Am. 71/22
(J)	Community development plan defined.	Decennial review	FMP/Regulatory amendment #3 ¹

¹This denotes a second FMP/regulatory amendment package to implement the fisheries management changes, and a third FMP/regulatory package to implement the decennial review. Both are separate amendments from BSAI Am. 71/22.

Several additional documents related to effects of the Coast Guard Act are attached to this memo for reference.

- Federal Register notice (8/8/06)
- NMFS letter to the State regarding decennial review of allocations (7/28/06)
- NMFS letter regarding Federal Advisory Committee Act (FACA) (8/22/06)
- NMFS letter suspending certain regulations related to community development plans (CDPs) and amendments (8/30/06)
- Letter from Yukon Delta Fisheries Development Association (YDFDA) regarding observer regulations (9/15/06)

First, NMFS issued a Federal Register notice (**Item C-2(b)**) on August 31, 2006, to inform the public about the CDQ percentage allocations among the six CDQ groups that are in effect as a result of the Coast Guard Act. **Subparagraph (C) of the Act establishes percentage allocations for groundfish, crab, and halibut allocated among the CDQ groups at those percentage allocations in effect on March 1, 2006.** Note that the allocations in effect as of March 1, 2006, are the same CDQ and PSQ (prohibited species quota) percentage allocations for all quota categories originally approved by NMFS as part of the 2003–2005 CDQ allocation process. While those CDQ and PSQ percentage allocations originally expired at the end of December 2005, NMFS issued an IAD (8/8/05) that removed the expiration date. This administrative determination established the CDQ percentage allocations that were in effect on March 1, 2006, for all BSAI groundfish, halibut, and prohibited species, as well as for all crab species except Eastern Aleutian Islands golden king crab and Adak red king crab. These two crab species were added to the CDQ Program as part of crab rationalization, and CDQ group allocations for these species were implemented through a final agency decision in October 2005. In addition, the Federal Register notice provides information about the percentage allocations for PSQ allocated among the CDQ groups that were not affected by the MSA amendments, but continue in effect under an administrative determination issued by NMFS on August 8, 2005.

Second, NMFS sent a letter to Commissioner Noll of the Department of Commerce, Community and Economic Development at the State of Alaska (**Item C-2(c)**) in July. This letter refers to subparagraph (H) of the Act, which requires that the State of Alaska conduct the decennial review (starting in 2012) of the CDQ groups and make any adjustments to allocations that result from the review under State law. No role is required for the Secretary of Commerce in the review or allocation adjustment unless State law prevents the State from undertaking this responsibility. The letter from NMFS to the State outlines this provision of the Act and asks for a written legal determination by the State as to whether it has the legal authority to adjust CDQ allocations consistent with the requirements of the MSA. This determination will assist NMFS and the Council in determining whether FMP and/or Federal regulatory amendments are necessary to implement this provision.

Third, subparagraph (G) of the Act establishes a new entity, the CDQ Panel, whose membership consists of one representative from each of the six CDQ groups. The panel is established to: “(I) administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, Secretary, or the State of Alaska, as the case may be; and (II) coordinate and facilitate activities of the entities under the program.” Prior to convening, the CDQ groups requested a legal determination about whether the Federal Advisory Committee Act (FACA) applies to the CDQ Panel. For reasons outlined in NMFS’s response (**Item C-2(d)**), NMFS has determined that FACA does not apply to the CDQ Panel.

Fourth, on August 3, the State sent a written request to NMFS for a determination on whether approval of substantial amendments to CDPs is still required under the recent MSA amendments. This request was spurred by two substantial amendments that were proposed and submitted by a CDQ group to the State. NMFS’s response is provided as **Item C-2(e)**. NMFS determined that certain regulations related to the submission, review, and approval or disapproval by NMFS of CDPs and CDP amendments, the annual budget report, and the annual budget reconciliation report, are inconsistent with subparagraph (I) of the MSA. While these

Federal regulations will be revised through our normal rulemaking process in the future, NMFS estimates that it may take a year or more to complete this process. Thus, until current regulations can be revised, NMFS is suspending enforcement of particular regulations that are clearly inconsistent with the MSA, including the requirement to submit requests for approval of substantial amendments. These regulations are outlined in the letter attached as **Item C-2(e)**.

Finally, on September 15, YDFDA sent a letter to NMFS requesting an interpretation of the enforcement policy regarding observer coverage on a fixed gear catcher vessel harvesting CDQ sablefish that is less than 125' length overall (**Item C-2(f)**). Subparagraph (B)(iv) of the Act is as follows: "*Regulation of Harvest. The harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated by the Secretary in a manner no more restrictive than for other participants in the applicable sector, including with respect to the harvest of nontarget species.*" YDFDA notes that Federal regulations require a CDQ vessel of this size in the fixed gear sablefish fishery to carry at least one level 2 observer, while a vessel of this size in the IFQ (non-CDQ) fixed gear sablefish fishery is only required to carry one observer for 30% of its fishing days in the calendar quarter. YDFDA requests an interpretation of NMFS's enforcement policy or a statement that NMFS is suspending enforcement of this regulation (see 50 CFR 679.50(c)(4)(v)). A response from NMFS is forthcoming.

In summary, the documents attached here are background material, provided to supplement the overall report being provided at this Council meeting. The Council's action at this meeting is to receive a report on the implementation of the MSA amendments to the CDQ Program provisions made through the 2006 Coast Guard Act.

PUBLIC LAW 109-241—JULY 11, 2006

COAST GUARD AND MARITIME
TRANSPORTATION ACT OF 2006

Public Law 109-241
109th Congress

An Act

July 11, 2006
[H.R. 889]

To authorize appropriations for the Coast Guard for fiscal year 2006, to make technical corrections to various laws administered by the Coast Guard, and for other purposes.

Coast Guard and
Maritime
Transportation
Act of 2006.
14 USC 1 note.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the “Coast Guard and Maritime Transportation Act of 2006”.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

- Sec. 1. Short title.
- Sec. 2. Table of contents.

TITLE I—AUTHORIZATION

- Sec. 101. Authorization of appropriations.
- Sec. 102. Authorized levels of military strength and training.
- Sec. 103. Supplemental authorization of appropriations.
- Sec. 104. Web-based risk management data system.

TITLE II—COAST GUARD

- Sec. 201. Extension of Coast Guard vessel anchorage and movement authority.
- Sec. 202. International training and technical assistance.
- Sec. 203. Officer promotion.
- Sec. 204. Coast Guard band director.
- Sec. 205. Authority for one-step turnkey design-build contracting.
- Sec. 206. Reserve recall authority.
- Sec. 207. Reserve officer distribution.
- Sec. 208. Expansion of use of auxiliary equipment to support Coast Guard missions.
- Sec. 209. Coast Guard history fellowships.
- Sec. 210. Icebreakers.
- Sec. 211. Operation as a service in the Navy.
- Sec. 212. Limitation on moving assets to St. Elizabeth's Hospital.
- Sec. 213. Cooperative agreements.
- Sec. 214. Biodiesel feasibility study.
- Sec. 215. Boating safety director.
- Sec. 216. Hangar at Coast Guard Air Station Barbers Point.
- Sec. 217. Promotion of Coast Guard officers.
- Sec. 218. Redesignation of Coast Guard law specialists as judge advocates.

TITLE III—SHIPPING AND NAVIGATION

- Sec. 301. Treatment of ferries as passenger vessels.
- Sec. 302. Great Lakes pilotage annual ratemaking.
- Sec. 303. Certification of vessel nationality in drug smuggling cases.
- Sec. 304. LNG tankers.
- Sec. 305. Use of maritime safety and security teams.
- Sec. 306. Enhanced civil penalties for violations of provisions enacted by the Coast Guard and Maritime Transportation Act of 2004.

- Sec. 307. Training of cadets at United States Merchant Marine Academy.
- Sec. 308. Reports from mortgagees of vessels.
- Sec. 309. Determination of the Secretary.
- Sec. 310. Setting, relocating, and recovering anchors.
- Sec. 311. International tonnage measurement of vessels engaged in the Aleutian trade.
- Sec. 312. Riding gangs.

TITLE IV—MISCELLANEOUS

- Sec. 401. Authorization of junior reserve officers training program pilot program.
- Sec. 402. Transfer.
- Sec. 403. LORAN-C.
- Sec. 404. Long-range vessel tracking system.
- Sec. 405. Marine vessel and cold water safety education.
- Sec. 406. Reports.
- Sec. 407. Conveyance of decommissioned Coast Guard Cutter MACKINAW.
- Sec. 408. Deepwater reports.
- Sec. 409. Helicopters.
- Sec. 410. Newtown Creek, New York City, New York.
- Sec. 411. Report on technology.
- Sec. 412. Assessment and planning.
- Sec. 413. Homeport.
- Sec. 414. Navigational safety of certain facilities.
- Sec. 415. Port Richmond.
- Sec. 416. Western Alaska community development quota program.
- Sec. 417. Quota share allocation.
- Sec. 418. Maine fish tender vessels.
- Sec. 419. Automatic identification system.
- Sec. 420. Voyage data recorder study and report.
- Sec. 421. Distant water tuna fleet.

TITLE V—LIGHTHOUSES

- Sec. 501. Transfer.
- Sec. 502. Misty Fiords National Monument and Wilderness.
- Sec. 503. Miscellaneous Light Stations.
- Sec. 504. Inclusion of lighthouse in St. Marks National Wildlife Refuge, Florida.

TITLE VI—DELAWARE RIVER PROTECTION AND MISCELLANEOUS OIL PROVISIONS

- Sec. 601. Short title.
- Sec. 602. Requirement to notify Coast Guard of release of objects into the navigable waters of the United States.
- Sec. 603. Limits on liability.
- Sec. 604. Requirement to update Philadelphia Area Contingency Plan.
- Sec. 605. Submerged oil removal.
- Sec. 606. Assessment of oil spill costs.
- Sec. 607. Delaware River and Bay Oil Spill Advisory Committee.
- Sec. 608. Nontank vessels.

TITLE VII—HURRICANE RESPONSE

- Sec. 701. Homeowners assistance for Coast Guard personnel affected by Hurricanes Katrina or Rita.
- Sec. 702. Temporary authorization to extend the duration of licenses, certificates of registry, and merchant mariners' documents.
- Sec. 703. Temporary authorization to extend the duration of vessel certificates of inspection.
- Sec. 704. Preservation of leave lost due to Hurricane Katrina operations.
- Sec. 705. Reports on impact to Coast Guard.
- Sec. 706. Reports on impacts on navigable waterways.

TITLE VIII—OCEAN COMMISSION RECOMMENDATIONS

- Sec. 801. Implementation of international agreements.
- Sec. 802. Voluntary measures for reducing pollution from recreational boats.
- Sec. 803. Integration of vessel monitoring system data.
- Sec. 804. Foreign fishing incursions.

TITLE IX—TECHNICAL CORRECTIONS

- Sec. 901. Miscellaneous technical corrections.
- Sec. 902. Correction of references to Secretary of Transportation and Department of Transportation; related matters.

SEC. 412. ASSESSMENT AND PLANNING.

There is authorized to be appropriated to the Maritime Administration \$400,000 to carry out an assessment of, and planning for, the impact of an Arctic Sea Route on the indigenous people of Alaska.

SEC. 413. HOMEPORT.

(a) **STUDY.**—The Commandant of the Coast Guard shall conduct a study to assess the current homeport arrangement of the Coast Guard polar icebreaker HEALY to determine whether an alternative arrangement would enhance the Coast Guard's capabilities to carry out the recommendation to maintain dedicated, year-round icebreaker capability for the Arctic that was included in the report prepared by the National Academy of Sciences and entitled: "Polar Icebreaker Roles and U.S. Future Needs: A Preliminary Assessment (ISBN: 0-309-10069-0)".

(b) **REPORT.**—Not later than one year after the date of enactment of this Act, the Commandant shall report the findings of the study to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

SEC. 414. NAVIGATIONAL SAFETY OF CERTAIN FACILITIES.

Deadline.

(a) **CONSIDERATION OF ALTERNATIVES.**—In reviewing a lease, easement, or right-of-way for an offshore wind energy facility in Nantucket Sound under section 8(p) of the Outer Continental Shelf Lands Act (43 U.S.C. 1337(p)), not later than 60 days before the date established by the Secretary of the Interior for publication of a draft environmental impact statement, the Commandant of the Coast Guard shall specify the reasonable terms and conditions the Commandant determines to be necessary to provide for navigational safety with respect to the proposed lease, easement, or right-of-way and each alternative to the proposed lease, easement, or right-of-way considered by the Secretary.

(b) **INCLUSION OF NECESSARY TERMS AND CONDITIONS.**—In granting a lease, easement, or right-of-way for an offshore wind energy facility in Nantucket Sound under section 8(p) of the Outer Continental Shelf Lands Act (43 U.S.C. 1337(p)), the Secretary shall incorporate in the lease, easement, or right-of-way reasonable terms and conditions the Commandant determines to be necessary to provide for navigational safety.

Pennsylvania.

SEC. 415. PORT RICHMOND.

The Secretary of the department in which the Coast Guard is operating, acting through the Commandant of the Coast Guard, may not approve a security plan under section 70103(c) of title 46, United States Code, for a liquefied natural gas import facility at Port Richmond in Philadelphia, Pennsylvania, until the Secretary conducts a vulnerability assessment under section 70102(b) of such title.

SEC. 416. WESTERN ALASKA COMMUNITY DEVELOPMENT QUOTA PROGRAM.

(a) **RESTATEMENT OF EXISTING PROGRAM INCORPORATING CERTAIN PROVISIONS OF REGULATIONS.**—Section 305(i) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1855(i)) is amended by striking paragraph (1) and inserting the following:

“(1) WESTERN ALASKA COMMUNITY DEVELOPMENT QUOTA PROGRAM.—

“(A) IN GENERAL.—There is established the western Alaska community development quota program in order—

“(i) to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area;

“(ii) to support economic development in western Alaska;

“(iii) to alleviate poverty and provide economic and social benefits for residents of western Alaska; and

“(iv) to achieve sustainable and diversified local economies in western Alaska.

“(B) PROGRAM ALLOCATION.—

“(i) IN GENERAL.—Except as provided in clause (ii), the annual percentage of the total allowable catch, guideline harvest level, or other annual catch limit allocated to the program in each directed fishery of the Bering Sea and Aleutian Islands shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006, for the program. The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and nontarget needs based on existing practice with respect to the program as of March 1, 2006, for each fishery.

“(ii) EXCEPTIONS.—Notwithstanding clause (i)—

“(I) the allocation under the program for each directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) shall be a directed fishing allocation of 10 percent upon the establishment of a quota program, fishing cooperative, sector allocation, or other rationalization program in any sector of the fishery; and

“(II) the allocation under the program in any directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) established after the date of enactment of this subclause shall be a directed fishing allocation of 10 percent.

“(iii) PROCESSING AND OTHER RIGHTS.—Allocations to the program include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.

“(iv) REGULATION OF HARVEST.—The harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated by the Secretary in a manner no more restrictive than for other participants in the applicable sector, including with respect to the harvest of nontarget species.

“(C) ALLOCATIONS TO ENTITIES.—Each entity eligible to participate in the program shall be authorized under the program to harvest annually the same percentage of each species allocated to the program under subparagraph (B) that it was authorized by the Secretary to harvest

of such species annually as of March 1, 2006, except to the extent that its allocation is adjusted under subparagraph (H). Such allocation shall include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.

“(D) ELIGIBLE VILLAGES.—The following villages shall be eligible to participate in the program through the following entities:

“(i) The villages of Akutan, Atka, False Pass, Nelson Lagoon, Nikolski, and Saint George through the Aleutian Pribilof Island Community Development Association.

“(ii) The villages of Aleknagik, Clark’s Point, Dillingham, Egegik, Ekuk, Ekwok, King Salmon/Savonoski, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, and Ugashik through the Bristol Bay Economic Development Corporation.

“(iii) The village of Saint Paul through the Central Bering Sea Fishermen’s Association.

“(iv) The villages of Chefornak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tuntutuliak, and Tununak through the Coastal Villages Region Fund.

“(v) The villages of Brevig Mission, Diomedes, Elim, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, and White Mountain through the Norton Sound Economic Development Corporation.

“(vi) The villages of Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village, and Nunam Iqua through the Yukon Delta Fisheries Development Association.

“(E) ELIGIBILITY REQUIREMENTS FOR PARTICIPATING ENTITIES.—To be eligible to participate in the program, an entity referred to in subparagraph (D) shall meet the following requirements:

Establishment.

“(i) BOARD OF DIRECTORS.—The entity shall be governed by a board of directors. At least 75 percent of the members of the board shall be resident fishermen from the entity’s member villages. The board shall include at least one director selected by each such member village.

“(ii) PANEL REPRESENTATIVE.—The entity shall elect a representative to serve on the panel established by subparagraph (G).

“(iii) OTHER INVESTMENTS.—The entity may make up to 20 percent of its annual investments in any combination of the following:

“(I) For projects that are not fishery-related and that are located in its region.

“(II) On a pooled or joint investment basis with one or more other entities participating in the program for projects that are not fishery-

related and that are located in one or more of their regions.

“(III) For matching Federal or State grants for projects or programs in its member villages without regard to any limitation on the Federal or State share, or restriction on the source of any non-Federal or non-State matching funds, of any grant program under any other provision of law.

“(iv) FISHERY-RELATED INVESTMENTS.—The entity shall make the remainder percent of its annual investments in fisheries-related projects or for other purposes consistent with the practices of the entity prior to March 1, 2006.

“(v) ANNUAL STATEMENT OF COMPLIANCE.—Each year the entity, following approval by its board of directors and signed by its chief executive officer, shall submit a written statement to the Secretary and the State of Alaska that summarizes the purposes for which it made investments under clauses (iii) and (iv) during the preceding year.

“(vi) OTHER PANEL REQUIREMENTS.—The entity shall comply with any other requirements established by the panel under subparagraph (G).

“(F) ENTITY STATUS, LIMITATIONS, AND REGULATION.—
The entity—

“(i) shall be subject to any excessive share ownership, harvesting, or processing limitations in the fisheries of the Bering Sea and Aleutian Islands Management Area only to the extent of the entity's proportional ownership, excluding any program allocations, and notwithstanding any other provision of law;

“(ii) shall comply with State of Alaska law requiring annual reports to the entity's member villages summarizing financial operations for the previous calendar year, including general and administrative costs and compensation levels of the top 5 highest paid personnel;

“(iii) shall comply with State of Alaska laws to prevent fraud that are administered by the Alaska Division of Banking and Securities, except that the entity and the State shall keep confidential from public disclosure any information if the disclosure would be harmful to the entity or its investments; and

“(iv) is exempt from compliance with any State law requiring approval of financial transactions, community development plans, or amendments thereto, except as required by subparagraph (H).

“(G) ADMINISTRATIVE PANEL.—

“(i) ESTABLISHMENT.—There is established a community development quota program panel.

“(ii) MEMBERSHIP.—The panel shall consist of 6 members. Each entity participating in the program shall select one member of the panel.

“(iii) FUNCTIONS.—The panel shall—

“(I) administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or

through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, as the case may be; and

“(II) coordinate and facilitate activities of the entities under the program.

“(iv) UNANIMITY REQUIRED.—The panel may act only by unanimous vote of all 6 members of the panel and may not act if there is a vacancy in the membership of the panel.

“(H) DECENNIAL REVIEW AND ADJUSTMENT OF ENTITY ALLOCATIONS.—

“(i) IN GENERAL.—During calendar year 2012 and every 10 years thereafter, the State of Alaska shall evaluate the performance of each entity participating in the program based on the criteria described in clause (ii).

“(ii) CRITERIA.—The panel shall establish a system to be applied under this subparagraph that allows each entity participating in the program to assign relative values to the following criteria to reflect the particular needs of its villages:

“(I) Changes during the preceding 10-year period in population, poverty level, and economic development in the entity’s member villages.

“(II) The overall financial performance of the entity, including fishery and nonfishery investments by the entity.

“(III) Employment, scholarships, and training supported by the entity.

“(IV) Achieving of the goals of the entity’s community development plan.

“(iii) ADJUSTMENT OF ALLOCATIONS.—After the evaluation required by clause (i), the State of Alaska shall make a determination, on the record and after an opportunity for a hearing, with respect to the performance of each entity participating in the program for the criteria described in clause (ii). If the State determines that the entity has maintained or improved its overall performance with respect to the criteria, the allocation to such entity under the program shall be extended by the State for the next 10-year period. If the State determines that the entity has not maintained or improved its overall performance with respect to the criteria—

“(I) at least 90 percent of the entity’s allocation for each species under subparagraph (C) shall be extended by the State for the next 10-year period; and

“(II) the State may determine, or the Secretary may determine (if State law prevents the State from making the determination), and implement an appropriate reduction of up to 10 percent of the entity’s allocation for each species under subparagraph (C) for all or part of such 10-year period.

“(iv) REALLOCATION OF REDUCED AMOUNT.—If the State or the Secretary reduces an entity’s allocation

under clause (iii), the reduction shall be reallocated among other entities participating in the program whose allocations are not reduced during the same period in proportion to each such entity's allocation of the applicable species under subparagraph (C).

“(I) SECRETARIAL APPROVAL NOT REQUIRED.—Notwithstanding any other provision of law or regulation thereunder, the approval by the Secretary of a community development plan, or an amendment thereof, under the program is not required.

“(J) COMMUNITY DEVELOPMENT PLAN DEFINED.—In this paragraph, the term ‘community development plan’ means a plan, prepared by an entity referred to in subparagraph (D), for the program that describes how the entity intends—

“(i) to harvest its share of fishery resources allocated to the program, or

“(ii) to use its share of fishery resources allocated to the program, and any revenue derived from such use, to assist its member villages with projects to advance economic development,

but does not include a plan that allocates fishery resources to the program.”.

(b) NO INTERRUPTION OF EXISTING ALLOCATIONS.—The amendment made by subsection (a) shall not be construed or implemented in a way that causes any interruption in the allocations of fishery resources to the western Alaska community development quota program or in the opportunity of an entity participating in that program to harvest its share of such allocations.

16 USC 1855
note.

(c) LOAN SUBSIDIES.—The last proviso under the heading “NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION—OPERATIONS, RESEARCH, AND FACILITIES” in the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006 (Public Law 109-108; 119 Stat. 2311-2312) is amended—

(1) by striking “for the cost of loans” and inserting “to subsidize gross obligations for the principal amount of direct loans, not to exceed a total of \$200,000,000,”; and

(2) by striking “use” and inserting “the purchase of all or part of ownership interests in fishing or processing vessels, shoreside fish processing facilities, permits, quota, and cooperative rights”.

SEC. 417. QUOTA SHARE ALLOCATION.

(a) IN GENERAL.— The Secretary of Commerce shall modify the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands being implemented under section 313(j) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1862(j)) to require that Blue Dutch, LLC, receives processor quota shares units equal to 0.75 percent of the total number of processor quota share units for each of the following fisheries: the Bristol Bay red king crab fishery and the Bering Sea C. opilio crab fishery.

(b) APPLICABILITY.—The modification made under subsection (a) shall apply with respect to each fishery referred to in subsection (a) whenever the total allowable catch for that fishery is more than 2 percent higher than the most recent total allowable catch in effect for that fishery prior to September 15, 2005.

(c) SAVINGS PROVISION.—Nothing in this section affects the authority of the North Pacific Fishery Management Council to submit, and the Secretary of Commerce to implement, changes to or repeal of conservation and management measures under section 313(j)(3) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1862(j)(3)).

Deadline.

(d) REGULATIONS.—Not later than 60 days after the date of enactment of this Act, the Secretary of Commerce shall issue regulations to implement this section.

SEC. 418. MAINE FISH TENDER VESSELS.

The prohibition under section 27 of the Merchant Marine Act, 1920 (46 App. U.S.C. 883) against transportation of fish or shellfish between places in the State of Maine by a vessel constructed in Canada shall not apply to a vessel of less than 5 net tons if—

(1) the vessel was engaged in the transportation of fish or shellfish between places in the State of Maine before January 1, 2005;

(2) before January 1, 2005, the owner of the vessel transported fish or shellfish pursuant to a valid wholesale seafood license issued under section 6851 of title 12 of the Maine Revised Statutes;

(3) the vessel is owned by a person that meets the citizenship requirements of section 2 of the Shipping Act, 1916 (46 U.S.C. App. 802); and

Deadline.

(4) not later than 180 days after the date of enactment of this Act, the owner of the vessel submits to the Secretary of the department in which the Coast Guard is operating an affidavit certifying that the vessel and owner meet the requirements of this section.

Deadlines.
Grants.

SEC. 419. AUTOMATIC IDENTIFICATION SYSTEM.

(a) PREVENTION OF HARMFUL INTERFERENCE.—Not later than 60 days after the date of enactment of this Act, the Secretary of the department in which the Coast Guard is operating, acting through the Commandant of the Coast Guard, may transfer \$1,000,000 to the National Telecommunications and Information Administration of the Department of Commerce for the purposes of awarding, not later than 120 days after such date of enactment, a competitive grant to design and develop a prototype device that integrates a Class B Automatic Identification System transponder (International Electrotechnical Commission standard 62287) with a wireless maritime data device approved by the Federal Communications Commission with channel throughput greater than 19.2 kilobits per second to enable such wireless maritime data device to provide wireless maritime data services, concurrent with the operation of the transponder, on frequency channels adjacent to the frequency channels on which the transponder operates, while minimizing or eliminating the harmful interference between the transponder and such wireless maritime data device. The design of the device developed under this subsection shall be available for public use.

(b) IMPLEMENTATION OF AIS.—It is the sense of the Senate, not later than 60 days after the date of enactment of this Act, that the Federal Communications Commission should resolve the disposition of its rulemaking on the Automatic Information System and licensee use of frequency bands 157.1875–157.4375 MHz and 161.7875–162.0375 MHz (RM-10821, WT Docket Number 04-344).

acquired, a projection of the remaining operational lifespan of each legacy asset, a detailed justification for each modification to the original Deepwater plan to meet the Service's revised mission needs statement, and an explanation of the costs that will be required above the estimated costs of the original Deepwater program resulting from such modifications.

Section 409. Helicopters

Section 410 of the House bill would limit the number of HH-65 helicopters that the Coast Guard may acquire to no more than four and prohibit the Commandant from acquiring such helicopters until 90 days after the submission to Congress of a determination that the cost of acquiring used HH-65 helicopters and the cost to modifying those helicopters or airframes to meet the same design, construction, and equipment standards that apply to the current fleet of HH-65 helicopters is more cost-effective than an acquisition or leasing of a similar number of MH-68 helicopters.

The Senate amendment does not include a comparable provision.

The Conference substitute adopts a provision that requires the Coast Guard to study and report to Congress an analysis of the potential impacts, including costs and benefits, of a requirement that the Coast Guard only acquires helicopters or major helicopter components built in the United States. The conferees understand that some foreign helicopter manufacturers own U.S. manufacturing facilities capable of building helicopters and some helicopter components, but that some components of those helicopters are only manufactured outside the United States.

Section 410. Newton Creek, New York City, New York

Section 412 of the House bill requires the Coast Guard to carry out a study and report to Congress on the pollution of Newtown Creek in the city of New York, New York caused by oil seepage.

The Senate amendment does not contain a comparable provision.

The Conference substitute adopts the House provision with a modification to require the Environmental Protection Agency to carry out the study rather than the Coast Guard.

Section 411. Report on technology

Section 414 of the House bill requires the Commandant of the Coast Guard to submit a report that includes an assessment of the availability and effectiveness of technologies that evaluate and identify inbound vessels and their cargo for potential threats before they reach United States ports, including technologies already tested or in testing at joint operating centers, as well as the costs associated with implementing such technology at all United States ports.

The Senate amendment does not include a comparable provision.

The Conference substitute adopts a provision that is substantively similar to the House-passed provision.

Section 412. Assessment and planning

Section 417 of the House bill authorizes an amount of \$400,000 to be appropriated to the Coast Guard to carry out an assessment of and planning for the impact of an Arctic Sea Route on the indigenous people of Alaska.

The Senate amendment does not contain a comparable provision.

The Conference substitute adopts the House provision with an amendment to authorize the funding to the Maritime Administration to carry out the assessment and planning rather than the Coast Guard.

Section 413. Homeport

Section 418 of the House bill requires, subject to the availability of appropriations, the

Commandant of the Coast Guard to homeport the Coast Guard cutter HEALY in Anchorage, Alaska.

The Senate amendment does not contain a comparable provision.

The Conference substitute adopts a provision that requires the Coast Guard to conduct a study to assess the current homeport for the Coast Guard polar icebreaker HEALY and to assess whether that site or alternative homeporting arrangements would enhance the Coast Guard's capabilities to meet the recommendations of the Interim Report of the National Academy of Sciences (Polar Icebreaker Roles and U.S. Future Needs: A Preliminary Assessment), namely that the United States should maintain dedicated, year-round icebreaking capability in the Arctic. The provision further requires the Coast Guard to report the findings of the study to Congress not later than one year after the enactment of this Act.

Section 414. Opinions regarding whether certain facilities create obstructions to navigation

Section 419 of the House bill requires the Coast Guard to provide an opinion in writing that states whether a proposed wind energy facility would create an obstruction to navigation in any case in which a person requests the Secretary of the Army to take action to permit a wind energy facility under the authority of section 10 of the Act of March 3, 1899 (33 U.S.C. 403).

The Senate bill does not contain a comparable provision.

The Conference substitute adopts a provision that prohibits the construction of an offshore wind energy facility in Nantucket Sound unless approved by the Commandant of the Coast Guard.

Section 415. Port Richmond

Section 424 of the House bill would prohibit the Commandant of the Coast Guard from approving a security plan under section 70103(c) of title 46, United States Code, for a liquefied natural gas import facility at Port Richmond in Philadelphia, Pennsylvania until the Secretary conducts a vulnerability assessment under section 70102(b) of such title.

The Senate bill does not contain a comparable provision.

The Conference substitute adopts the House provision.

Section 416. Eligibility to participate in Western Alaska Community Development Quota Program

Section 426 of the House bill clarifies that the approval by the Secretary of Commerce of a community development plan for a Western Alaska Community Development Group does not constitute a major Federal action under Federal law.

The Senate bill does not contain a comparable provision.

The Conference substitute establishes the Western Alaska Community Development Quota program and lists the purposes of the program. It is the intent of Congress that all activities of the CDQ groups continue to be considered tax-exempt (as has been the practice since the program's inception in 1992) so that the six CDQ groups can more readily address the pressing economic needs of the region.

The Conference substitute requires that the CDQ program continue to receive the same annual percentage allocations of each fishery as it does now under existing Federal statute and regulation. It also requires that the percentage of a particular fishery allocated to the CDQ program shall be a directed fishing allowance if treated as such under existing practice and law (such as in the Bering Sea and Aleutian Islands pollock fishery), or in the alternative to include both directed

fishing and non-target fishing allocation needs in fisheries where that is the current practice and law for the CDQ allocation. It is not the intent of the conferees to either change the current allocations to the CDQ program or create "squid box" problems where minor species such as squid inhibit any directed fishing under the CDQ program.

The Conference substitute provides that the allocation to the CDQ program of certain Bering Sea and Aleutian Islands groundfish species (including Pacific cod, mackerel, and flatfish species) be permanently increased to 10 percent (up from 7.5 percent) and treated as directed fishing allocations as soon as any quota-type programs are established in any sector of the applicable fishery or sector allocations are adopted in the fishery.

The Conference substitute requires that a directed fishing allocation of 10 percent be made to the CDQ program in any new fishery that is opened in the Bering Sea and Aleutian Islands.

The Conference substitute codifies existing practice with respect to processing and any other rights related to CDQ allocations. It specifies that the allocations to the CDQ program itself, as well as the allocations to each of the CDQ groups include the harvesting rights, the rights to process the fish, and any other rights or privileges related to the fish that are associated with the allocations as of March 1, 2006. This is not intended to give the CDQ program or the CDQ groups processing privileges that they do not already have. The language is also not intended to change the inshore/offshore split contained in the American Fisheries Act.

The Conference substitute requires that the harvest of the CDQ allocations be regulated in a manner no more restrictive or costly than for other participants in the applicable sector of the fishery. This section only applies to fisheries with individual quotas or fishing cooperatives.

The Conference substitute allocates to each CDQ group the same percentage of each species that it was authorized to harvest annually by the Secretary as of March 1, 2006. It codifies the existing allocations among the groups dating back to 2003 as well as allocations for new crab CDQ allocations which were approved by the National Marine Fisheries Service in 2005. This includes all species for which the CDQ groups receive an allocation. Additionally, the provision establishes a new system to reallocate up to 10 percent of a CDQ group's allocation if the group fails to meet goals and criteria weighted by the group itself and based on the needs of its region.

By eliminating short term changes in fishery allocations, the conferees intend for the CDQ groups to be able to more readily address the economic needs of western Alaska.

The Conference substitute clarifies existing law by naming the 65 communities and six entities eligible to participate in the CDQ program.

The Conference substitute establishes the requirements that each of the six CDQ groups must fulfill to maintain eligibility in the CDQ program. Each group must be governed by a board of directors, at least 75 percent of the members of which are resident fishermen from the CDQ group's member villages, and have at least one director from each of its member villages. Each CDQ group must select a representative to serve on the CDQ panel.

The Conference substitute allows each CDQ group to make up to 20 percent of its annual investments: (I) on non-fishery projects in its member villages; (II) on pooled or joint investments with other CDQ groups in their regions; or (III) for the purpose of matching Federal or State grants for projects or programs in its member villages. Any remaining

investments must be in fishery related projects or for purposes consistent with the current practices of the CDQ groups. It also requires each CDQ group to submit an annual written statement to the Secretary of Commerce and the State of Alaska which summarizes its investments for the previous year.

The Conference substitute requires CDQ groups to comply with any excessive share limitations in the BSAI fisheries only to the extent of their proportional ownership in any other entities. This provision is intended to address the inherent conflict between excessive share limitations in the fisheries and the CDQ program goal to expand the economic base of the adjacent communities through investment in the fisheries.

The excessive share limitations imposed by the North Pacific Council, Secretary, and Congress are mainly intended to prevent for-profit entities and individuals from acquiring excessive shares of fishing privileges in the fisheries. The excessive share concept stems from National Standard Four of the Magnuson-Stevens Act. It pre-dates the CDQ program and fails to take into account the unique characteristics of the CDQ program.

The Conference substitute would therefore exempt CDQ groups from the "attribution" requirements of the American Fisheries Act, the crab quota program, and other federal regulations. Under the "attribution" rules, an entity is attributed with the entirety of another entity's harvesting or processing capacity even if the original entity only owns as little as 10 percent of the other entity. Under the substitute, if a CDQ group owns 25 percent of another entity, only 25 percent of the other entity's harvesting or processing capacity would be counted against the CDQ group in determining compliance with any excessive share limitation. Similarly, if a CDQ group owns 77 percent of another entity, only 77 percent of the other entity's capacity would be counted against the CDQ group. The provision is intended to allow the CDQ groups to continue to expand in the BSAI fisheries off their shores, while not completely exempting CDQ groups from excessive share limitations.

The Conference substitute requires each CDQ group to comply with State of Alaska law for the purpose of ensuring that the group provides an annual report to its member villages describing its financial operations, including its general and administrative costs and compensation levels. This provision ensures that the State of Alaska's role is to ensure adequate "transparency" to the member villages, particularly with respect to administrative costs.

The Conference substitute requires CDQ groups to additionally comply with State of Alaska banking and securities law to prevent fraud. This requirement removes the State of Alaska from the investment planning and decisions of the CDQ groups, but creates anew, narrower role, to assist the member villages in ensuring against any fraud by the CDQ group. The provision also Clause (iii) requires that the CDQ group and State of Alaska keep confidential from public disclosure any information the disclosure of which would be harmful to the entity or its investments.

The Conference substitute exempts CDQ groups from compliance with any State approval of financial transactions, community development plans, and community development plan amendments, however the provision requires CDQ groups to comply with the decennial review conducted by the State of Alaska.

The Conference substitute establishes a community development quota program panel. The CDQ Panel will consist of a member from each of the six CDQ groups.

The CDQ Panel removes the need for governmental oversight of the CDQ program and encourages the CDQ groups to work together. Decisions by the CDQ Panel require the unanimous vote of all six Panel members. The Panel may not act if there is a vacancy.

The Conference substitute requires a decennial review of the CDQ program by the State of Alaska. The first review will be in 2012. The CDQ Panel establishes a system to be used by the State of Alaska for purposes of the decennial review that allows each CDQ group to assign relative values to certain criteria in order to match the relative weights of the criteria to the specific needs identified by the CDQ group for its villages. The criteria are: (I) changes in the population, poverty level, and economic development in the CDQ group's member villages; (II) the overall financial performance of the CDQ group, including its fishery and non-fishery investments; (III) the employment, scholarships, and training supported by the CDQ group; (IV) the achievement of the goals of the entities Community Development Plan. Each CDQ group would weight these criteria to reflect the needs of its member villages.

The Conference substitute requires the State of Alaska to use the criteria as weighted by each CDQ group to determine the performance of each CDQ group under the decennial review. The State of Alaska is required to make each performance determination on the record and after an opportunity for a hearing. If the State applies the CDQ group's weightings and determines that a CDQ group has maintained or improved its overall performance, the allocations to the CDQ group are automatically extended for the next 10-year period. If, on the other hand, the State determines that a CDQ group has failed to maintain or improve its performance as measured under the weighted criteria, then at least 90 percent of the CDQ group's allocation of each species under is automatically extended, and the State may determine an appropriate reduction of up to 10 percent of each species for all or part of the next 10-year period. If State law prevents the State from making this determination then the Secretary may make the appropriate reduction. Any reductions imposed by the State of Alaska or the Secretary under shall be reallocated for the period of the reduction to the other non-penalized groups in proportion to each non-penalized group's allocation of the applicable species.

The Conference substitute eliminates the requirement that CDQ groups seek either the review or approval by the Secretary of community development plans or amendments to community development plans. The Conference agreement does not require the State of Alaska to approve community development plans and amendments.

Nothing in the Conference substitute should be construed or implemented in a way that causes any interruption to the CDQ program or to the opportunity of CDQ groups to harvest their allocations.

Subsection (b) would amend existing CDQ loan authority to set the upper limit for the total of the CDQ loans provided by the recent bill language, and paragraph (2) would clarify that CDQ loans under the 1998 CDQ program may be used for the purchase of vessels, processors, permits, quota, and cooperative rights.

Section 417. Quota share allocation

Section 427 of the House bill provides that a portion of the total crab processing quota shares equal to 1.5 percent of the total allowable catch for the Bristol Bay red king crab fishery and the Bering Sea C. Opilio crab fishery be made available to the vessel Blue Dutch, LLC in years when the total allow-

able catch for that fishery is more than 2 percent higher than the total allowable catch for that fishery during calendar year 2005.

The provision further provides that the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands implementing regulations shall thereafter be adjusted so that the total of all crab processing quota shares for each fishery referred to equals 90 percent of the total allowable catch.

The Senate bill does not contain a comparable provision.

The Conference substitute adopts a provision that directs the Secretary of Commerce to modify the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands to provide 0.75 percent of the processor quota share units for the Bristol Bay red king crab fishery and the Bering Sea C. Opilio crab fishery to the vessel Blue Dutch, LLC in years when the total allowable catch for that fishery is more than 2 percent higher than the most recent total allowable catch for that fishery prior to September 15, 2005.

Section 418. Maine fish tender vessels

The House bill does not contain a comparable provision.

Section 211 of the Senate amendment would establish a waiver that would allow vessels not built in the United States to transport fish and shellfish within the coastal waters of the State of Maine if that vessel is ineligible for documentation under chapter 121 of title 46, United States Code because it measures less than 5 net tons and has transported fish or shellfish within the coastal waters of the State of Maine prior to December 31, 2004.

The Conference substitute adopts a provision that authorizes foreign-built vessels that are less than 5 net tons to transport fish or shellfish between places in the State of Maine if that vessel transported fish or shellfish between places in Maine prior to January 1, 2005; the owner of such vessel owns a valid wholesale seafood license to conduct such transportation that was issued under the Revised Maine Statutes prior to January 1, 2005; the vessel is owned by a person or persons that meet U.S. citizenship requirements under section 2 of the Shipping Act, 1996; and the owner of the vessel submits within 180 days of enactment of this Act an affidavit to the Secretary in which the Coast Guard is operating that certifies that the owner and vessel meet the requirements of this section.

Section 419. Automatic identification system

The House bill does not contain a comparable provision.

Section 219 of the Senate amendment authorizes the Secretary to transfer \$1,000,000 to the Department of Commerce for the purposes of awarding a competitive grant to design, develop, and prototype a device that integrates a Class B Automatic Identification System (AIS) transponder with an FCC-approved wireless maritime data device. The Senate-passed amendment also expresses the Sense of the Senate that the Federal Communications Commission should quickly resolve the disposition of its rulemaking on the AIS and licensee use of AIS frequency bands.

The Conference substitute adopts the Senate provision.

Section 420. Voyage data recorder study and report

Section 429 of the House bill would require the Secretary to prescribe regulations to require ferries that carry more than 399 passengers be equipped with a voyage data recorder and to establish standards, methods

CONGRESSIONAL RECORD -- *SENATE*

Monday, June 19, 2006

109th Congress, 2nd Session

152 Cong Rec S 6025

REFERENCE: Vol. 152, No. 79

SECTION: Senate

TITLE: MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT
REAUTHORIZATION ACT OF 2005

CDQ/CGMTA Excerpt Below, Beginning on p.6042

SEC. 611. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Secretary such sums as may be necessary to carry out the obligations of the United States under the Agreement and this title.

CDQ PROGRAM

Mrs. MURRAY. Mr. President, as part of the conference report on the Coast Guard and Maritime Transportation Act of 2006, which is expected to be passed by the Senate shortly, there is a provision in section 416 that amends section 305(i) of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1855(i)), which authorizes the Western Pacific Community Development Quota (CDQ) Program for fisheries of the Bering Sea and Aleutian Islands (BS/AI).

Mr. STEVENS. That is correct. Section 416 provides more specific authorities and direction concerning the operations and fishing allocations to and among CDQ groups, in accordance with the recommendations of a Blue Ribbon panel established by the Governor of Alaska.

Mrs. MURRAY. I am familiar with this program, which originated in the North Pacific Fishery Management Council in 1992, and I support its goals of providing economic opportunities for rural coastal communities in Western Alaska. It is my understanding that section 416 ensures the CDQ groups will continue to receive the same annual percentage allocations as they do now under existing Federal law, and that it would preserve existing treatment of such allocations consisting of a directed fishing allowance if that is the current law, i.e., the BS/AI pollock fishery, or including both directed and non-target fishing in fisheries where that is the current practice. Is that correct, Senator Stevens?

Mr. STEVENS. Yes, that is correct. Are you concerned about those provisions?

Mrs. MURRAY. No, my concerns relate to Section 416's amendment to [*S6042] MSA section 305(i)(1)(B), which would increase CDQ group allocations for certain BS/AI groundfish fisheries, including Pacific cod, mackerel, and flatfish species, from 7.5 percent to 10 percent, and treat this allocation as a directed fishing allowance, which does not include incidental catch. All allocations in these fisheries, including the CDQ allocations, are currently-managed as total quotas, not as directed fishing allowances, which obliges all participants to keep both the directed and incidental catch within a "hard cap." Did you intend to change the current manner in which the council sets CDQ allocations in these fisheries, from a hard cap allocation to a directed fishing allowance allocation?

Mr. STEVENS. Yes, we wanted to create the same approach for these groundfish fisheries that we created legislatively for pollock. However, these allocations would become effective only upon the establishment of a quota program, fishing cooperative, sector allocation or rationalization program in the fishery, and the intent is to ensure that management measures apply equally to both CDQ and non-CDQ groups. With respect to application of this section to the Pacific cod fishery, however, the new CDQ allocations under section 416 are not intended to take effect until full rationalization of that fishery, or January 1, 2009, whichever date is earlier.

Mrs. MURRAY. We are both justifiably proud of the success of the pollock cooperatives established under the American Fisheries Act, AFA, and particularly their low bycatch rates. However, it is my understanding from speaking with NOAA and council staff that making this directed fishing allowance in statute for the CDQ portion of these other BS/AI groundfish fisheries would deprive the council of its current authority to limit incidental catch associated with these allocations, although it would retain such authority for the non-CDQ allocations. I am concerned that this lack of authority could unintentionally promote increases in incidental catch for CDQ groups. In addition, any unconstrained growth in incidental catch under the legislatively directed fishing allowances could result in less available catch allowance for the non-CDQ groups subject to incidental catch controls, which seems contrary to your intent that each set of groups be subject to the same management controls.

While the pollock fishery has very low incidental catch rates, in 2005 its incidental catch was only 0.16 percent above the directed fishery allowance, the directed fisheries of the BS/AI, other than halibut, sablefish, pollock, and crab, have a relatively higher level of bycatch. The council has taken actions to limit and reduce the amount of incidental catch allowance to all directed fishery participants in order to reduce overall bycatch levels. Prohibiting the council from establishing an incidental catch allowance is antithetical to current public policy and resource management in the BS/AI. Moreover, it is not consistent with provisions included in the Senate's version of the Magnuson-Stevens Act reauthorization, S. 2012. I suggest Section 416 (MSA section 305(i)(1)(B), as amended) be modified to include this explicit authority.

Do you agree with me that the council should retain its ability to set incidental catch allowances for the CDQ groups in the fisheries affected by section 416's amendment to MSA section 305(i)(1)(B)?

Mr. STEVENS. Yes, I agree. We did not intend to eliminate any management authorities regarding incidental catch that are currently available to the Council.

Mrs. MURRAY. In view of our agreement on these points, do you agree to authorize the council and the Secretary to establish incidental catch limits for these fisheries without prohibiting the council from providing the CDQ program with an incidental catch allowance.

Mr. STEVENS. Yes, I would agree to that clarification to subparagraph (B). However, that change must also guarantee that any management measures will apply equally to both CDQ and non-CDQ portions of the fisheries affected by subparagraph (B). Do you agree?

Mrs. MURRAY. Yes, I do agree that we must ensure fair treatment of both groups in these fisheries, and would support including such language in these changes. Do I have your commitment that you will include these changes to Section 416 in the Coast Guard Conference Report before final passage in the Senate, or, if not procedurally possible, in another bill that will be enacted this year, including the final version of the Magnuson-Stevens Act reauthorization?

Mr. STEVENS. Yes. Do you give your consent for final passage of S. 2012 today?

Mrs. MURRAY. I fully support passage of S. 2012, your and Senator Inouye's bill to reauthorize the Magnuson-Stevens Act, particularly in view of your commitment to make these changes to section 416 of the Coast Guard Conference Report. Senator Inouye, are you in agreement with Senator Stevens and me on these points?

Mr. INOUE. Yes, I would be pleased to work with you and Chairman Stevens on ensuring that the items you have agreed upon are enacted.

Special Accommodations

As listed below, NMFS will hold five public meetings to obtain recommendations from swordfish fishery participants and other members of the public regarding potential swordfish fishery management measures. These meetings will be physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Sari Kiraly at (301) 713-2347, at least 7 days prior to the meeting.

Public Meeting Dates, Times, and Locations

1. September 14, 2006, from 6–8 p.m. at the Vietnamese Community Center of Houma, 1268 Highway 182 West, Houma, LA 70364.
2. September 18, 2006, from 7–9 p.m. at the Manahawkin Holiday Inn, 151 Route 72 East, Manahawkin, NJ 08050.
3. September 19, 2006, from 7–9 p.m. at the Peabody Holiday Inn, 1 Newberry Street, Peabody, MA 01960.
4. September 20, 2006, from 7–9 p.m. at the North Carolina Aquarium on Roanoke Island, 374 Airport Road, Manteo, NC 27954.
5. September 21, 2006, from 6–8 p.m. at the NMFS Panama City Laboratory, 3500 Delwood Beach Road, Panama City, FL 32408.

Dated: August 25, 2006.

James P. Burgess,

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

[FR Doc. 06–7325 Filed 8–30–06; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 082106C]

Fisheries of the Exclusive Economic Zone Off Alaska; Western Alaska Community Development Quota Program

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

ACTION: Notice.

SUMMARY: NMFS issues this notice to inform the public about the Community Development Quota (CDQ) percentage allocations among the six CDQ managing entities (CDQ groups) that are in effect as a result of recent amendments to the Magnuson-Stevens Fishery Conservation and Management

Act (Magnuson-Stevens Act). On July 11, 2006, the Coast Guard and Maritime Transportation Act of 2006 amended the Magnuson-Stevens Act to establish percentage allocations for groundfish, crab, and halibut allocated among the CDQ groups at those percentage allocations in effect on March 1, 2006. In addition, this notice provides information about the percentage allocations for prohibited species quota (PSQ) allocated among the CDQ groups that were not affected by the Magnuson-Stevens Act amendments, but continue in effect under an administrative determination issued by NMFS on August 8, 2005.

ADDRESSES: Copies of section 416 of the Coast Guard and Maritime Transportation Act of 2006 and the August 8, 2005, initial administrative determination (IAD) extending the 2003–2005 groundfish, halibut, crab, and prohibited species CDQ percentage allocations may be obtained by mail from NMFS Alaska Region, Attn: in-person at Ellen Walsh, Records Officer, P.O. Box 21668, Juneau, AK 99802; NMFS Alaska Region, 709 W. 9th Street, Room 420A, Juneau, AK; or at the NMFS Alaska Region web site at <http://www.fakr.noaa.gov/cdq>.

FOR FURTHER INFORMATION CONTACT: Obren Davis, 907–586–7241 or obren.davis@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The Coast Guard and Maritime Transportation Act of 2006 (Public Law 109–241) was signed by the President on July 11, 2006. Section 416 of this legislation amended section 305(i)(1) of the Magnuson-Stevens Act. The Magnuson-Stevens Act is the primary statute governing management of the nation's marine fisheries within the U.S. exclusive economic zone. Section 305(i)(1) establishes the Western Alaska CDQ Program, which provides western Alaska communities with allocations of Bering Sea and Aleutian Islands (BSAI) groundfish, halibut, crab, and prohibited species. These allocations provide such communities with the opportunity to participate and invest in BSAI fisheries in support of economic development activities. Revised section 305(i)(1) of the Magnuson-Stevens Act contains a broad range of changes to various aspects of the CDQ Program. These include elements associated with CDQ Program administration and oversight, percentage allocations of annual CDQ Program catch limits, permanent eligibility status for current CDQ communities, and CDQ fisheries management measures. Subparagraph

(C) of section 305(i)(1), "Allocations to Entities" directs that:

Each entity eligible to participate in the program shall be authorized under the program to harvest annually the same percentage of each species allocated to the program under subparagraph (B) that it was authorized by the Secretary to harvest of such species annually as of March 1, 2006, except to the extent that its allocation is adjusted under subparagraph (H).

Subparagraph (H) addresses the decennial review and adjustment of entity allocations beginning in 2012. This notice does not address the process that will be used to make such adjustments; that process will be addressed in future rulemaking. Once such a decennial review is completed, the percentage allocations contained in this notice may be revised through the adjustment process described in subparagraph (H).

Purpose

Annual CDQ Program allocations for approximately 36 quota categories of BSAI groundfish, halibut, crab, and prohibited species are distributed among CDQ groups based on CDQ and PSQ percentage allocations. Historically, percentage allocations have been established through periodic CDQ application processes. Section 305(i)(1)(c) establishes the CDQ percentage allocations for BSAI groundfish, halibut, and crab at the same levels that were in effect on March 1, 2006. The CDQ and PSQ percentage allocations for all quota categories (except two) that were in effect on that date were originally approved by NMFS on January 17, 2003, as part of the 2003–2005 CDQ allocation process. The expiration date for those CDQ and PSQ percentage allocations was December 31, 2005.

On August 8, 2005, NMFS issued an IAD that removed the December 31, 2005, expiration date from these CDQ and PSQ percentage allocations. This administrative determination, which was effective on September 7, 2005, established the CDQ percentage allocations that were in effect on March 1, 2006, for all BSAI groundfish, halibut, and prohibited species, as well as for all crab species except Eastern Aleutian Islands (EAI) golden king crab and Adak red king crab. This IAD is available from NMFS (see ADDRESSES).

EAI golden king crab and Adak red king crab were allocated to the CDQ Program on April 1, 2005, as part of the crab rationalization program (70 FR 10174; March 2, 2005). These two crab species had not previously been allocated to the CDQ Program, so they were not included in the CDQ

percentage allocations that were originally approved by NMFS on January 17, 2003. On October 12, 2005, NMFS issued a final agency decision that established CDQ percentage allocations for these two crab species through June 30, 2006. These were the CDQ percentage allocations in effect for EAI golden king crab and Adak red king crab on March 1, 2006.

The prohibited species allocated to the CDQ Program are not allocations for directed fisheries under sections 305(i)(1)(B) and (C) of the Magnuson-Stevens Act. Therefore, they are not included among the species allocated to the program under section 305(i)(1)(B). Existing PSQ percentage allocations will remain in effect under the administrative determination issued on

August 8, 2005, unless revised through some future final agency action.

Allocation Percentages

The tables below identify the CDQ and PSQ percentage allocations in effect for each CDQ group. Table 1 lists the CDQ percentage allocations of BSAI groundfish, crab, and halibut. Table 2 lists the PSQ percentage allocations of BSAI prohibited species.

TABLE 1—CDQ PERCENTAGE ALLOCATIONS OF BSAI GROUND FISH, CRAB, AND HALIBUT AS OF MARCH 1, 2006

Species	Area ¹	CDQ Group ²					
		APICDA	BBEDC	CBSFA	CVRF	NSEDC	YDFDA
GROUND FISH³	.....	.....	.....	.....	.....	.....	.....
Pollock	BS	14%	21%	5%	24%	22%	14%
	AI	14%	21%	5%	24%	22%	14%
	Bogoslof	14%	21%	5%	24%	22%	14%
Pacific cod	BSAI	15%	21%	9%	18%	18%	19%
Sablefish (from trawl gear allocation)	BS	21%	22%	9%	13%	13%	22%
	AI	26%	20%	8%	13%	12%	21%
Sablefish, fixed gear	BS	15%	20%	16%	0%	18%	31%
	AI	14%	19%	3%	27%	23%	14%
Atka mackerel	EAI/BS	30%	15%	8%	15%	14%	18%
	CAI	30%	15%	8%	15%	14%	18%
	WAI	30%	15%	8%	15%	14%	18%
Yellowfin sole	BSAI	28%	24%	8%	6%	7%	27%
Rock sole	BSAI	24%	23%	8%	11%	11%	23%
Greenland turbot	BS	16%	20%	8%	17%	19%	20%
	AI	17%	19%	7%	18%	20%	19%
Arrowtooth flounder	BSAI	22%	22%	9%	13%	12%	22%
Flathead sole	BSAI	20%	21%	9%	15%	15%	20%
Other flatfish	BSAI	26%	24%	8%	8%	8%	26%
Alaska plaice	BSAI	14%	21%	5%	24%	22%	14%
Pacific ocean perch	BS	17%	21%	6%	21%	19%	16%
	EAI	30%	15%	8%	15%	14%	18%
	CAI	30%	15%	8%	15%	14%	18%
	WAI	30%	15%	8%	15%	14%	18%
	BS	21%	19%	7%	17%	17%	19%
Other rockfish	AI	21%	18%	8%	17%	17%	19%

CRAB	.....	.....	.....	.....	.....	.....
Red king	Adak	8%	18%	21%	18%	21%	14%
Red king	Bristol Bay	17%	19%	10%	18%	18%	18%
<i>C. bairdi</i> (Tanner) crab	BS	10%	19%	19%	17%	18%	17%
<i>C. opilio</i> crab	BS	8%	20%	20%	17%	18%	17%
Golden king	EAI	8%	18%	21%	18%	21%	14%
Red king	Norton Sound	0%	0%	0%	0%	50%	50%
Red and blue king	Pribilof Is.	0%	0%	100%	0%	0%	0%
Blue king	St. Matthew	50%	12%	0%	12%	14%	12%
PACIFIC HALIBUT	.....	.....	.....	.....	.....	.....	.....
	4B	100%	0%	0%	0%	0%	0%
	4C	15%	0%	85%	0%	0%	0%
	4D	0%	26%	0%	24%	30%	20%
	4E	0%	30%	0%	70%	0%	0%

¹Management area abbreviations: AI = Aleutian Islands, BS = Bering Sea, CAI = Central AI, EAI = Eastern AI, and WAI = Western AI.

²CDQ groups: APICDA = Aleutian Pribilof Island Community Development Corporation, BBEDC = Bristol Bay Economic Development Corporation, CBSFA = Central Bering Sea Fishermen's Association, CVRF = Coastal Villages Region Fund, NSEDC = Norton Sound Economic Development Corporation, and YDFDA = Yukon Delta Fisheries Development Association.

³Certain BSAI groundfish species allocated to the CDQ Program are not allocated among CDQ groups. Program allocations for northern rockfish, shortraker rockfish, and rougheye rockfish were not allocated among the CDQ groups on March 1, 2006, per NMFS's January 17, 2003, administrative determination that approved 2003-2005 CDQ allocation percentages. No percentage allocations were in effect on March 1, 2006, for the "other species" category, which is no longer allocated among CDQ groups per the recommendation of the North Pacific Fishery Management Council (68 FR 69974, December 16, 2003). NMFS now manages these species at the CDQ program level. Finally, squid was removed from the CDQ Program in 2001 (66 FR 13762, March 7, 2001).

TABLE 2—PSQ PERCENTAGE ALLOCATIONS OF BSAI PROHIBITED SPECIES

Species	Area	CDQ Group					
		APICDA	BBEDC	CBSFA	CVRF	NSEDC	YDFDA
<i>C. opilio</i> crab	BS	25%	24%	8%	10%	8%	25%
Pacific halibut	BSAI	22%	22%	9%	12%	12%	23%
Chinook salmon	BSAI	14%	21%	5%	24%	22%	14%
Non-Chinook salmon	BSAI	14%	21%	5%	24%	22%	14%
Red king crab	Zone 1	24%	21%	8%	12%	12%	23%
<i>C. bairdi</i> (Tanner) crab	Zone 1	26%	24%	8%	8%	8%	26%
<i>C. bairdi</i> (Tanner) crab	Zone 2	24%	23%	8%	11%	10%	24%

CDQ groups: APICDA = Aleutian Pribilof Island Community Development Corporation, BBEDC = Bristol Bay Economic Development Corporation, CBSFA = Central Bering Sea Fishermen's Association, CVRF = Coastal Villages Region Fund, NSEDC = Norton Sound Economic Development Corporation, and YDFDA = Yukon Delta Fisheries Development Association.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: August 25, 2006.

James P. Burgess,

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

[FR Doc. 06-7326 Filed 8-30-06; 8:45 am]

BILLING CODE 3510-22-S

THE COMMISSION OF FINE ARTS

Sunshine Act; Notice of Meeting

The next meeting of the Commission of Fine Arts is scheduled for September 21, 2006, at 10 a.m. in the Commission's offices at the National Building Museum, Suite 312, Judiciary Square, 401 F Street, NW., Washington, DC 20001-2728. Items of discussion affecting the appearance of Washington, DC, may include buildings, parks and memorials.

Draft agendas and additional information regarding the Commission are available on our Web site: <http://www.cfa.gov>. Inquiries regarding the agenda and requests to submit written or oral statements should be addressed to Thomas Luebke, Secretary, Commission of Fine Arts, at the above address or call 202-504-2200. Individuals requiring sign language interpretation for the hearing impaired should contact the Secretary at least 10 days before the meeting date.

Dated in Washington, DC, August 28, 2006.

Thomas Luebke,
Secretary.

[FR Doc. 06-7382 Filed 8-29-06; 11:36 am]

BILLING CODE 6330-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the Defense Policy Board Advisory Committee

AGENCY: Department of Defense, Defense Policy Board Advisory Committee.

ACTION: Notice.

SUMMARY: The Defense Policy Board Advisory Committee will meet in closed session on September 21, 2006 from 0800 hrs until 1830 at the State Department, Washington, DC and September 22, 2006 from 0800 hrs until 1400 at the Pentagon.

The purpose of the meeting is to provide the Secretary of Defense, Deputy Secretary of Defense and Under Secretary of Defense for Policy with independent, informed advice on major matters of defense policy. The Board will hold classified discussions on national security matters.

In accordance with Section 10(d) of the Federal Advisory Committee Act, Public Law No. 92-463, as amended [5 U.S.C. App II (1982)], it has been determined that this meeting concerns matters listed in 5 U.S.C. § 552B(c)(1)(1982), and that accordingly this meeting will be closed to the public.

Dated: August 25, 2006.

L.M. Bynum,

*OSD Federal Register Liaison Officer,
Department of Defense.*

[FR Doc. 06-7294 Filed 8-30-06; 8:45 am]

BILLING CODE 5000-06-M

DEPARTMENT OF DEFENSE

Department of the Air Force

Notice of Intent to Grant an Exclusive Patent License

AGENCY: Department of the Air Force, DoD.

ACTION: Notice of intent.

SUMMARY: Pursuant to the provisions of Part 404 of Title 37, Code of Federal Regulations, which implements Public Law 96-517, as amended, the Department of the Air Force announces its intention to grant Hybrid Plastics Inc., a Mississippi corporation, having a place of business at 55 W.L. Runnels

Ind. Road, Hattiesburg, MS 39401; two exclusive licenses in any right, title and interest the Air Force has in the following three U.S. Patents:

License 1: U.S. Patent 6,362,279, issued 26 March 2002, entitled "Pre-ceramic Additives as Fire Retardants for Plastics", Joseph D. Lichtenhan and Jeffrey W. Gilman—Inventors.

License 2: U.S. Patent 6,660,823, issued 9 December 2003, entitled "Modifying POSS Compounds", Joseph D. Lichtenhan, Frank J. Feder and Daravong Soulivong—Inventors.

U.S. Patent 6,770,724, issued 3 August 2004, entitled "Altering of POSS Rings", Joseph D. Lichtenhan, Timothy S. Haddad, Frank J. Feher and Daravong Soulivong—Inventors.

DATES: Any objection to the grant of either of the above licenses must be submitted in writing and received within fifteen (15) days from the date of publication of this Notice in the *Federal Register* in order to be considered.

FOR FURTHER INFORMATION CONTACT: Written objection should be sent to: Air Force Materiel Command Law Office, AFMCLO/JAZ, 2240 B Street, Room 100, Wright-Patterson AFB OH 45433-7109. Telephone: (937) 255-2838; facsimile (937) 255-3733.

Bao-Anh Trinh,

Air Force Federal Register Liaison Officer.

[FR Doc. 06-7277 Filed 8-30-06; 8:45 am]

BILLING CODE 5001-06-P

DEPARTMENT OF DEFENSE

Department of the Navy

Meeting of the Board of Visitors of Marine Corps University

AGENCY: Department of the Navy, DoD.

ACTION: Notice of open meeting.

SUMMARY: The Executive Committee of the Board of Visitors of the Marine Corps University (BOV MCU) will meet



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

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

Item C-2(c)

July 28, 2006

William C. Noll, Commissioner
Department of Commerce, Community,
and Economic Development
P.O. Box 110807
Juneau, Alaska 99811-0807

Dear Commissioner Noll:

On July 11, 2006, the President signed HR 889, the Coast Guard and Maritime Transportation Act of 2006 (Public Law 109-241). Section 416 of this legislation amended section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which governs the Western Alaska Community Development Quota (CDQ) Program. Enclosed are (1) excerpts from the April 6, 2006, conference committee report on HR 889, and (2) excerpts from Public Law (Pub. L.) 109-241.

Section 305(i)(1)(H) of the MSA, as revised by Pub. L. 109-241, now requires a decennial review of the CDQ groups and CDQ Program and provides for an adjustment of allocations of groundfish, halibut, or crab quota among the CDQ groups under certain circumstances. Section 305(i)(1)(H)(i) requires that the State of Alaska evaluate the performance of each CDQ group, during 2012 and every 10 years thereafter. Section 305(i)(1)(H)(iii) requires:

(iii) **ADJUSTMENT OF ALLOCATIONS.**—After the evaluation required by clause (i), the State of Alaska shall make a determination, on the record and after an opportunity for a hearing, with respect to the performance of each entity participating in the program for the criteria described in clause (ii). If the State determines that the entity has maintained or improved its overall performance with respect to the criteria, the allocation to such entity under the program shall be extended by the State for the next 10-year period. If the State determines that the entity has not maintained or improved its overall performance with respect to the criteria—

(I) at least 90 percent of the entity's allocation for each species under subparagraph (C) shall be extended by the State for the next 10-year period; and

(II) the State may determine, or the Secretary may determine (if State law prevents the State from making the determination), and implement an appropriate reduction of up to 10 percent of the entity's allocation for each species under subparagraph (C) for all or part of such 10-year period.

The MSA requires that the State of Alaska conduct the decennial review and any reallocations that result from the review under State law. No role is required for the Secretary of Commerce in



this review or allocation adjustment process unless State law prevents the State from undertaking this responsibility.

The National Marine Fisheries Service (NMFS) and the North Pacific Fishery Management Council must assess the need for amendments to fishery management plans and Federal regulations governing the CDQ Program as a result of Pub. L. 109-241. In order to begin the assessment of implementation of section 305(i)(1)(H), we require a determination by the State of Alaska as to whether it has the legal authority to adjust allocations of groundfish, crab, or halibut quota among the CDQ groups consistent with the requirements of the MSA. Therefore, we request that the State of Alaska provide us a written determination about its legal authority under Section 305(i)(1)(H) as soon as possible.

Please contact Sally Bibb, NMFS Alaska Region, Sustainable Fisheries Division at (907) 586-7389 or Lauren Smoker, NOAA General Counsel, Alaska Region at (907)-586-7414, ext. 233 if you have any questions about the MSA amendments made through Pub. L. 109-241 or this request.

Sincerely,



Robert D. Mecum
Acting Administrator, Alaska Region

Enclosure

cc: CDQ Groups
Greg Cashen
NPFMC



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

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

Item C-2(d)

August 22, 2006

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

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

Phillip Lestenkof
Central Bering Sea Fishermen's Association
P.O. Box 288
St. Paul, Alaska 99660

Morgan Crow
Coastal Villages Region Fund
711 H Street, Suite 200
Anchorage, Alaska 99501-3461

Eugene Asicksik
Norton Sound Economic
Development Corporation
420 L Street, Suite 310
Anchorage, Alaska 99501-1971

Ragnar Alstrom
Yukon Delta Fisheries
Development Association
301 Calista Court, Suite C
Anchorage, Alaska 99518-3028

Re: Applicability of the Federal Advisory Committee Act to the Western Alaska
Community Development Quota Administrative Panel

Dear CDQ Group Executive Directors:

This letter responds to your request for a determination about whether the Federal Advisory Committee Act (FACA), 5 U.S.C. App. I (1982), applies to the Western Alaska Community Development Quota Administrative Panel (CDQ Panel). For the reasons stated below, we have determined that FACA does not apply to the CDQ Panel.

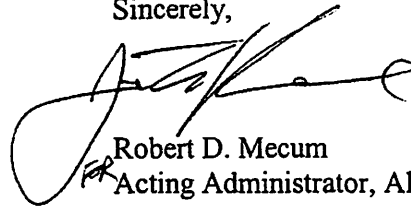
The CDQ Panel was created on July 11, 2006, when the President signed the Coast Guard and Maritime Transportation Act of 2006 (the Coast Guard bill), Pub. L. No. 109-241 (2006). Section 416(a) of the Coast Guard bill revises section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1855(i), by replacing all of the existing language in this section with new language. Section 305(i)(1)(A) establishes, and sets forth the purposes of, the Western Alaska Community Development Quota Program (CDQ Program). Section 305(i)(1)(G) establishes the CDQ Panel and defines its membership and functions. It states that the CDQ Panel shall administer certain aspects of the CDQ Program, either through contractual arrangement or recommendation, and coordinate and facilitate the activities of the program entities (306 (i)(1)(G)(iii)(I) and (II)).

Pursuant to FACA regulations at 41 C.F.R. 102-3.40(k), committees established by statute to perform primarily operational, as opposed to advisory, functions are not subject to FACA. The same regulation states that operational functions are those specifically authorized by statute or



Presidential directive, such as making or implementing Government decisions or policy. In this case, the CDQ Panel has been established by statute in order to administer activities associated with the implementation of the CDQ Program's objectives as defined by section 305(i)(1)(A) of the MSA. These objectives are (1) to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Areas, (2) to support economic development in western Alaska, (3) to alleviate poverty and provide economic and social benefits for residents of western Alaska; and (4) to achieve sustainable and diversified local economies in western Alaska. Accordingly, the CDQ Panel is not subject to FACA. Note, however, that should the CDQ Panel's activities become primarily advisory, as opposed to operational, FACA will then apply.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Mecum", written over a horizontal line.

Robert D. Mecum
Acting Administrator, Alaska Region

cc: Greg Cashen, ADCCED
NPFMC



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

Item C-2(e)

P.O. Box 21668

Juneau, Alaska 99802-1668

August 30, 2006

William C. Noll, Commissioner
Alaska Department of Commerce,
Community and Economic Development
550 W. 7th Avenue, Suite 1770
Anchorage, Alaska 99501-3510

Dear Commissioner Noll:

This letter responds to your August 3, 2006, letters about two proposed substantial amendments to Norton Sound Economic Development Corporation's (NSEDC's) Community Development Plan (CDP). Specifically, you recommended that we approve NSEDC's proposed substantial amendment 06-07NS to hire and support an Alaska Sea Grant Marine Advisory Program agent in Nome, and proposed substantial amendment 06-08NS to invest in a Consolidated Bulk Fuel Program. In addition, in each letter, you stated that it was unclear whether approval of substantial amendments is still required after recent amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and you asked the National Marine Fisheries Service (NMFS) to make a determination about that question.

On July 11, 2006, the President signed the Coast Guard and Maritime Transportation Act of 2006 (the Coast Guard Act). Section 416(a) of the Coast Guard Act revises section 305(i)(1) of the MSA by replacing all of the existing language in this section with new language. These MSA amendments address allocations of groundfish, halibut, and crab to the CDQ Program; allocations of quota among the CDQ groups; management of the CDQ fisheries; eligible communities; limits on allowable investments; the creation of a CDQ administrative panel; compliance with State of Alaska (State) reporting requirements; and other aspects of program administration and oversight by the State and NMFS, on behalf of the Secretary of Commerce. Most of these MSA amendments will require revisions to Federal regulations that will be implemented through proposed and final rulemaking. Amendments also will need to be made by the North Pacific Fishery Management Council (Council) to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs. A more thorough report about implementation of these MSA amendments will be provided to the Council at its October 2006 meeting.

In the meantime, however, questions such as yours about the continued applicability of CDQ Program regulations have arisen. How must we manage and administer the CDQ Program in situations where certain regulations at 50 CFR part 679 are now in conflict with the MSA? For reasons described in more detail in the attachment to this letter, I have determined that regulations in §679.30 related to submission, review, and approval or disapproval by NMFS of



Community Development Plans (CDPs), amendments to CDPs, the annual budget report, and the annual budget reconciliation report are inconsistent with section 305(i)(1)(I) of the MSA. We intend to revise these regulations through rulemaking. However, these revisions will be complicated because they are related to determining the role of the CDP in future adjustments to allocations among the CDQ groups under section 305(i)(1)(H) and to determining what, if any, regulations will be needed to implement requirements related to limits on investments by the CDQ groups in section 305(i)(1)(E)(iii) through (v). It may take a year or more to prepare the analysis necessary to support this rulemaking, to consult with the Council on proposed regulatory and fishery management plan amendments, to consider any recommendations submitted by the CDQ administrative panel, to publish a proposed rule, to respond to public comments on the proposed rule, and to implement a final rule revising 50 CFR part 679.

Until current regulations can be revised to be consistent with the MSA, NMFS is suspending enforcement of the following regulations because they are not consistent with the new section 305(i)(1)(I) of the MSA: (1) regulations at §679.30(a) and §679.30(d) that require submission, review, and approval of proposed CDPs; (2) regulations at §679.30(g)(2) that require submission and approval of the annual budget report; (3) regulations at §679.30(g)(3) that require submission of the annual budget reconciliation report; and (4) regulations at §679.30(g)(4) and (5) that require submission, review, and approval of substantial and technical amendments. The result of this action is that enforcement of all of the regulations at 50 CFR part 679 that formerly provided Federal government oversight of how the CDQ groups used the CDQ allocations to provide benefits to the eligible communities have been suspended. New regulations defining the role of the Federal government in oversight of the CDQ Program, consistent with the requirements of the MSA, will have to be developed and implemented in the future.

I also have determined that, as of July 11, 2006, the CDQ groups are not required to submit requests for approval of substantial amendments. If a CDQ group submits proposed substantial amendments, as NSEDC has done in the case of amendments 06-07NS and 06-08NS, it would be inconsistent with the MSA for NMFS to approve or disapprove these proposed amendments. Therefore, we cannot act on the State's recommendation to review and approve these two proposed substantial amendments and we cannot make any revisions to our copy of NSEDC's CDP to reflect the changes proposed in these amendments.

Under the MSA, as amended by the Coast Guard Act, the CDQ groups must now monitor their expenditures and comply with section 305(i)(1)(E)(iii) through (v) of the MSA related to allowable investments. NMFS does not yet have regulations interpreting or governing this new section of the MSA. Therefore, we could not review the proposed expenditures described in amendments 06-07NS and 06-08NS to assess compliance with these new requirements of the MSA.

If you have any further questions, please contact Sally Bibb at (907) 586-7389.

Sincerely,



Robert D. Mecum
Acting Administrator, Alaska Region

Attachment

cc: Jeff Passer, NMFS Enforcement
Greg Cashen, ADCED
CDQ groups
NPFMC

Attachment to August 30, 2006, Letter to William C. Noll
Re: NSEDC Substantial Amendments 06-07NS and 06-08NS

I. Current Federal Regulations Governing Community Development Plans and Amendments to Community Development Plans

Following is a description of the regulations at 50 CFR part 679 that address the Community Development Plans (CDPs) and amendments to the CDPs.

The Community Development Plan: The Community Development Plan is defined in Federal regulations at 50 CFR part 679 (§679.2), as follows:

Community Development Plan (CDP) means a business plan for the economic and social development of a specific Western Alaska community or group of communities under the CDQ program at §679.30.

Section 679.30(a) requires that qualified applicants (CDQ groups)¹ submit a proposed CDP to the State of Alaska (State) as an application for allocations of groundfish, crab, halibut, and prohibited species quota. The information that must be contained in a proposed CDP is listed in §679.30(a)(1). The required information includes a description of all CDQ projects, project schedules and milestones, and employment information; a list of the communities participating in the CDP; information about the managing organization, the board of directors, business relationships, investments, and budgets; audited annual financial statements; an organizational chart; a description of how the group intends to harvest and process its allocations; and a request for percentage allocations.

Section 679.30(d) requires the State to transmit the proposed CDP and its recommendations for approval of each of the proposed CDPs to NMFS, along with the findings and rationale supporting the State's recommended percentage allocations of quota to each of the CDQ groups. Under these regulations, and prior to the recent MSA amendments, NMFS reviewed the State's recommendations and the proposed CDPs. NMFS approved the proposed CDPs that complied with the information requirements in §679.30, approved the State's recommended allocations among the CDQ groups if the State's findings and rationale support its recommendations, and disapproved the State's recommendations if the State's findings and rationale did not support its recommendations.

Since 1992, the State has specified the years over which the CDPs and allocations among the CDQ groups will be effective. These allocation cycles have ranged from one year to three years. Section 679.30(a) states that "[A]llocations of CDQ and PSQ are harvest privileges that expire upon the expiration of the CDP. When a CDP expires, further CDQ allocations are not implied

¹ A qualified applicant is defined at §679.2 and means a local fishermen's organization or a local economic development organization that represents a community or group of communities eligible for the CDQ Program; is incorporated under the laws of the State of Alaska or under Federal law; and has a board of directors composed of at least 75 percent resident fishermen of the community (or group of communities). The six CDQ groups have been determined to be qualified applicants for purposes of the CDQ Program regulations in 50 CFR part 679.

or guaranteed, and a qualified applicant must re-apply for further allocations on a competitive basis with other qualified applicants.” Once NMFS approves a proposed CDP, §679.30(g)(4) defines the CDP as a working business plan and requires that it be kept up to date through substantial amendments, described at §679.30(g)(4), and technical amendments, described at §679.30(g)(5).

The six CDPs in effect today were originally submitted to NMFS for review by the State on October 15, 2002. On January 17, 2003, NMFS approved these CDPs and associated percentage allocations of groundfish, crab, halibut, and prohibited species, with an expiration date of December 31, 2005. On August 8, 2005, NMFS issued an initial administrative determination to remove the December 31, 2005, expiration date from the CDPs and the associated percentage allocations among the CDQ groups until a future final agency action replaced the CDPs and associated allocations. This decision was effective on September 8, 2005. The six CDPs originally approved by NMFS on January 17, 2003, remain in effect today.

Substantial amendments to the CDP: §679.30(g)(4)(i) states that “[S]ubstantial amendments to a CDP require a written request by the CDQ group to the State and NMFS for approval of the amendment. The State must forward the amendment to NMFS with a recommendation as to whether it should be approved.” Sections 679.30(g)(4)(ii) and (iii) address approval or disapproval of the proposed substantial amendment. Section 679.30(g)(4)(iv) contains a list of changes to a CDP that require the submission of a request for approval of a substantial amendment. Section 679.30(g)(4)(v) contains the information that must be submitted in the request for approval of a substantial amendment. The six CDPs in effect today have been amended through substantial amendments approved by NMFS numerous times since the CDPs originally were approved on January 17, 2003.

Technical amendments to the CDP: §679.30(g)(5) states that “Any change to a CDP that is not considered a substantial amendment under paragraph (g)(4)(iv) of this section is a technical amendment.” These regulations require the CDQ groups to notify the State of any technical amendments, require the State to “forward the technical amendment to NMFS with its recommendations for approval or disapproval of the amendment.” NMFS reviews the proposed amendment and, if it complies with all applicable requirements, NMFS approves the proposed amendment and notifies the State and the CDQ group.

The annual budget report: §679.30(g)(2) requires each CDQ group to submit an annual budget report to NMFS by December 15 of the year preceding the year for which the annual budget applies. The annual budget report provides an update to the annual budgets in the CDP for each year the CDP is effective. NMFS replaces the annual budget for a specific year in the original CDP with the updated annual budget report submitted each year. Therefore, the updated budgets submitted through the annual budget report are considered amendments to the CDP. Regulations at §679.30(g)(2)(iii) states that an “annual budget report is approved upon receipt by NMFS, unless disapproved by NMFS in writing by December 31. If disapproved, the annual budget report will be returned to the CDQ group for revision and resubmittal to NMFS.”

The annual budget reconciliation report: §679.30(g)(3) requires each CDQ group to “reconcile its annual budget by May 30 of the year following the year for which the annual budget applied.”

The annual budget reconciliation report is required to compare, or reconcile, the actual income and expenditures for each CDQ project described in a CDP with the estimated income and expenditures that were projected for each CDQ project in the annual budget contained in the CDP. The CDQ groups prepare the annual budget report as a schedule included in the annual audited financial statements that are submitted to the State. The State then submits these reports to NMFS as part of the State's annual report on the CDQ Program.

II. Magnuson-Stevens Fishery Conservation and Management Act Amendments that are Related to CDPs and Amendments

The Coast Guard and Maritime Transportation Act of 2006 (Public Law 109-241) includes the following four subparagraphs that specifically address CDPs and amendments to CDPs:

Approval of CDPs and Amendments: Section 305(i)(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) states the following:

(I) SECRETARIAL APPROVAL NOT REQUIRED.- Notwithstanding any other provision of law or regulation thereunder, the approval by the Secretary of a community development plan, or an amendment thereof, under the program is not required.

We interpret this paragraph to prohibit NMFS from requiring that proposed CDPs and amendments to CDPs be approved by NMFS, on behalf of the Secretary of Commerce, before a CDQ group may receive an allocation of quota or undertake the activities described in a proposed CDP or a proposed amendment.

State Regulations Governing CDPs and Amendments: Section 305(i)(1)(F) of the MSA states the following:

(F) ENTITY STATUS, LIMITATIONS, AND REGULATION.—The entity—

...
(iv) is exempt from compliance with any State law requiring approval of financial transactions, community development plans, or amendments thereto, except as required by subparagraph (H).

The paragraph exempts the CDQ groups from State laws requiring approval of financial transactions, community development plans, or amendments to CDPs. This exemption for compliance with specific State laws does not cause an inconsistency between any Federal regulations and the MSA. However, this subparagraph provides additional confirmation for our interpretation of section 305(i)(1)(I), which does apply directly to NMFS regulations. In addition, §679.30(d), §679.30(g)(4)(i), and §679.30(g)(5)(ii) require the State to forward to NMFS proposed CDPs and proposed amendments along with the State's recommendations for approval or disapproval of the proposed CDPs and proposed amendments. If the MSA exempts CDQ groups from the State's laws or regulations related to approval of CDPs and amendments, the State may be unable to obtain the information necessary to satisfy Federal regulations related to the State's review and approval of CDPs and amendments.

Use of the Community Development Plan in the Future: Sections 305(i)(1)(H) and (J) of the MSA provide information about the use of the CDPs in the future.

Section 305(i)(1)(H) follows:

(H) DECENNIAL REVIEW AND ADJUSTMENT OF ENTITY ALLOCATIONS.—

(i) IN GENERAL.—During calendar year 2012 and every 10 years thereafter, the State of Alaska shall evaluate the performance of each entity participating in the program based on the criteria described in clause (ii).

(ii) CRITERIA.—The panel shall establish a system to be applied under this subparagraph that allows each entity participating in the program to assign relative values to the following criteria to reflect the particular needs of its villages:

(I) Changes during the preceding 10-year period in population, poverty level, and economic development in the entity's member villages.

(II) The overall financial performance of the entity, including fishery and nonfishery investments by the entity.

(III) Employment, scholarships, and training supported by the entity.

*(IV) Achieving of the goals of the entity's **community development plan** [Emphasis added].*

In addition, section 305(i)(1)(J) defines a CDP, as follows:

(J) COMMUNITY DEVELOPMENT PLAN DEFINED.—In this paragraph, the term 'community development plan' means a plan, prepared by an entity referred to in subparagraph (D), for the program that describes how the entity intends—

(i) to harvest its share of fishery resources allocated to the program, or

(ii) to use its share of fishery resources allocated to the program, and any revenue derived from such use, to assist its member villages with projects to advance economic development, but does not include a plan that allocates fishery resources to the program.

We interpret that reference to the "entity's community development plan" in one of the four criteria that will be used to evaluate the CDQ groups during the decennial review process means that a CDP of some form will continue to be prepared by the CDQ groups. In addition, the inclusion of such a specific definition of a CDP in section 305(i)(1)(J) of the MSA further supports the interpretation that CDPs will continue to be required to be prepared by the CDQ groups. However, the future role of the CDPs must be addressed through analysis and rulemaking to implement the amendments to section 305(i)(1) of the MSA. For example, the analysis and rulemaking should address the following questions: what would the CDP be used for and by whom; must a CDP be submitted to the State or NMFS; if so, what information would be required to be contained in a CDP; and when would a CDP be required to be submitted?

The MSA also includes a new subparagraph that affects the use of a CDP as an application for CDQ allocations among the CDQ groups. Section 305(i)(1)(C) states the following:

(C) ALLOCATIONS TO ENTITIES.—Each entity eligible to participate in the program shall be authorized under the program to harvest annually the same percentage of each species allocated to the program under subparagraph (B) that it was authorized by the Secretary to harvest of such species annually as of March 1, 2006, except to the extent that its allocation is adjusted under subparagraph (H). Such allocation shall include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.

The subparagraph established the percentage allocations of groundfish, halibut, and crab among the CDQ groups at the percentage allocations in effect on March 1, 2006. A portion of these percentage allocations may be adjusted every ten years starting in 2012 under the provisions of section 305(i)(1)(H). This amendment to the MSA requires revisions to NMFS regulations in §679.30(a) through (d) about the CDQ allocation process, including regulations that define the CDP as an application for CDQ percentage allocations.

III. Conclusions

Approval of CDPs: As described above, it would be inconsistent with section 305(i)(1)(I) of the MSA for NMFS to continue to enforce requirements for approval of a CDP. Therefore, if NMFS receives a proposed CDP from the CDQ groups or the State, NMFS would be unable to apply the regulations at §679.30(d) that require NMFS to either approve or disapprove the proposed CDP. CDPs are submitted as applications for CDQ allocations among the CDQ groups. The MSA now requires that the percentage allocations of groundfish, crab, and halibut among the CDQ groups are established at those percentage allocations in effect on March 1, 2006, until at least 2012. Therefore, it is unlikely that NMFS will receive any proposed CDPs from the CDQ groups or the State before NMFS revises its regulations to be consistent with the recent MSA amendments.

Submission and Approval of Amendments to CDPs: Regulations related to the submission, review, and approval or disapproval of substantial and technical amendments apply on an ongoing basis, as demonstrated by the State's recent submission of two substantial amendments for NMFS's review. However, regulations at §679.30(g)(4)(ii) and §679.30(g)(5)(ii) that require NMFS to approve proposed substantial and technical amendments to CDPs are no longer consistent with section 305(i)(1)(I) of the MSA. Therefore, NMFS can no longer enforce regulations that require the CDQ groups to obtain approval by NMFS for substantial and technical amendments. In addition, because the submission of information required for a proposed substantial amendment is defined at §679.30(g)(4)(i) as a request by the CDQ group for approval of the amendment, it is inconsistent with the MSA for NMFS to continue to enforce the requirement that CDQ groups submit requests for approval of substantial amendments or any of the information required to be submitted in such requests for approval.

NMFS regulations do not require the CDQ groups to submit requests for approval of technical amendments. Section 679.30(g)(5)(i) refers to the CDQ groups notifying the State about technical amendments. However, the results of our determination that NMFS may no longer

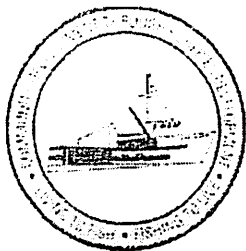
enforce requirements that the CDQ groups submit requests for approval of substantial amendments makes it unreasonable for NMFS to continue to enforce requirements that the CDQ group submit the information required for technical amendments. Both substantial and technical amendments are required to keep a CDP up to date. If the CDQ groups are no longer required to update their CDPs through substantial amendments, the CDPs will become out of date quickly and will no longer reflect the working business plan of the CDQ group, as envisioned by NMFS's current regulations. It is not reasonable to suspend enforcement of regulations related to substantial amendments and continue to require the submission of information for technical amendments. Technical amendments alone will not accomplish the objective of maintaining a CDP as a working business plan for a CDQ group. Therefore, NMFS also is suspending enforcement of regulations at §679.30(g)(5) requiring the submission of technical amendments to CDPs.

These interpretations are consistent with the legislative intent of the new section 305(i)(1)(I) of the MSA, which states:

The Conference substitute eliminates the requirement that the CDQ groups seek either the review or approval by the Secretary of community development plans or amendments to community development plans. The Conference agreement does not require the State of Alaska to approve community development plans and amendments. (Congressional Record, p H1661, April 6, 2006.)

Submission and Approval of the Annual Budget Report: As described in section I of this attachment, NMFS considers the revised budgets submitted in the annual budget report as amendments to the CDPs. Therefore, requirements in §679.30(g)(2)(iii) related to approval or disapproval of the annual budget report are now inconsistent with the requirement in section 305(i)(1)(I) of the MSA that approval by NMFS of amendments to CDPs is not required. Based on the rationale described above for substantial and technical amendments to CDPs, it is inconsistent with the MSA for NMFS to continue to enforce requirements at §679.30(g)(2) for the submission and approval of the annual budget report by December 15 of each year.

Submission of the Annual Budget Reconciliation Report: The annual budget reconciliation report requires a comparison, or reconciliation, between actual and estimated annual income and expenses for each CDQ project listed in the annual budget in the CDP. Compliance with the requirements for the annual budget reconciliation report assumes that the annual budgets and list of CDQ projects in the CDP are being kept up to date. However, as described above, it is inconsistent with section 305(i)(1)(J) of the MSA to require the CDQ groups to update the list of CDQ projects in their CDPs through amendments or to submit revised annual budgets prior to the beginning of each year. Therefore, it also would be inconsistent with the MSA to continue to require the CDQ groups to prepare the annual budget reconciliation report. If the list of CDQ projects and the annual budgets in the CDPs are no longer being kept up to date, then the CDP would not contain the information that is required to be reconciled in the annual budget reconciliation report.



Yukon Delta Fisheries Development Association

1016 West Sixth Avenue • Suite 301 • Anchorage • AK 99501
Tel: (907) 644-0326 Fax: (907) 644-0327

September 15, 2006

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: Enforcement Policy Clarification

Dear Ms. Bibb:

Yukon Delta Fisheries Development Association ("YDFDA") requests an interpretation of the enforcement policy regarding observer coverage for CDQ fixed gear sablefish harvesting by the F/V LISA MARIE (LOA 78') in the Bering Sea and Aleutian Islands found at 50 CFR 679.50(c)(4)(v) in light of the recently enacted Coast Guard and Maritime Transportation Act of 2006 (the "Act").

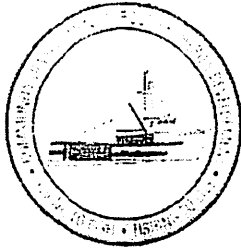
Section 416(a) of the Act revised section 305(i)(1) of the Magnuson Stevens Act and included an amendment in Subsection (B)(iv) that reads as follows:

REGULATION OF HARVEST.--The harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated by the Secretary in a manner no more restrictive than for other participants in the applicable sector, including with respect to the harvest of nontarget species.

The regulation found at 50 CFR 679.50(c)(1)(v) allows a catcher vessel greater than 60' LOA but less than 125' LOA that participates for more than 3 fishing days in a directed fishery for groundfish in a calendar quarter to only be required to carry an observer for at least 30 percent of its fishing days in that calendar quarter. However, the regulations governing observers in CDQ fisheries found at 50 CFR 679.50(c)(4)(v), require that the same sized vessel carry at least one level 2 observer at all times during harvesting operations.

The Act was signed by the President and made effective on July 11, 2006. The Act's Section 416(a) is, therefore, in conflict with 50 CFR 679.50(c)(4)(v) when the vessel is harvesting CDQ sablefish, a fishery where there are individual quotas. This current regulation is more restrictive than the regulation governing harvesting operations for non-CDQ sablefish found at 50 CFR 679.50(c)(1)(v). In light of this conflict and in light of the continued expense of such observer coverage incurred by the LISA MARIE in its ongoing 2006 fishing operations under current

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Yukon Delta Fisheries Development Association

1016 West Sixth Avenue • Suite 301 • Anchorage • AK 99501
Tel: (907) 644-0326 Fax: (907) 644-0327

regulations, we request either an interpretation of your enforcement policy under 50 CFR 679.50(c)(4) as soon as possible or a statement that NMFS is suspending enforcement of 50 CFR 679.50(c)(4)(v).

Thank you very much. Please call if you have any questions.

YUKON DELTA FISHERIES DEVELOPMENT ASSOCIATION

Sincerely,

A handwritten signature in cursive script that reads "Ragnar Alstrom for".

Ragnar Alstrom, Executive Director

**Western Alaska Community Development Quota Program
Implementation of the Magnuson-Stevens Act Amendments in the
Coast Guard and Maritime Transportation Act of 2006**

Staff discussion paper - October 2006

On July 11, 2006, the President signed the Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act). Section 416(a) of the Coast Guard Act revises section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) by replacing all of the existing language in this section with new language. The MSA amendments and legislative history are attached to the C-2 action memo as Item C-2(a). This report is intended to provide an overview of the effects of the Coast Guard Act and a proposed plan for implementation of these amendments.

I. Introduction

The MSA amendments address all aspects of management and oversight of the CDQ Program, including the purpose of the CDQ Program; allocations of groundfish, halibut, and crab to the CDQ Program; allocations of quota among the CDQ groups; management of the CDQ fisheries; eligible communities; eligibility criteria for participation in the CDQ Program, limits on allowable investments; the creation of a CDQ administrative panel; compliance with State of Alaska (State) reporting requirements; a decennial review and allocation adjustment process; and other aspects of program administration and oversight by the State and NMFS, on behalf of the Secretary of Commerce. Most of these MSA amendments will require revisions to Federal regulations that will be implemented through proposed and final rulemaking. Amendments also will need to be made by the Council to the Fishery Management Plan (FMP) for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs.

For the purpose of this report, staff has divided the provisions in the Act into **four** general issue categories:

- Allocations
- Fisheries management
- Decennial review and adjustment of allocations
- Administration and oversight

Staff proposes that the provisions of the Act be implemented through **seven** separate FMP and/or regulatory amendments. **Table 1** below provides an outline of each of the subparagraphs of the Act, including a brief summary of the issue, the general category under which staff has organized the issue, and the proposed vehicle for implementation. **This report references the changes to Section 305(i)(1) of the MSA by the subparagraphs (A) through (F) listed in Table 1.**

Note that of the allocation issues, one is addressed through a notice in the *Federal Register*, while others will be implemented through the rulemakings for BSAI Amendments 85 and 80.¹ In addition, changes to the TAC categories allocated to the CDQ Program in 2007 will be implemented through the proposed and final rules for the 2007/2008 groundfish specifications. The first fisheries management issue listed is proposed to be implemented through a regulatory amendment, and the second will likely need both an FMP and regulatory amendment. The issues associated with the decennial review may be implemented through a regulatory amendment, or may not necessitate any changes to Federal regulations or the FMPs. Finally, all of the administrative and oversight provisions are proposed to be implemented through Amendment 71 to the BSAI groundfish FMP and Amendment 22 to the BSAI crab FMP (BSAI Am. 71/22).

¹Council final action on BSAI Amendment 85 was in April 2006. Final action on BSAI Amendment 80 was in June 2006. Implementation of both amendments is expected in 2008.

Table 1. Sub-paragraph reference and subject of amendments to section 305(i)(1) of the MSA made through the 2006 Coast Guard Act

Sub-paragraph of section 305(i)(1)	Subject of MSA requirements	Issue category	Federal vehicle for implementation
(A)	Purpose of the CDQ Program.	Admin & oversight	Am. 71/22
(B)(i)	Current allocations to the CDQ Program and how those allocations are managed.	Allocations	2007/08 groundfish specifications
(B)(ii)	Allocations to the program under future sector allocation and rationalization programs or upon the establishment of new BSAI fisheries.	Allocations	BSAI Am. 85 BSAI Am. 80
(B)(iii)	Processing and other rights related to CDQ allocations.	Allocations	No regulatory revisions identified
(B)(iv)	Restrictions on the regulation of harvest of halibut, fixed gear sablefish, pollock, and crab CDQ allocations.	Fisheries management	Regulatory amendment
(C)	Percentage allocations of groundfish, halibut, and crab among the CDQ entities (CDQ groups).	Allocations	FR notice
(D)	Specific list of the 65 eligible villages and the six CDQ groups through which each may participate in the program.	Admin & oversight	Am. 71/22
(E)(i)	Requirements for CDQ entity's board of directors.	Admin & oversight	Am. 71/22
(E)(ii), (vi)	CDQ entities must elect CDQ Panel representatives and comply with requirements established by CDQ Panel.	Admin & oversight	Am. 71/22
(E)(iii)-(v)	Allowable investments, limits on non-fisheries investments, statement of compliance.	Admin & oversight	Am. 71/22
(F)(i)	Excessive share ownership, harvesting, or processing limitations in BSAI fisheries.	Fisheries management	FMP/Regulatory amendment #2 ¹
(F)(ii)-(iv)	Compliance with and exemptions from certain State laws.	Admin & oversight	No regulatory revisions identified
(G)	CDQ Panel membership, functions, and decision making.	Admin & oversight	No regulatory revisions identified
(H)	Decennial review and adjustment of entity allocations.	Decennial review	FMP/Regulatory amendment #3 ¹
(I)	Approval of community development plans and amendments not required.	Admin & oversight	Remove current regulations through Am. 71/22
(J)	Community development plan defined.	Decennial review	FMP/Regulatory amendment #3 ¹

¹This denotes a second FMP/regulatory amendment package to implement the fisheries management changes, and a third FMP/regulatory package to implement the decennial review. Both are separate amendments from BSAI Am. 71/22.

The remainder of this report addresses each of the issues in the MSA amendments organized into the four primary categories above and describes the potential vehicles by which they will be implemented. Table 5, provided as an attachment to this report, is a more detailed explanation of each of the provisions of the Act and an initial assessment of whether the paragraph will require revisions to the FMPs or Federal regulations. Table 5 will be helpful as a reference as the Council reviews each issue in this paper.

II. Allocations

Allocation issues include: 1) CDQ allocations under **subparagraph (B)(i)**, and 2) allocations to the program under future sector allocation and rationalization programs (**subparagraph (B)(ii)(I)**). Subparagraph (B)(ii)(I) will be implemented under BSAI Amendments 85 and 80, as appropriate. Note that the Council took final action on these two amendments in April 2006 and June 2006, respectively.

CDQ Allocations under Section 305(i)(1)(B)(i)

Subparagraph (B)(i) addresses the species that are allocated to the CDQ Program and the management of these allocations.

(B) PROGRAM ALLOCATION.—(i) IN GENERAL.—Except as provided in clause (ii), the annual percentage of the total allowable catch, guideline harvest level, or other annual catch limit allocated to the program in each directed fishery of the Bering Sea and Aleutian Islands shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006, for the program. The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and nontarget needs based on existing practice with respect to the program as of March 1, 2006, for each fishery.

Prior to these amendments, section 305(i)(1)(A) of the MSA stated that “a percentage of the total allowable catch of any Bering Sea fishery is allocated to the program.” The MSA now requires that “the annual percentage of the total allowable catch, guideline harvest level, or other annual catch limit allocated to the program *in each directed fishery of the Bering Sea and Aleutian Islands* shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006. NMFS interprets this change in the MSA to require allocations to the CDQ Program only for those total allowable catch (TAC) categories that had a directed fishery in 2006, when the MSA amendments were enacted.²

- *Halibut*: A directed fishery for halibut exists in the BSAI. Therefore, the current allocations of a percentage of the halibut quotas in Areas 4B, 4C, 4D, and 4E are consistent with section 305(i)(1)(B)(i) of the MSA. No changes are needed to the allocations of halibut to the CDQ Program.

² The Conference Committee report on H.R. 889 (April 6, 2006, page H1660) states that “The Conference substitute requires that the CDQ Program continue to receive the same annual percentage allocations of each fishery as it does now under existing Federal statute and regulation.” This statement appears to be in conflict with the statutory requirement that allocations to the CDQ Program be made for each directed fishery of the BSAI. However, the legislative history also says “It is not the intent of the conferees to either change the current allocations to the CDQ program or create “squid box” problems where minor species such as squid inhibit any directed fishing under the CDQ program.” No longer allocating to the CDQ Program species or species groups that do not have a directed fishery in the BSAI would remove hard cap management for these species, which appears to be consistent with the second statement in the legislative history. NMFS will continue to examine the statute and its legislative history to ensure that our interpretations are consistent with the MSA.

- *Crab*: Some of the crab species allocated to the CDQ Program do not have directed fisheries in some years because of low stock abundance. If a commercial fishery quota is not established for a particular crab species, then no CDQ allocation is issued for that crab species that year. This process is consistent with section 305(i)(1)(B)(i) of the MSA, so no changes are needed to the allocations of crab to the CDQ Program.

Of the three species or species groups allocated to the CDQ Program (groundfish, halibut, and crab), the term “directed fishery” is most commonly applied to the groundfish TACs, because some of these TACs are not large enough to allow a directed fishery at any time during the year. Therefore, NMFS interprets this change in the MSA to require the identification of any groundfish TAC category that does not have a directed fishery in the BSAI. These TAC categories would no longer be allocated to the CDQ Program.

Table 2 shows the groundfish TAC categories allocated to the CDQ Program as of March 1, 2006, and the percentage allocation to the program of each TAC category. Ten percent of the BSAI pollock TACs are allocated to the CDQ Program as directed fishing allowances, as required by the American Fisheries Act (AFA). Twenty percent of the fixed gear allocation of the sablefish TAC is allocated to the CDQ Program under BSAI Amendment 15, which was implemented in 1995. Squid has not been allocated to the CDQ Program since 2000 (under BSAI Amendment 66). Seven and one-half percent of the remaining groundfish TAC categories are allocated to the CDQ Program under BSAI Amendment 39, which was implemented in 1998.

Table 2 also shows the status of management of these allocations on March 1, 2006. The MSA requires that species allocated to the CDQ Program continue to be managed as either a directed fishing allowance or an allocation that includes “both directed fishing and nontarget needs” according to existing practices on March 1, 2006. Pollock is the only groundfish allocated to the CDQ Program that was managed as a directed fishing allowance on March 1, 2006. The remaining groundfish are managed as single quotas under which all catch of the species by vessels fishing on behalf of the CDQ group accrues against either the group’s allocation for that species, or against the allocation to the CDQ Program (if the species or species group is not allocated among the CDQ groups). All catch accrues against the CDQ allocations regardless of whether that fish was caught while directed fishing for the species or as incidental catch in other CDQ fisheries.

All of these groundfish CDQ allocations, except five rockfish TAC categories and the “other species” category, were managed under “hard caps” on March 1, 2006. The CDQ groups are prohibited from exceeding their CDQ allocations of these species. As shown on the second page of Table 2, northern rockfish, shortraker rockfish, roughey rockfish, other rockfish, and other species are not allocated among the CDQ groups, but are managed at the “CDQ reserve level” with soft caps. No directed fishing is allowed by any CDQ group on these species categories. All catch by all CDQ groups accrues against the CDQ allocation for these species. Retention of these species is limited by either maximum retainable amounts (MRAs) or retention is prohibited, depending on the status of the overall TAC for these species. Because these species are not allocated among the CDQ groups, no CDQ group is prohibited from exceeding a quota of these species, so catch of these species does not prevent the CDQ groups from harvesting their other CDQ allocations (unless catch by all sectors approaches overfishing).

Table 2. BSAI groundfish TAC categories; CDQ allocations and management approach on March 1, 2006; identification of TAC categories with a BSAI directed fishery in 2006; and notes about the likely status of the CDQ allocation in the future

TAC category	% allocation as of 3/1/2006	Management – “Existing Practices as of 3/1/2006”	Was there a BSAI directed fishery in 2006?	Likely Status in Future
Pollock, BS	10% as a DFA	Directed fishing allowance (DFA) managed with hard cap, incidental catch accrues against a single ICA for CDQ and non-AFA fisheries	yes	MSA requires both: (1) continued management under “existing practices,” and (2) regulation no more restrictive than cooperative (AFA) or IFQ fisheries.
Pollock, AI	10% as a DFA			
Pollock, Bogoslof	0%	Not allocated to CDQ Program	no	
Sablefish, BS, fixed gear	20%	Allocations include directed fishing and nontarget needs, hard cap	yes	
Sablefish, AI, fixed gear	20%		yes	
Pacific cod, BSAI	7.5%	Allocations include directed fishing and nontarget needs and are managed with a hard cap	yes	10% DFA + ICA under Am.85
Atka mackerel, EAI/BS	7.5%		yes	10% DFA + ICA under Am.80
Atka mackerel, CAI	7.5%		yes	
Atka mackerel, WAI	7.5%		yes	
Yellowfin sole, BSAI	7.5%		yes	
Rock sole, BSAI	7.5%		yes	
Greenland turbot, BS	7.5%		yes	
Greenland turbot, AI	7.5%		yes	
Arrowtooth flounder, BSAI	7.5%		yes	
Flathead sole, BSAI	7.5%		yes	
Other flatfish, BSAI	7.5%		yes	
Alaska plaice, BSAI	7.5%		yes	
Pacific ocean perch (POP), EAI	7.5%		yes	
POP, CAI	7.5%		yes	
POP, WAI	7.5%	yes		

DFA = directed fishing allowance; ICA = incidental catch allowance

Table 2 (continued). BSAI groundfish TAC categories; CDQ allocations and management approach on March 1, 2006; identification of TAC categories with a BSAI directed fishery in 2006; and notes about the likely status of the CDQ allocation in the future

TAC category	% allocation as of 3/1/2006	Management – “Existing Practices as of 3/1/2006”	Was there a BSAI directed fishery in 2006?	Likely Status in Future
Sablefish, BS, trawl	7.5%	Allocations include directed fishing and nontarget needs and are managed with a hard cap	no	No BSAI directed fishery, so would no longer be allocated to CDQ Program
Sablefish, AI, trawl	7.5%		no	
Pacific ocean perch, BS	7.5%		no	
Northern rockfish, BSAI	7.5%	Allocation to the CDQ Program for these species are managed at the CDQ reserve level with a soft cap and not allocated among the CDQ groups. No directed fishing allowed on these species in the CDQ Program	no	No BSAI directed fishery, so would no longer be allocated to CDQ program
Shortraker rockfish, BSAI	7.5%			
Rougheye rockfish, BSAI	7.5%			
Other rockfish, BS	7.5%			
Other rockfish, AI	7.5%			
Other species, BSAI	7.5%			
Squid, BSAI	0%	Not allocated to CDQ Program	yes	? because squid has not been allocated to the CDQ Program since 2000

Table 2 also identifies whether directed fishing was allowed for each species in the BSAI in 2006. Directed fishing for all of the species on page 1 of Table 2, except pollock in the Bogoslof District, was allowed at some time during 2006. Therefore, NMFS concludes that these TAC categories are consistent with the MSA term "each directed fishery" of the BSAI at the time this amendment to the MSA was made and would continue to be allocated to the CDQ Program.

The TAC categories that did not have a directed fishery in the BSAI in 2006 are:

- Pollock in the Bogoslof district
- Sablefish from the trawl allocation of the BS and AI sablefish TACs
- Bering Sea Pacific ocean perch
- Northern rockfish
- Shortraker rockfish
- Rougheyeye rockfish
- Other rockfish
- Other species

CDQ allocations for 2007 have already been established through the 2006/2007 groundfish specifications final rule (71 FR 10894; March 3, 2006). The species or species groups and percentage allocations identified in Table 2 as allocated to the CDQ Program in 2006 also were allocated to the CDQ Program in 2007 under this final rule. Rulemaking for the 2007/2008 groundfish specifications will be prepared after the October 2006 Council meeting. This rule will make any changes necessary for the 2007 fisheries and will implement specifications for the 2008 groundfish fisheries. **As a result of the Coast Guard Act, NMFS will propose in this rulemaking to no longer allocate to the CDQ Program the groundfish TAC categories listed above that did not have a directed fishery in the BSAI in 2006.** This action is necessary to make the rulemaking for the 2007/2008 groundfish specifications consistent with the MSA. NMFS also will propose to make changes to the CDQ allocations in BSAI Amendments 85 and 80. These proposed revisions are explained in more detail in the following section.

Catch in the CDQ fisheries of species in TAC categories that are not allocated to the CDQ Program would be managed under the regulations and fishery status that applies to the TAC category in all BSAI groundfish fisheries. Retention would either be limited to maximum retainable amounts or all catch of the species would be required to be discarded. Notices of closures to directed fishing and retention requirements for these species would apply equally to the CDQ and non-CDQ sectors. These species would be managed with "soft caps," and catch of these species in the CDQ fisheries would not constrain the catch of other CDQ species unless catch by all sectors approached overfishing.

The MSA amendments did not address the allocations of halibut, salmon, and crab *prohibited species* to the CDQ Program. Therefore, NMFS assumes that these allocations would remain at 7.5% of each prohibited species catch limit and would continue to be allocated among the CDQ groups. Nothing in the MSA appears to restrict the Council's ability to change the allocations of prohibited species to the CDQ Program in the future, or the management of these allocations to the program.

All species allocated to the CDQ Program will remain at the percentage allocations in effect on March 1, 2006, unless a quota program, fishing cooperative, sector allocation, or other rationalization program is established after the date of enactment (July 11, 2006).

Implementation of subparagraph (B)(ii) under Amendments 85 and 80

Subparagraph (B)(ii)(I) now requires that:

(ii) EXCEPTIONS.—Notwithstanding clause (i)—(I) the allocation under the program for each directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) shall be a directed fishing allocation of 10 percent upon the establishment of a quota program, fishing cooperative, sector allocation, or other rationalization program in any sector of the fishery;

BSAI Amendment 85 involves Pacific cod sector allocations and BSAI Amendment 80 involves both cooperatives and sector allocations for flatfish. However, the Council took final action on both of these FMP amendments before the MSA was amended by the Coast Guard Act. Therefore, an increase in CDQ allocations to 10 percent as a directed fishing allowance and the regulatory revisions necessary to implement these allocation changes must be added to these FMP amendments for the Council's recommendations to be consistent with the MSA.

Amendment 85 would establish sector allocations of Pacific cod in the BSAI among nine non-CDQ harvesting sectors. Therefore, section 305(i)(1)(B)(ii)(I) of the MSA requires that, at the same time these sector allocations are established, the allocation of Pacific cod to the CDQ Program must increase to 10 percent as a directed fishing allocation.

The following summarizes the integration of this new section of the MSA into Amendment 85:

- NOAA GC has advised that the term “establishment” in section 305(i)(1)(B)(ii)(I) of the MSA means “the date on which fishing commences under an approved quota program, fishing cooperative, sector allocation or other rationalization program” (NOAA GC legal opinion, September 25, 2006). Therefore, NMFS interprets the MSA to require that the increase in the Pacific cod CDQ allocation to 10 percent of the TAC as a directed fishing allowance must occur when fishing commences under Amendment 85. At this time, and pending Secretarial approval, NMFS expects fishing under the Amendment 85 Pacific cod sector allocations to start on January 1, 2008.
- The analysis for Amendment 85 and proposed FMP amendment text must include provisions to increase the allocation of Pacific cod to 10 percent of the TAC as a directed fishing allowance to be consistent with section 305(i)(1)(B)(ii)(I) of the MSA when the Secretary reviews the proposed amendment. The proposed regulations developed by NMFS to support Amendment 85 also must be consistent with the MSA at the time the proposed rule is approved by the Secretary to be published in the *Federal Register*. These revisions have been made in the proposed FMP amendment text and the analysis, and they have been incorporated by NMFS into the proposed rule.
- The term “directed fishing allocation” means the same as “directed fishing allowance.”
- The 10 percent allocation of Pacific cod to the CDQ Program does not include the amount of Pacific cod needed for incidental catch and bycatch of Pacific cod in other groundfish CDQ fisheries.
- A CDQ Pacific cod incidental catch allowance (ICA) would be specified annually in the groundfish specifications process. This amount may change annually, depending on expected incidental catch needs in upcoming years.
- Figure 1 shows how the allocations of Pacific cod would occur under Amendment 85, with the addition of the requirements of section 305(i)(1)(B)(i)(I) of the MSA. The 10 percent allocation as a

directed fishing allowance and the CDQ incidental catch allowance would be subtracted from the Pacific cod TAC before further allocation among the non-CDQ harvesting sectors.

- The total incidental catch of Pacific cod in the CDQ fisheries has ranged from about 750 mt to 1,100 mt between 1999 and 2005, with an average of 946 mt. In 2004 and 2005, when the CDQ groups harvested the highest proportions of their flatfish CDQ allocations, the incidental catch of cod was about 1,100 mt or about 0.5% of the Pacific cod TACs in those years.
- Incidental catch of Pacific cod in the CDQ fisheries may increase in the future if CDQ allocations of groundfish increase to 10 percent of the TAC as a directed fishing allowance under Amendment 80 and if the CDQ groups harvest an increasing percentage of their flatfish allocations.
- If Amendment 85 is approved for 2008, NMFS likely will recommend in the 2008/2009 annual groundfish specifications a CDQ ICA for Pacific cod of between 0.5% and 1% of the Pacific cod TAC.

The Coast Guard Act requires that management of the Pacific cod CDQ allocations change from “hard cap” to “soft cap” management. To implement these requirements, NMFS will propose in Amendment 85 that:

- The CDQ directed fishing allowance of 10 percent of the TAC would be combined with the CDQ ICA each year to form the CDQ reserve for Pacific cod.
- The CDQ reserve of Pacific cod would then be divided among the CDQ groups based on the percentage allocations of Pacific cod in effect under section 305(i)(1)(C) of the MSA. Each CDQ group would receive one allocation of Pacific cod that would include its directed fishing allowance and a proportional share of the Pacific cod CDQ ICA.
- All catch of Pacific cod by any vessel fishing for that CDQ group would accrue against the CDQ group’s allocation of Pacific cod until that allocation was reached. When the CDQ allocation is reached, all vessels fishing on behalf of the CDQ group would be prohibited from further retention of Pacific cod (“soft cap”). Further catch of Pacific cod by vessels fishing on behalf of the CDQ group would still continue to occur in other groundfish CDQ fisheries. However, the prohibition on retention would minimize this additional catch because vessel operators would have no incentive to catch Pacific cod. The CDQ group would decide how to manage their CDQ fisheries and how to allocate their portion of the Pacific cod ICA among their vessels and target fisheries.
- Allocations made to each CDQ group would continue to be transferable among the CDQ groups, but not outside of the CDQ Program.
- No prohibitions would exist against a CDQ group exceeding the amount of Pacific cod allocated to it, because to do so would result in “hard cap” management and limitations on the group’s ability to conduct other groundfish CDQ fisheries in which additional Pacific cod may be caught.

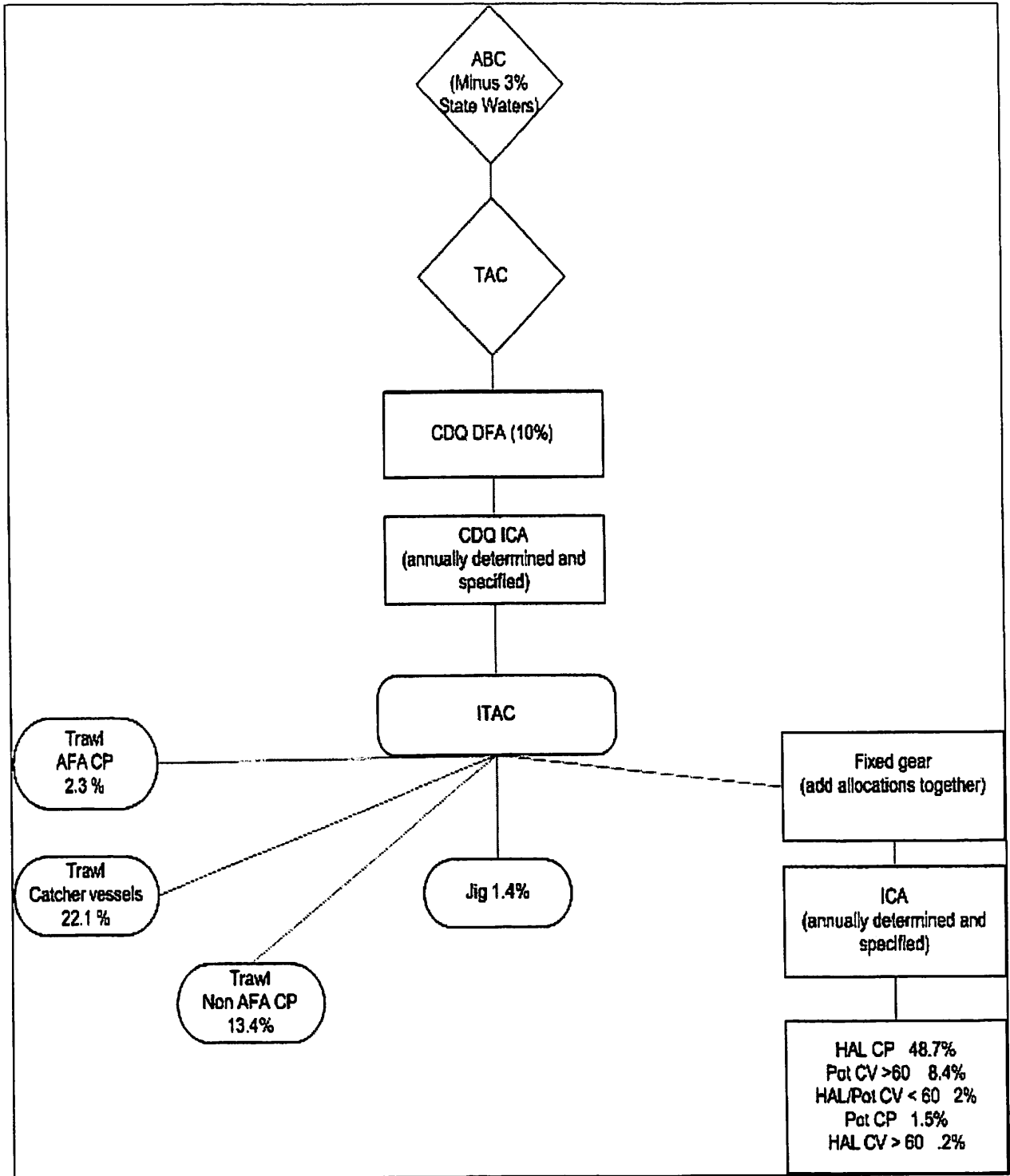


Figure 1. Allocations of Pacific cod under BSAI Amendment 85, including MSA requirements for CDQ allocations as a directed fishing allowance and a CDQ incidental catch allowance

- This approach does not require NMFS or the CDQ groups to identify the directed fishery or fisheries each vessel fishing on behalf of a CDQ group is participating in to accrue catch against a separate DFA or ICA. It also does not require the application of MRAs to manage the CDQ allocations, because the retention status for Pacific cod would change from 100 percent retention allowed while the CDQ group had an available Pacific cod allocation to no retention allowed once the CDQ allocation was reached.
- NMFS is concerned about maintaining the catch of Pacific cod in the CDQ fisheries to the amount allocated to the CDQ Program through the directed fishing allowance and CDQ ICA. The Pacific cod TAC will be fully allocated among the CDQ and non-CDQ harvesting sectors. Therefore, catch in excess of allocations by any sector could result in the total catch of Pacific cod exceeding the TAC. There is no buffer in the Pacific cod TAC/ABC to make up for overages by any of the harvesting sectors. The proposed approach for managing the allocations of Pacific cod to the CDQ Program maximizes the possibility that the catch of Pacific cod in the CDQ fisheries will not exceed the amount allocated to the program, because the CDQ groups will have no incentive to catch additional Pacific cod after the allocations are reached.

Under **Amendment 80**, the Council proposes to allow the non-AFA trawl catcher/processor sector to form cooperatives and receive allocations of Atka mackerel, Aleutian Islands Pacific ocean perch, yellowfin sole, rock sole, and flathead sole. Therefore, because Amendment 80 involves the authorization to form cooperatives, the requirements in section 305(i)(1)(B)(ii)(I) of the MSA are triggered for the Amendment 80 target species. In addition, the Council also proposed to increase the allocations of the Amendment 80 target species and “secondary species” to the CDQ Program to 10 percent of the TAC for each of these species or species groups. The secondary species in the Council’s motion on Amendment 80 includes all other species allocated to the CDQ Program in addition to the Amendment 80 target species. NMFS interprets that a change in the percentage of these secondary species TACs allocated to the CDQ Program constitutes the establishment of a sector allocation between the CDQ and non-CDQ sectors. An allocation of 10 percent of these secondary species TACs to the CDQ Program indirectly constitutes an allocation of 90 percent of the TACs to the non-CDQ sector or sectors. The establishment of sector allocations for the secondary species under Amendment 80 triggers the requirement that the allocations of species or species groups other than just the Amendment 80 target species will increase to 10 percent of the TAC as a directed fishing allowance.

Subparagraph (ii)(I) also specifies that increases in allocations required when a fishing cooperative or sector allocation is established applies only to each directed fishery of the BSAI. The TAC categories with directed fisheries in the BSAI in 2006 are listed in Table 2. Under Amendment 80, NMFS will propose that the allocation of the following TAC categories to the CDQ Program would increase to 10 percent of the TAC as a directed fishing allowance:

- Atka mackerel
- Aleutian Islands Pacific ocean perch
- Yellowfin sole
- Rock sole
- Flathead sole
- Arrowtooth flounder
- Alaska plaice
- Greenland turbot
- “Other” flatfish

NMFS also will propose similar measures to manage these species allocations to the CDQ Program under Amendment 80 as were described above for Amendment 85. For each of these species, NMFS annually

would specify a CDQ ICA that would be added to the 10 percent directed fishing allowance and then further allocated among the CDQ groups based on the applicable percentage allocations of each TAC category. All catch of these species by any vessel fishing on behalf of a CDQ group would accrue against the group's allocation until the allocation amount was reached, then further catch of these species would be required to be discarded.

No allocations to the CDQ Program would be made from the TAC categories that did not have a directed fishery in the BSAI in 2006. These species or species groups are:

- Pollock in the Bogoslof district
- Sablefish from the trawl allocation of the BS and AI sablefish TACs
- Bering Sea Pacific ocean perch
- Northern rockfish
- Shortraker rockfish
- Rougheye rockfish
- Other rockfish
- Other species

NMFS also must resolve the status of squid under the section 305(i)(1)(B) of the MSA, because a directed fishery was allowed for squid in 2006. Thus, squid meets the conditions for "each directed fishery in the BSAI," although squid has not been allocated to the CDQ Program since 2000.

NMFS will propose that the list of species that would receive annual allocations to the CDQ Program would be fixed through the Amendment 80 rulemaking and could only be changed through FMP and regulatory amendments.

Catch of species that are not allocated to the CDQ Program would be managed under the regulations and fishery status that applies to the species in all BSAI groundfish fisheries. Depending on the amount of the TAC and the expected incidental catch in all groundfish fisheries, some retention may be allowed under MRAs, or all catch of the species would be required to be discarded. Closure notices for these species would apply equally to the CDQ and non-CDQ sectors.

Removing "hard cap" management of the CDQ allocations removes the potential for an enforcement action when a CDQ allocation is exceeded. Therefore, NMFS would no longer need the CDQ groups to submit the CDQ catch report to independently acknowledge the catch that is accruing against their CDQ allocations to support timely enforcement of "hard caps." As a result, NMFS will propose in Amendment 80 to remove the requirement that the CDQ groups submit a CDQ catch report to NMFS. The CDQ catch accounting and monitoring would be integrated into the regional catch accounting system managed by NMFS. The regional catch accounting system is based primarily on observer data, weekly production reports where observer data is not available, and shoreside delivery reports. All of the information necessary to manage the CDQ allocations and quotas is available from these other data sources already submitted to NMFS. Eliminating the CDQ catch report would reduce reporting costs for the CDQ groups, as well as computer programming and maintenance costs for NMFS.

Subparagraph (B)(ii)(I) specifically excludes pollock, sablefish, halibut, and crab from requirements associated with the establishment of a quota program, fishing cooperative, sector allocation, or other rationalization program. Therefore, the CDQ allocation requirements of section 305(i)(1)(B)(i) would continue to apply to these four species groups. Ten percent of the pollock TAC would continue to be allocated to the CDQ Program as a directed fishing allowance under the AFA. Ten percent of all crab TACs, except Norton Sound red king crab, would continue to be allocated to the CDQ Program under the crab rationalization program. Seven and one-half percent of the Norton Sound red king crab guideline

harvest level would continue to be allocated to the CDQ Program under the BSAI crab FMP and 50 CFR 679.31(d). The percentage allocations of halibut to the CDQ Program would continue to range from 20 percent to 100 percent of the halibut quotas in Areas 4B, 4C, 4D, and 4E under 50 CFR 679.31. Twenty percent of the fixed gear sablefish portion of the sablefish TACs would continue to be allocated to the CDQ Program under 50 CFR 679.20(b)(1)(iii)(B).

Subparagraph (B)(iv) related to regulation of harvest also must be evaluated in the Amendment 80 analysis and rulemaking to ensure that the CDQ allocations of the species allocated to cooperatives (the Amendment 80 target species) are managed no more restrictively than they are managed in the (non-CDQ) cooperative fisheries.

The fisheries management measures developed for Amendments 85 and 80 must anticipate that, in the near future, the combination of the recent changes to the MSA, Amendment 85, and Amendment 80 likely will require that the CDQ allocations of *all* groundfish species with directed fisheries in the BSAI, except fixed gear sablefish, will be 10 percent of the TAC as a directed fishing allowance. To accommodate the new requirements, NMFS proposes a consistent and integrated approach to managing CDQ allocations as directed fishing allowances. While in the past, management of a CDQ allocation as a directed fishing allowance was the exception (pollock), it will now become the method used for all groundfish CDQ allocations, with the possible exception of fixed gear sablefish.

III. Fisheries Management

Fisheries management issues under this section include: 1) regulation of harvest (**Subparagraph (B)(iv)**), and 2) the status of the CDQ reserve management action from the December 2005 Council meeting. Subparagraph (B)(iv) is proposed to be implemented under a regulatory amendment.

Implementation of Requirements for the Regulation of Harvest

Subparagraph (B)(iv) requires:

REGULATION OF HARVEST.—The harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated by the Secretary in a manner no more restrictive than for other participants in the applicable sector, including with respect to the harvest of nontarget species.

The BSAI fisheries with individual fishing quotas (IFQs) are halibut, fixed gear sablefish, and crab. The only BSAI fishery with fishing cooperatives is the Bering Sea pollock fishery, as established by the AFA. **Subparagraph (B)(iv) requires an assessment of the regulations governing CDQ allocations of halibut, fixed gear sablefish, crab, and pollock to identify regulations that are more restrictive than the regulations that apply in the applicable IFQ or cooperative fishery.** Regulations that are identified as inconsistent with the MSA must be revised through proposed and final rulemaking.

Initial assessment identifies three areas where the regulations governing the CDQ fisheries for halibut, fixed gear sablefish, or pollock are probably more restrictive than requirements that apply in the halibut or fixed gear sablefish IFQ fisheries or the pollock AFA fisheries. These three areas are: observer coverage requirements, catch retention requirements, and permit (LLP) requirements. A comparison and preliminary assessment is provided in **Table 3** and described in more detail below.

Observer coverage requirements

Observer coverage requirements for vessels 60 feet (') and greater length overall (LOA) fishing for halibut CDQ or using fixed gear to fish for sablefish CDQ are higher than observer coverage requirements for vessels fishing for halibut IFQ or fixed gear sablefish IFQ. There are no observer coverage requirements for vessels directed fishing for halibut IFQ if they are not also directed fishing for groundfish. Observer coverage requirements for catcher vessels fishing for non-CDQ groundfish are based on vessel length (no coverage, 30 percent, and 100 percent coverage levels). Observer coverage requirements for vessels fishing for groundfish CDQ, including sablefish, are: one observer on $\geq 60'$ catcher vessels and all pot catcher/processors, and two observers for catcher/processors using hook-and-line or trawl gear.

In 2005, five catcher vessels between 60' - 125' using pot gear and one catcher/processor (174' LOA) using hook-and-line gear harvested about 431 mt of fixed gear sablefish CDQ (203 mt in the BS and 224 mt in the AI). The five catcher vessels fished sablefish CDQ for a total of 216 days. If the same vessels had been fishing for sablefish IFQ, they would have been required to have 30 percent observer coverage. The hook-and-line catcher/processor fished for sablefish CDQ for three days. Catcher/processors are required to carry two observers while CDQ fishing, but they also have the option of submitting a request for approval of an alternative fishing plan that demonstrates that all CDQ catch can be observed by one observer. This catcher/processor was operating under an approved alternative fishing plan with one observer, which is the same observer coverage that would have been required if the vessel was sablefish IFQ fishing.

Two vessels between 60' - 125' fished for halibut CDQ in 2005. This resulted in approximately 40 days of observer coverage. The same vessels fishing for halibut IFQ would not have been required to carry observers. Most of the vessels that participate in the halibut CDQ fishery are $< 60'$. None of these vessels would have been required to carry observers under current CDQ requirements.

Thirty percent observer coverage is required for catcher vessels between 60' - 125', if the vessel is directed fishing for AFA pollock and 100 percent if the vessel is directed fishing for pollock CDQ. Therefore, the observer coverage requirements for this CDQ catcher vessel class are more restrictive than for the same AFA vessels while (non-CDQ) pollock fishing. However, in recent years, no catcher vessels that require observer coverage have participated in the pollock CDQ fisheries. Only catcher vessels delivering unsorted codends to motherships have participated in the pollock CDQ fisheries. These vessels are not required to have observers in either the CDQ or AFA pollock fisheries. Therefore, the revisions to CDQ observer coverage requirements to align pollock CDQ and pollock AFA requirements likely would have no practical effect on current observer coverage levels in the pollock CDQ fisheries.

Shoreside processors receiving deliveries from all catcher vessels groundfish CDQ fishing (including sablefish and pollock) and from vessels $\geq 60'$ halibut CDQ fishing are required to have an observer in the plant to monitor the CDQ delivery. Observers from vessels using nontrawl gear can serve as the plant observer for the CDQ deliveries. Observer coverage at a shoreside plant receiving sablefish IFQ deliveries is 0 percent, 30 percent, or 100 percent based on the amount of groundfish processed at the plant each month. Observer coverage in shoreplants taking deliveries of AFA pollock from catcher vessels is similar to the CDQ observer coverage requirements and requires an observer to monitor each delivery.

Table 3. Comparison of regulation of harvest regulations for the halibut, sablefish, pollock, and crab CDQ fisheries compared with regulations governing the IFQ and AFA fisheries for these species

Fishery and Vessel or Processor Category	Observer Coverage Requirements in the Non-CDQ fisheries	Observer Coverage Requirements in the CDQ fisheries	CDQ more restrictive?
<i>Halibut (compare with IFQ)</i>			
Catcher vessel <60' LOA	None	None	No
Catcher vessel ≥60' LOA	None	1 observer	Yes
Catcher/processor (HAL gear)	None	2 observers, unless 1 obs. is approved under an alternative fishing plan	Yes
Shoreside processor	None	Each landing by CDQ vessels =>60' LOA must be observed, may use observer from vessel	Yes
<i>Sablefish (compare with IFQ)</i>			
Catcher vessel <60' LOA	None	None	No
Catcher vessel ≥60' LOA	30% or 100% depending on LOA	1 observer	Yes
Catcher/processor (HAL gear)	0%, 30%, or 100% depending on LOA	2 observers, unless 1 obs. is approved under an alternative fishing plan	Yes
Catcher/processor (pot gear)	0% or 30% depending on LOA	1 observer	Yes
Shoreside processor	0%, 30%, 100% observer coverage based on processor's monthly production	Each landing by CDQ vessels =>60' LOA must be observed, may use observer from vessel	Yes
<i>Pollock (compare with AFA)</i>			
Catcher vessel <60' LOA	None	None	No
Catcher vessel 60' to 124' LOA	30% observer coverage	1 observer	Yes
Catcher vessel ≥125' LOA	100% observer coverage	1 observer	No
Catcher vessel, unsorted codends	None	None	No
Catcher/processor (trawl gear)	2 observers	2 observers, all hauls must be observed	No
Mothership	2 observers, all hauls must be observed	2 observers, all hauls must be observed	No
Shoreside processor	Each landing must be observed	Each landing must be observed	No
<i>Crab (compare with IFQ)</i>	Observer coverage requirements for the crab fisheries are established by the State of Alaska. Requirements do not differ for the IFQ and CDQ crab fisheries.		No

Fishery and Vessel or Processor Category	Requirements for vessels and processors in non-CDQ fisheries	Requirements for vessels and processors in CDQ fisheries	CDQ more restrictive?
Retention Requirements			
Catcher vessel <60' LOA, halibut	Halibut if available IFQ, rockfish and cod ¹	Rockfish and cod ¹	No
Catcher vessel <60' LOA, sablefish	Sablefish if available IFQ, rockfish and cod ¹	Rockfish and cod, ¹ all groundfish CDQ species if using CDQ catch accounting option 1 ²	Yes
Catcher vessel ≥60' LOA, halibut or sablefish	Halibut or sablefish if available IFQ, rockfish and cod ¹	Rockfish and cod, ¹ all groundfish CDQ species if using CDQ catch accounting option 1 ²	Yes
Catcher/processor, halibut or sablefish	Halibut or sablefish if available IFQ, rockfish and cod ¹	Rockfish and cod ¹	No
Catcher vessels, any length, pollock	Pollock and cod under IR/IU at §679.27	Pollock and cod under IR/IU at §679.27, all groundfish CDQ species	Yes
Catcher/processors or motherships, pollock	Pollock and cod under IR/IU at §679.27	Pollock and cod under IR/IU at §679.27	No
LLP Requirements			
Halibut	Vessels fishing only for halibut IFQ are not required to have an LLP.	Vessels fishing only for halibut IFQ are not required to have an LLP.	No
Sablefish	Vessels directed fishing for sablefish IFQ are exempt from LLP requirements.	Sablefish CDQ is not included in the LLP exemption for sablefish IFQ	Yes
Pollock	LLP is required	LLP is required	No

¹ Vessels fishing for halibut and sablefish IFQ, or halibut CDQ must retain all rockfish and Pacific cod, unless discard is required under 50 CFR part 679, subpart B, or by the State of Alaska.

² Retention is not required if the vessel is using catch accounting option 2, which relies on observer's species composition sampling for catch estimates.

Groundfish CDQ retention and accounting requirements

Catcher vessels $\geq 60'$ fishing for groundfish CDQ or halibut CDQ are required to retain all groundfish and have it sorted and weighed at a shoreside processor (unless they choose to use observer data for catch accounting, in which case they are required to have an observer sampling station). All of the catcher vessels using fixed gear in the CDQ fisheries have selected the option of retaining CDQ species and using landed catch weights rather than installing an observer sampling station and using observer data. The retention requirements exist to obtain accurate accounting of all species that accrue against the CDQ group's allocations. A similar retention requirement for these groundfish species does not exist in the halibut or fixed gear sablefish IFQ fisheries or in the pollock AFA fisheries, with the following two exceptions.

1. Vessels directed fishing for halibut or fixed gear sablefish in both the IFQ and CDQ fisheries are required to retain all of rockfish and Pacific cod.
2. Vessels using trawl gear in both the CDQ and non-CDQ groundfish fisheries are required to retain Pacific cod and pollock under regulations at 50 CFR 679.27.

Permit requirements

Federal regulations at 50 CFR 679.4(k) require vessel operators directed fishing for "license limitation groundfish" to have a License Limitation Program (LLP) license. Section 679.2 defines license limitation groundfish to exclude sablefish managed under the IFQ program, but does not exclude sablefish managed under the CDQ Program. The requirement to have an LLP license to use fixed gear to harvest CDQ sablefish probably would be considered more restrictive than the requirements that apply to the harvest of sablefish IFQ. The exemption to the definition of license limitation groundfish may need to be expanded to include sablefish CDQ harvested with fixed gear.

Crab regulation of harvest

An initial assessment of applicable regulations identified no differences that would be considered more restrictive for the crab CDQ allocations or fisheries relative to the crab IFQ allocations or fisheries.

Implementation of regulatory amendments

The areas of inconsistency in regulation of harvest identified above require analysis and revisions to Federal regulations. The analysis will require the identification of alternatives, or an explanation of why only one set of regulatory revisions will remove the inconsistencies between section 305(i)(1)(B)(iv) of the MSA. This analysis is in preparation and an update with more detail about the alternatives and scope of the analysis will be presented to the Council at its December 2006 meeting. If these regulatory amendments undergo review at two Council meetings and subsequent preparation of proposed and final rules, it is unlikely that regulatory changes will be effective until late 2007 or 2008.

One of the alternatives NMFS will consider in this analysis is whether fixed gear sablefish CDQ should be managed under the IFQ Program regulations, similar to halibut CDQ currently. This would ensure that the fixed gear sablefish CDQ allocations are not managed more restrictively than fixed gear sablefish IFQ, because these two program allocations would be managed under the same regulations. However, NMFS is seeking further input on other potential alternatives. A specific opportunity for input on all aspects of the issue will be provided when the initial draft analysis is presented to the Council.

NMFS also must address how to comply with the requirements of the MSA for the duration of 2006, as well as 2007. CDQ groups have indicated that they are, and will be, using about the same types and numbers of vessels as were used in 2005 to fish for their remaining 2006 halibut CDQ and fixed gear sablefish CDQ. Yukon Delta Fisheries Development Association has requested NMFS to issue an enforcement policy about observer coverage requirements for vessels fishing for sablefish CDQ (see Item C-2(f)) attached to the action memo for this issue). NMFS is coordinating a response to this letter with NMFS Enforcement and NOAA GC.

Status of CDQ Reserve Management Action

In December 2005, the Council recommended the following regulatory amendments for the management of groundfish CDQ reserves:

1. Remove the prohibition against allowing the transfer of groundfish CDQ or halibut PSQ from one CDQ group to another CDQ group to cover harvest overages.
2. Allocate only target species CDQ reserves among CDQ groups. CDQ target species allocations would be managed as hard caps and unallocated CDQ reserves would be managed as soft caps.

The Council adopted the following list of CDQ target and non-target species to be identified in Federal regulation:

CDQ Target Species		CDQ Non-Target Species
BS and AI pollock	Bogoslof pollock*	BSAI Alaska plaice **
BSAI Pacific cod		AI Greenland turbot **
BS and AI sablefish (fixed gear)		BSAI northern rockfish
BS and AI sablefish (from trawl allocation)*		BSAI other flatfish**
EAI/BS, CAI, and WAI Atka mackerel		BSAI shortraker rockfish
BSAI yellowfin sole		BSAI roughey rockfish
BSAI rock sole		BS and AI other rockfish
BS Greenland turbot		BS Pacific ocean perch
BSAI flathead sole		
EAI, CAI, and WAI Pacific ocean perch		Existing exceptions
BSAI arrowtooth flounder		BSAI other species (not allocated among groups)
		BSAI squid (not allocated to CDQ Program)

*A directed fishery was not allowed in the BSAI for these TAC categories, so these species would not be allocated to the CDQ Program in the future.

**These species were open to directed fishing in the BSAI in 2006, so these species would continue to be allocated to the CDQ Program in the future.

NMFS began developing a proposed rule for the CDQ reserve management action following the December 2005 Council meeting. NMFS suspended work on this rulemaking in March 2006, once it became apparent that elements of the Coast Guard Act would address some of the same issues addressed by the Council's action and, in some cases, would conflict with the Council's action.

The primary concern about the consistency between the MSA and the Council's recommendations relates to which groundfish species will continue to be allocated to the CDQ Program and how these allocations will be managed under Amendments 85 and 80. Three TAC categories that the Council recommended be designated as CDQ target species, allocated among the groups, and managed with a "hard cap" would not be allocated to the CDQ Program under NMFS's interpretation of section 305(i)(1)(B)(i) and (ii) of the MSA (pollock in the Bogoslof district and the trawl allocation of sablefish in the BS and AI). (See the previous discussion under Section II of this paper.)

If Amendments 85 and 80 are approved, most of the groundfish species allocated to the CDQ Program would be allocated as directed fishing allowances plus an amount needed for incidental catch in the CDQ fisheries. Although these species would continue to be allocated among the CDQ groups, the MSA would require NMFS to manage these allocations with soft caps. Therefore, the Council's December 2005 recommendation about continuing to manage CDQ target species allocations with hard caps would be inconsistent with the MSA.

Three of the TAC categories that the Council recommended be designated as CDQ nontarget species and not allocated among the CDQ groups would continue to be allocated to the CDQ Program under section 305(i)(1)(B)(i) of the MSA: Alaska plaice, Greenland turbot, and other flatfish. Directed fishing for these TAC categories was allowed in 2006. Therefore, the MSA would require allocation of these species to the CDQ Program. Under Amendment 80, NMFS will propose that 10 percent of the TACs for these species or species group would be allocated to the CDQ Program as a directed fishing allowance and continue to be allocated among the CDQ groups. Therefore, elements of the Council's December 2005 recommendations about the CDQ non-target species also would be inconsistent with the MSA.

Because the allocations and management of groundfish to the CDQ Program are now governed by the MSA, NMFS proposes to implement revisions to the regulations identifying which species are allocated to the CDQ Program, the percentage allocations, and the management of these CDQ allocations through the 2007/2008 groundfish specifications and Amendments 85 and 80. **Therefore, the regulatory revisions associated with the Council's December 2005 recommendations about how to manage the species allocated to the CDQ Program would not be further developed by NMFS as a separate regulatory action.**

NMFS has not yet fully evaluated how the amendments to the MSA affect the Council's recommendation to allow the transfer of groundfish CDQ or halibut PSQ between CDQ groups to cover harvest overages (after-the-fact transfers). Analysis of this question requires further legal interpretation of section 305(i)(1)(B)(i). Specifically, NMFS must determine what current management measures are included in the requirement that allocations to the CDQ Program continue to be managed based on existing practices as of March 1, 2006. In addition, NMFS must evaluate whether the Council's recommendation for after-the-fact transfers could be included in CDQ fisheries management measures implemented to support the changes in CDQ allocations and management of these allocations required under Amendments 85 and 80. If they cannot, the Council could consider recommending that NMFS continue to pursue allowing after-the-fact transfers by incorporating it into the regulatory amendment being prepared for regulation of harvest or as a separate regulatory action.

IV. Decennial review and allocation adjustment process

The Coast Guard Act maintains the current CDQ allocations among the groups (those in place as of March 1, 2006), and provides a process for adjusting the allocations among the groups, starting in 2012 and every ten years thereafter. The issues related to the review and readjustment process are the subject of this section: 1) decennial review and adjustment of allocations (**Subparagraph (H)**), and 2) definition of the Community Development Plan (**Subparagraph (J)**). Both of these provisions are proposed to be implemented under the same FMP/regulatory amendment.

Subparagraph (H) of the Act requires that the State of Alaska conduct a decennial review (starting in 2012 and every ten years thereafter) of the CDQ groups and make any adjustments to allocations that result from the review under State law. No role is required for the Secretary of Commerce in the review or allocation adjustment unless State law prevents the State from undertaking this responsibility. If State law does not allow the State to conduct this review and readjust the allocations among the groups, the Secretary of Commerce is required to do so. NMFS sent a letter to the State of Alaska on July 28, 2006, outlining subparagraph (H) of the Act and asking for a written legal determination by the State as to whether it has the legal authority to adjust CDQ allocations consistent with the requirements of the MSA.³ This determination will assist NMFS and the Council in determining whether FMP and/or Federal regulatory amendments are necessary to implement this provision.

The MSA provides specific authority for the State to conduct the review and allocation readjustment process without requiring a role for NMFS. If the State has this authority under its Constitution and laws to conduct the review and readjustment process consistent with the MSA, the Secretary of Commerce would not be required to review and approve the State's decisions, as has been the practice in past allocation processes. It is possible that NMFS's role could be limited to accepting a written decision from the State about the adjusted CDQ percentage allocations and, on the basis of this information, NMFS could establish the annual allocations to the CDQ groups of groundfish, halibut, and crab CDQ. Thus, the content and scope of the analysis to implement the decennial review and allocation adjustment process is dependent on whether or not the State has the authority to conduct this process.

In addition, **subparagraph (J)** of the Act defines the community development plan. This provision states that a CDP means a plan, prepared by a CDQ group, for the program that describes how the group intends: "i) to harvest its share of fishery resources allocated to the program, or ii) to use its share of fishery resources allocated to the program, and any revenue derived from such use, to assist its member villages with projects to advance economic development, but does not include a plan that allocates fishery resources to the program" [emphasis added]. (Note that while subparagraph (J) defines the CDP, subparagraph (I) explicitly states that the approval by the Secretary of a CDP, or an amendment to a CDP, is not required.⁴) Thus, at a minimum, current Federal regulations are inconsistent with the definition of a CDP in subparagraph (J) and must be revised. However, since current regulations require submission of a CDP only as application for allocations, this inconsistency may not require immediate action.

Both subparagraphs (H) and (J) address the decennial review process and adjustment in allocations, in that (H) appears to require the preparation and submission of the CDP defined in (J) in order for the State to conduct its review, recognizing that the CDP no longer represents an application for allocations. Staff intends to implement both subparagraphs (H) and (J) through the same regulatory amendment. **Because**

³Letter from Robert Mecum, Acting Administrator, Alaska Region, NMFS to William Noll, Commissioner, Dept. of Commerce, Community and Economic Development. July 28, 2006. This letter is Item C-2(c) attached to the C-2 action memo.

⁴See letter from Robert Mecum, Acting Administrator, Alaska Region, NMFS to William Noll, Commissioner, Dept. of Commerce, Community and Economic Development. August 30, 2006. This letter is Item C-2(e) attached to the C-2 action memo.

the analysis to implement these provisions depends heavily on whether or not the State has the authority to conduct the evaluation and reallocation process, staff recommends waiting to further analyze these subparagraphs until the State responds to the request for a determination of its authority. This is, in part, why staff is planning an FMP/regulatory amendment for the allocation issues in these paragraphs separate from BSAI Amendment 71/22. Staff recommends re-evaluating this plan if the State is unable to respond to NMFS's request by the February 2007 Council meeting.

The following are a few summary points regarding the plan for this FMP/regulatory amendment, depending on the State's response:

1. If the State does have the legal authority to conduct the review and readjustment process, staff needs to determine how and when the results of this process get communicated to NMFS in time to revise percentage allocations that are applied to annual CDQ allocations.
2. If the State determines that it does not have the authority to conduct the review and reallocation process, analysts would not have to spend a lot of time researching and explaining how the process would work if the State has this legal authority.
3. If the State determines that it does not have the authority to conduct the review and reallocation process on its own, then staff would develop alternatives for the process through which NMFS would consider adjustments to CDQ allocations on a decennial basis. In effect, the review and potential readjustment of CDQ percentage allocations would have to be done under the authority of the Secretary of Commerce, either through rulemaking or an administrative adjudication. NMFS would be responsible to ensure that the process used as a basis for any readjustment complied with all applicable Federal laws.
4. Under both scenarios, it is uncertain how changes would be made to prohibited species quota (PSQ) percentage allocations. This authority has not been delegated to the State under the MSA. The analysis must determine if the option exists to delegate this to the State or, because it is not explicitly included in the MSA, whether NMFS must take final agency action to change PSQ allocations.

V. Other administrative and oversight issues

The remaining Coast Guard Act provisions related to the administration and oversight of the CDQ Program that require changes to Federal regulations are intended to be implemented through a separate FMP/regulatory amendment. **These include those changes resulting from subparagraphs (A), (D), (E), and (I). The FMP amendment number will continue to be BSAI Am. 71 to the BSAI groundfish FMP and Amendment 22 to the crab FMP, as these numbers have previously been reserved for this action.** However, the proposed amendments will not mirror the Council's previous or current (as of December 2005) alternatives for BSAI Am. 71/22, as they must be revised to be consistent with the MSA amendments made through the Coast Guard Act.

Table 4, attached to this paper, provides a comparison of the Council's alternatives for BSAI Amendments 71/22 from December 2005 with the recent MSA amendments. Table 4 thus identifies which alternatives previously developed under Amendment 71/22 are no longer consistent with the MSA. This table includes the differences between the State of Alaska Blue Ribbon Panel's recommendations (Alternative 3) and the MSA. The amendments to the MSA implement many of the Blue Ribbon Panel's recommendations, but there are some provisions that vary.

In brief, this preliminary review shows that Alternative 1 (no action) and Alternative 2 are not consistent with the revised MSA. In December 2006, staff intends to provide a discussion paper that will: 1) propose to restructure the alternatives for BSAI Amendments 71/22 such that they are consistent with the MSA amendments, and 2) identify potential options under the discretionary issues that appear to allow for decisions by the Council. Initial review of this amendment package would be tentatively scheduled for February 2007.

The remainder of this section reviews subparagraphs (A), (D), (E), and (I) that will be implemented through Am. 71/22. There are several discretionary and non-discretionary issues related to these subparagraphs. Meaning, some provisions of the Coast Guard Act are specific and explicit requirements, and others provide an opportunity for the Council to develop and evaluate options for their implementation. Staff divided the non-discretionary and discretionary issues as follows for further discussion.

The **non-discretionary** requirements are primarily in subparagraphs (A), (D), and (I) as follows:

- new statement of program purpose (A)
- explicit list of eligible communities and the CDQ groups that may represent them (D)
- approval of CDPs and CDP amendments is not required (I)

The major **discretionary** issues are associated with changes needed in Federal regulations to implement the requirements related to eligibility requirements for the CDQ groups in subparagraph (E):

- composition of board of directors (E)(i)
- election of CDQ Panel members (E)(ii)
- allowable investments (E)(iii) and (iv)
- statement of compliance (E)(v)
- other CDQ Panel requirements (E)(vi)

Non-discretionary requirements

First, **subparagraph (A)** creates a new purpose statement for the CDQ Program:

*“(A) IN GENERAL. – There is established the western Alaska community development quota program in order –
(i) to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area;
(ii) to support economic development in western Alaska;
(iii) to alleviate poverty and provide economic and social benefits for residents of western Alaska; and
(iv) to achieve sustainable and diversified local economies in western Alaska.”*

Amendments 71/22 would add this purpose statement to the BSAI groundfish FMP and remove the current statement of purpose in Federal regulations at 50 CFR 679.1(e). There are no options associated with this subparagraph.

Second, **subparagraph (D)** lists each of the 65 eligible villages in the CDQ Program, as well as the CDQ group through which each village is allowed to participate. The list of communities in subparagraph (D) supersedes the MSA *criteria* for eligible villages, such that no new communities can become eligible for the program in the future. The subparagraph also requires that communities can only participate through the CDQ group listed in the MSA; thus, a community can no longer change to a different CDQ group or form a new CDQ group and continue its eligibility in the program. Amendment 71/22 would thus: 1)

revise Table 7 in Federal regulations to list all 65 eligible communities; 2) add the list of 65 eligible communities to the BSAI FMP; and 3) remove the community eligibility criteria from the BSAI groundfish FMP and Federal regulations. There are no options associated with this subparagraph.

Note that the Council took action on eligible communities in April 2006.⁵ This action was necessary to make the BSAI groundfish and crab FMPs and regulations consistent with the MSA and the 2005 transportation act (SAFETEA-LU).⁶ While not yet submitted to the Secretary of Commerce, this action would modify the community eligibility criteria in regulation to exactly conform to the criteria listed in the MSA, as well as clarify that all 65 currently participating communities are eligible. In addition, this action would establish a process in Federal regulations by which communities not listed as eligible in regulation can apply and be evaluated for eligibility in the program using the same criteria. At the time the Council took action on this issue, it was noted that this action would be affected by the 2006 Coast Guard Act, if approved. As noted above, the MSA amendments made through the Coast Guard Act limit eligible communities to only those 65 currently participating and remove the community eligibility criteria. Thus, prior to final action on Amendment 71/22, the Council will likely need to rescind its previous action on eligible communities from April 2006.

In addition, Amendments 71/22 would reorganize and update the CDQ sections in the BSAI crab FMP, and would refer readers to the BSAI groundfish FMP for detail as appropriate. These housekeeping items were also included in the eligible communities amendment package the Council approved in April 2006.

Finally, **subparagraph (I)** addresses the approval of the community development plan (CDP):

“(I) SECRETARIAL APPROVAL NOT REQUIRED. – Notwithstanding any other provision of law or regulation thereunder, the approval by the Secretary of a community development plan, or an amendment thereof, under the program is not required.”

Subparagraph (I) is interpreted by NOAA GC to mean that the Secretary of Commerce may not require approval of CDPs or amendments to CDPs. Because current Federal regulations⁷ require such approval, current regulations are more restrictive than the MSA. Amendment 71/22 would thus remove Federal regulations for this requirement. There are no options associated with this subparagraph.

Note that the State has already sent a written request (August 3, 2006) to NMFS for a determination on whether approval of substantial amendments to CDPs is still required under the MSA amendments, as two substantial amendments have recently been proposed and submitted by a CDQ group to the State. NMFS determined that certain regulations related to the submission, review, and approval or disapproval by NMFS of CDPs and CDP amendments, the annual budget report, and the annual budget reconciliation report, are inconsistent with subparagraph (I) of the MSA. Thus, while these Federal regulations are proposed to be revised through Amendment 71/22, NMFS is suspending enforcement of these particular regulations until such time that rulemaking can be completed. NMFS's response to the State and the regulations at issue are attached to the action memo for this agenda item (Item C-2(e)).

⁵BSAI Amendment 87 to the BSAI Groundfish FMP and Amendment 21 to the BSAI King and Tanner Crab FMP and regulatory amendments.

⁶Safe, Accountable, Flexible, Efficient Transportation Equity Act (August 2005).

⁷Regulations at 50 CFR 679.30(d) requires NMFS to approve CDPs. Regulations at 50 CFR 679.30(g)(4) and (5) require the submission of CDP amendments and the review and approval of amendments by NMFS.

Discretionary requirements

The major discretionary issues are associated with changes needed in Federal regulations to implement **subparagraph (E)**. This subparagraph creates a new section that lists six requirements for participating CDQ groups. These requirements are proposed to be listed in Federal regulation under Amendments 71/22:

- composition of board of directors (E)(i)
- election of CDQ Panel members (E)(ii)
- allowable investments (E)(iii) and (iv)
- statement of compliance (E)(v)
- other CDQ Panel requirements (E)(vi)

Subparagraph (E)(i) requires that the CDQ group shall be governed by a Board of Directors, 75% of the members of which are resident fishermen from the entity's member villages. It further requires that the Board shall include at least one director selected by each such member village. Current Federal regulations at 50 CFR 679.2 require that the Board be comprised of at least 75% resident fishermen of the community or group of communities. Thus, while Federal regulations would be revised under Amendments 71/22 to use the same wording as (E)(i), current regulations are not inconsistent with the MSA.

Subparagraph (E)(ii) requires that the CDQ group shall elect a representative to serve on the CDQ Panel established under subparagraph (G). The functions of the CDQ Panel are listed such that the panel shall: 1) administer those aspects of the program not otherwise addressed in the paragraph, either through private contractual arrangement or through recommendations to the Council, Secretary, or State of Alaska; and 2) coordinate and facilitate activities of the entities under the program. The panel can only act by unanimous vote of all six members. Recall from Table 1, that at this point, the CDQ Panel establishment, functions, and decision making processes under subparagraph (G) do not appear to require changes to the FMPs or Federal regulations. (If revisions are identified in the future, staff could include those in Amendments 71/22.) Thus, staff currently proposes to limit Amendments 71/22 to adding the requirement to Federal regulations that each CDQ group must identify a CDQ Panel representative, as this is included in the requirements to participate in the CDQ Program under subparagraph (E).

Subparagraphs (E)(iii) and (iv) govern allowable investments by the CDQ groups, and Subparagraph (v) requires submission of an annual statement of compliance to the Secretary and the State, summarizing the purposes for which each group made such investments. Subparagraph (E)(iii) allows each CDQ group to make up to 20% of its annual investments in any combination of the following:

- (I) *For projects that are not fishery-related and that are located in its region.*
- (II) *On a pooled or joint investment basis with one or more other entities participating in the program for projects that are not fishery-related and that are located in one or more of their regions.*
- (III) *For matching Federal or State grants for projects or programs in its member villages without regard to any limitation on the Federal or State share, or restriction on the source of any non-Federal or non-State matching funds, of any grant program under any other provision of law.*

Subparagraph (E)(iv) states:

“The entity shall make the remainder percent of its annual investments in fisheries-related projects or for other purposes consistent with the practices of the entity prior to March 1, 2006.”

Note that the alternatives currently in Amendment 71/22 provide various options for the type of allowable investments and the amount that the CDQ groups may invest in non-fisheries related projects (see Table 3). These alternatives are no longer consistent with the MSA, and thus, should not continue to be included for further analysis in Am. 71/22. **However, there appears to be discretion for the Council to choose options to both define terms under subparagraph (E)(iii)-(v) and/or to determine NMFS’s role in monitoring compliance with these requirements. Because limitations on allowable investments are explicitly provided for in the Act, it is assumed that the Federal government may have some role in the evaluation and/or oversight of compliance with these requirements.**

Subparagraphs (E)(iii), (iv), and (v) allow for various alternatives to implement the requirements related to allowable investments. The following represent possible alternatives for Council consideration, which address: 1) the elements of the MSA requirements that would be included in NMFS regulations, and 2) the extent to which NMFS would monitor or evaluate compliance with the allowable investment requirements. These could be included in Am. 71/22, depending on the legal interpretation of these requirements:

Alternative 1: No Action

Alternative 1 would allow the MSA requirements to stand on their own without associated Federal regulations. Because specific Federal regulations that govern allowable investments currently do not exist, there is no need to revise current regulations. If no changes were made to the FMP and regulations under Alternative 1, the MSA would provide the applicable requirements for limitations on investments and the requirement to submit the statement of compliance to the Secretary and State. Legal interpretation will inform whether this is a viable alternative, or viable in part. For example, NOAA GC may need to determine whether the MSA requirement that the CDQ groups submit a statement of compliance requires NMFS to implement regulations governing the submission of this report. This alternative will need to be evaluated regardless, in terms of the analytical need to describe the status quo.

Alternative 2: Require submission of the statement of compliance by a specific date

Alternative 2 would revise Federal regulations to require the submission of the statement of compliance by a specific date. This alternative represents a very limited role for NMFS. The regulations could be limited to the exact language in the MSA, without further definitions or clarifications, and establish a date at which the report is due to NMFS. The intent under this alternative is that NMFS would accept a signed certification that the report was accurate and would not independently evaluate the accuracy of the report unless some other information provided to NMFS indicated that a false statement had been filed. NMFS would need to determine the consequences of not submitting a report by the date required (e.g., enforcement action, permit sanction, etc.).

Alternative 3: Limited role for NMFS

Alternative 3 could represent a role for NMFS in the substance and format of the statement of compliance, but would not require NMFS to determine whether each CDQ group complied with the limitations on allowable investments. Federal regulations could be revised to: 1) include the MSA language governing allowable investments; 2) define specific terms (e.g. investment, fishery-related, CDQ region, other purposes consistent with the practices of the entity prior to March 1, 2006); 3) specify

the format and contents of the statement of compliance, and 4) specify the submission date of the statement of compliance.

Similar to Alternative 2, NMFS would accept that a signed certification was accurate and would not independently evaluate the accuracy or completeness of the report unless some other information provided to NMFS indicated that a false statement had been filed. In effect, the regulations would provide the CDQ groups with increased detail on the meaning of the terms in the MSA and provide a standardized format for the statement of compliance. This may help guide the CDQ groups to ensure that they are in compliance with the MSA; however, this alternative does not differ from Alternative 2 in that NMFS does not evaluate the report for accuracy.

Alternative 4: NMFS actively monitors compliance with MSA requirements

Like Alternative 3, Alternative 4 would revise Federal regulations to: 1) include the MSA language governing allowable investments; 2) define specific terms (e.g. investment, fishery-related, CDQ region, other purposes consistent with the practices of the entity prior to March 1, 2006); 3) specify the format and contents of the statement of compliance, and 4) specify the submission date of the statement of compliance.

However, Alternative 4 would provide for an increased oversight role for NMFS compared to Alternative 3. NMFS would require the submission of more detailed information about investments by the CDQ groups in order to evaluate: the total amount invested each year in each category by the CDQ group; the classification of investments into the two categories (generally fisheries related versus non-fisheries related); and whether the CDQ group complied with the spending limits in the MSA. This information could be required as part of the statement of compliance or required separately.

Legal interpretation will inform whether this alternative would be consistent with the MSA. For example, NOAA GC may need to determine whether NMFS has the authority to define specific terms (e.g., CDQ region, investment, etc.), and whether NMFS can require the submission of more detailed information than a 'summary'. This legal guidance is necessary as summary information in the statement of compliance would not provide adequate information to evaluate or verify whether the CDQ groups were complying with the MSA requirements.

In sum, staff proposes that the alternatives for BSAI Am. 71/22 be modified to reflect the changes resulting from the Coast Guard Act related to administrative and government oversight issues (Subparagraphs (A), (D), (E), and (I)). In effect, alternatives and options that are no longer consistent with the MSA would be removed, and new alternatives and options could be added relative to the issues in which the Council may have additional discretion. Staff will provide a discussion paper in December 2006 to facilitate this effort, with a proposed restructuring of the alternatives.

VI. Summary

There is no action required by the Council at this meeting. The purpose of this report is to inform the Council about the plan to implement the various elements of the Coast Guard Act relevant to the CDQ Program. The MSA revisions can be categorized into four general issues: allocations; fisheries management; decennial review and adjustment of allocations; and administration and oversight. At this time, staff intends to implement the provisions of the Act through seven separate FMP and/or regulatory amendments. In December, staff plans to provide a discussion paper with proposed changes to the alternatives and options for BSAI Am. 71/22, in order to facilitate Council action to modify those alternatives to implement the administrative and oversight provisions consistent with the MSA.

**Table 4. Comparison of current Amendment 71/22 alternatives with MSA amendments
(An "X" through the cell identifies alternatives previously developed for Amendment 71 that are no longer consistent with the MSA)**

Component	Alternative 1 (no action)	Alternative 2 (preferred alt from June 2002)	Alternative 3 (Blue Ribbon Panel)	MSA Amendments under 2006 Coast Guard Bill
1. Role of government in oversight	Not specifically defined. No revisions to current regulations.	Define the role of government oversight in the CDQ Program.	Option 1: State conducts nonbinding review of proposed major investments and "transparency" reporting by Div. of Banking & Securities. Option 2: Minimum role of NMFS and Council to maximum extent permissible.	Likely not necessary to specifically define in FMP or regulations, because the MSA now provides specific requirements.
2. Extent of government oversight	No revisions to current regulations.	Oversight extends to CDQ groups and >50% owned subsidiaries.	State would implement regulations for financial reporting requirements similar to ANCSA Corps., annual report to communities, disclosure of compensation. State would provide annual report to Council, including copies of each CDQ group's annual report to communities.	Defined by specific requirements in the MSA. Removes requirement for approval of community development plans and amendments by NMFS.
3. Allowable investments	No revisions to current regulations.	CDQ groups may invest up to 20% of previous year's pollock royalties in non-fisheries projects in the CDQ region.	CDQ groups may invest up to 20% of net revenues in non-fisheries related projects in the CDQ region.	CDQ groups may invest up to 20% of annual investments in non-fisheries related projects, etc.
4. CDQ Program purpose	No revisions to statement of purpose in §679.1(e).	Revised statement of purpose for the CDQ Program.	Revised statement of purpose for the CDQ Program (two options).	MSA contains a specific statement of the purpose of the CDQ Program, (different from Alt. 1 – 3).
5. Process by which CDQ allocations are made	Allocations made by NMFS informal administrative adjudication based on recommendations from State.	Options to continue current allocation process or to make CDQ allocations through rulemaking.	Allocations would continue to be made through NMFS informal adjudication based on recommendations from the State.	MSA requires decennial review and allocation adjustment process for CDQ percentage allocations. MSA requires State to conduct this process, if authority allows. NMFS informal adjudication may be an alternative for this process, depending on State's authority.

6. Fixed versus performance-based allocations	100% of CDQ is allocated on a competitive basis.	100% of CDQ is allocated on a competitive basis.	85% - 95% of each percentage allocation of <i>CDQ</i> and <i>PSQ</i> to a group is fixed, 5% - 15% is variable every allocation cycle.	90% of each percentage allocation of CDQ to a group is fixed, 10% is variable. No requirement related to PSQ percentage allocations.
7. CDQ allocation evaluation criteria	Specific evaluation criteria are in State regulations and are not specified in Federal regulations.	List of 10 evaluation criteria that would be added to NMFS regulations. Population is the only one of these ten criteria that is consistent with MSA criteria.	List of 6 evaluation criteria: 1. population/poverty level 2. # of jobs created 3. amt of in-region investment in fisheries and non-fisheries 4. amt and # of scholarships & training 5. community econ development 6. financial performance of CDQ group	MSA requires four specific evaluation criteria: 1. population, poverty level & econ development 2. financial performance of CDQ group 3. employment, scholarships, training 4. achievement of goals of the group's CDP
8. Duration of the allocation cycle	Variable cycle length, as determined by the State. Length of allocation cycle not in Federal regulations.	3-year allocation cycle.	10-year allocation cycle to coincide with US Census. First 10-year cycle would be 2012 - 2021.	10-year allocation cycle to coincide with US Census. First 10-year cycle would be 2012 - 2021. First review would be conducted in 2012.
PROPOSED NEW COMPONENTS TO INCLUDE UNDER AM. 71/22				
9. Eligible communities	n/a	n/a	n/a	Provides list of eligible communities and the CDQ groups under which they may participate.
10. Eligibility requirements for CDQ groups	n/a	n/a	n/a	MSA lists eligibility requirements for CDQ groups to participate in the program: 1. Board of Directors must be 75% resident fishermen from group's member villages. 2. Each group elects a rep to serve on CDQ Panel. 3. Allowable investments (see component 3) 4. Each group shall submit an annual statement of compliance to the SOC and State of Alaska.

Table 5. Summary of issues and management measures necessary to implement the MSA amendments made through the 2006 Coast Guard Act

Provision (referring to new subparagraphs of MSA section 305(i)(1))	Summary of the issue and FMP and regulatory amendments that are required to implement provisions
<p>(1) Western Alaska Community Development Quota Program.— (A) In General.—There is established the western Alaska community development quota program in order— (i) to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area; (ii) to support economic development in western Alaska; (iii) to alleviate poverty and provide economic and social benefits for residents of western Alaska; and (iv) to achieve sustainable and diversified local economies in western Alaska.</p>	<p>The MSA statement of the purpose of the CDQ Program is different from the purpose in the BSAI groundfish FMP and 50 CFR part 679. Revise FMP amendment and regulations text to be consistent with the MSA through BSAI Amendment 71/22.</p>
<p>(B) Program Allocation. (i) In General.—Except as provided in clause (ii), the annual percentage of the total allowable catch, guideline harvest level, or other annual catch limit allocated to the program in each directed fishery of the Bering Sea and Aleutian Islands shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006, for the program. The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and nontarget needs based on existing practice with respect to the program as of March 1, 2006, for each fishery.</p>	<p>NMFS interprets “each directed fishery” to mean that TAC categories without a directed fishery in the BSAI in 2006 would no longer be allocated to the CDQ Program. NMFS will propose to no longer allocate the following species to the CDQ Program in the 2007/2008 groundfish specifications, and in the future: pollock in the Bogoslof district, sablefish from the trawl allocation, BS POP, northern rockfish, shortraker rockfish, rougheye rockfish, other rockfish, and other species.</p>
<p>(B)(ii) Exceptions.—Notwithstanding clause (i)— (1) the allocation under the program for each directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) shall be a directed fishing allocation of 10 percent upon the establishment of a quota program, fishing cooperative, sector allocation, or other rationalization program in any sector of the fishery; and</p>	<p>BSAI Amendment 85 and Amendment 80 trigger the requirements of this paragraph. Appropriate FMP and regulatory amendments will be made through those amendment packages.</p>

<p>(B)(ii) Exceptions. (II) the allocation under the program in any directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) established after the date of enactment of this subclause shall be a directed fishing allocation of 10 percent.</p>	<p>No FMP or regulatory amendments are needed unless a new BSAI directed fishery is established in the future.</p>
<p>(B) (iii) Processing and other rights. (iii) Processing and other rights.—Allocations to the program include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.</p>	<p>Initial assessment has not identified any FMP or regulatory amendments that would be needed for this provision because, as described in the legislative intent, this subparagraph reflects current practices under the FMPs and federal regulations.</p>
<p>(B)(iv) Regulation of Harvest.—The harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated by the Secretary in a manner no more restrictive than for other participants in the applicable sector, including with respect to the harvest of nontarget species.</p>	<p>This paragraph affects the regulations governing CDQ allocations and fisheries for halibut, fixed gear sablefish, pollock, and crab (the species with IFQ programs or cooperatives). It will primarily require amendments to regulations for halibut and fixed gear sablefish CDQ fisheries and, to a lesser extent, pollock CDQ. An initial assessment has not identified any revisions required for crab CDQ. A separate regulatory amendment package will be prepared to implement these requirements.</p>
<p>(C) Allocations to entities.—Each entity eligible to participate in the program shall be authorized under the program to harvest annually the same percentage of each species allocated to the program under subparagraph (B) that it was authorized by the Secretary to harvest of such species annually as of March 1, 2006, except to the extent that its allocation is adjusted under subparagraph (H). Such allocation shall include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.</p>	<p>A notice was published in the <i>Federal Register</i> on August 31, 2006, listing the percentage allocations among the CDQ groups of groundfish, halibut, and crab that were in effect on March 1, 2006. These percentage allocations will be in effect unless changed under the decennial review and allocation adjustment process described in subparagraph (H). The first review is required to occur in 2012. The MSA amendments did not address the percentage allocations of prohibited species quota among the CDQ groups. The percentage allocations initially approved by NMFS on January 17, 2003, will be in effect under an administrative determination issued by NMFS on September 7, 2005. The process for changing PSQ percentage allocations should be evaluated through the FMP and regulatory amendment package for the decennial review and allocation adjustment process under subparagraph (H).</p>
<p>(D) Eligible Villages.—The following villages shall be eligible to participate in the program through the following entities: ...</p>	<p>Supersedes Council's April 2006 action on consistency with SAFETEA-LU under Amendments 87/22. Requires communities to be associated with specific CDQ groups. Action is to add the list of CDQ groups and associated eligible communities to FMPs and revise Table 7 to 50 CFR part 679 through revised Amendment 71/22.</p>

<p>(E) Eligibility Requirements for Participating Entities.—To be eligible to participate in the program, an entity referred to in subparagraph (D) shall meet the following requirements:</p>	<p>NMFS interprets the provisions of subparagraph (E) as eligibility requirements for participation in the CDQ Program and receipt of CDQ allocations.</p>
<p>(i) Board of Directors. —The entity shall be governed by a board of directors. At least 75 percent of the members of the board shall be resident fishermen from the entity’s member villages. The board shall include at least one director selected by each such member village.</p>	<p>These are the same requirements as currently exist in §679.2, (definition of qualified applicant for the CDQ Program). Compliance information was collected through the CDPs, so a different means of collecting verification of compliance with this requirement will have to be developed. Suggest including in revised Amendment 71/22.</p>
<p>(ii) Panel Representative. —The entity shall elect a representative to serve on the panel established by subparagraph (G).</p>	<p>Develop regulations needed to confirm compliance with this eligibility requirement through revised Amendment 71/22.</p>
<p>(iii) Other Investments. —The entity may make up to 20 percent of its annual investments in any combination of the following:</p> <p>(I) For projects that are not fishery-related and that are located in its region.</p> <p>(II) On a pooled or joint investment basis with one or more other entities participating in the program for projects that are not fishery-related and that are located in one or more of their regions.</p> <p>(III) For matching Federal or State grants for projects or programs in its member villages without regard to any limitation on the Federal or State share, or restriction on the source of any non-Federal or non-State matching funds, of any grant program under any other provision of law.</p> <p>(iv) Fishery-Related Investments.—The entity shall make the remainder percent of its annual investments in fisheries-related projects or for other purposes consistent with the practices of the entity prior to March 1, 2006.</p> <p>(v) Annual Statement of Compliance.—Each year the entity, following approval by its board of directors and signed by its chief executive officer, shall submit a written statement to the Secretary and the State of Alaska that summarizes the purposes for which it made investments under clauses (iii) and (iv) during the preceding year.</p>	<p>A requirement for the submission of the annual statement of compliance should be added to NMFS regulations as a condition of eligibility for the CDQ Program. Assess alternatives for implementation of this requirement and whether any other elements of (E)(iii) and (iv) need to be in Federal regulations through revised Amendment 71/22.</p>
<p>(vi) Other Panel Requirements.—The entity shall comply with any other requirements established by the panel under subparagraph (G).</p>	<p>Assess how (or whether) compliance with this provision should be included in NMFS regulations as a requirement for eligibility for the CDQ Program under revised Amendment 71/22.</p>

<p>(F) Entity Status, Limitations, and Regulation. The entity— (i) shall be subject to any excessive share ownership, harvesting, or processing limitations in the fisheries of the Bering Sea and Aleutian Islands Management Area only to the extent of the entity’s proportional ownership, excluding any program allocations, and notwithstanding any other provision of law;</p>	<p>Initial assessment indicates that this provision will require amendments to the BSAI crab FMP and regulations at 50 CFR part 679 (AFA) and 680 (crab). Assess alternatives and impacts through a separate FMP and regulatory amendments package, as opposed to Amendment 71/22.</p> <p>NMFS is assessing a request from one of the CDQ groups to issue an interpretation of how to apply this provision to transfers until regulations can be revised.</p>
<p>(F) (ii) shall comply with State of Alaska law requiring annual reports to the entity’s member villages summarizing financial operations for the previous calendar year, including general and administrative costs and compensation levels of the top 5 highest paid personnel; (iii) shall comply with State of Alaska laws to prevent fraud that are administered by the Alaska Division of Banking and Securities, except that the entity and the State shall keep confidential from public disclosure any information if the disclosure would be harmful to the entity or its investments; and (iv) is exempt from compliance with any State law requiring approval of financial transactions, community development plans, or amendments thereto, except as required by subparagraph (H).</p>	<p>Initial assessment has not identified any FMP or regulatory amendments that would be needed for this provision. Requirements to implement these provisions would be implemented, monitored, and enforced by the State of Alaska.</p>
<p>(G) Administrative Panel. (i) Establishment.—There is established a community development quota program panel. (ii) Membership.—The panel shall consist of 6 members. Each entity participating in the program shall select one member of the panel. (iii) Functions.—The panel shall— (I) administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, as the case may be; and (II) coordinate and facilitate activities of the entities under the program. (iv) Unanimity required.—The panel may act only by unanimous vote of all 6 members of the panel and may not act if there is a vacancy in the membership of the panel.</p>	<p>Initial assessment has not identified any FMP or regulatory amendments that would be needed for this provision.</p>

(H) Decennial Review and Adjustment of Entity Allocations.

(i) In general.—During calendar year 2012 and every 10 years thereafter, the State of Alaska shall evaluate the performance of each entity participating in the program based on the criteria described in clause (ii).

(ii) Criteria.—The panel shall establish a system to be applied under this subparagraph that allows each entity participating in the program to assign relative values to the following criteria to reflect the particular needs of its villages: **(I)** Changes during the preceding 10-year period in population, poverty level, and economic development in the entity's member villages. **(II)** The overall financial performance of the entity, including fishery and nonfishery investments by the entity. **(III)** Employment, scholarships, and training supported by the entity. **(IV)** Achieving of the goals of the entity's community development plan.

(iii) Adjustment of allocations.—After the evaluation required by clause (i), the State of Alaska shall make a determination, on the record and after an opportunity for a hearing, with respect to the performance of each entity participating in the program for the criteria described in clause (ii). If the State determines that the entity has maintained or improved its overall performance with respect to the criteria, the allocation to such entity under the program shall be extended by the State for the next 10-year period. If the State determines that the entity has not maintained or improved its overall performance with respect to the criteria—**(I)** at least 90 percent of the entity's allocation for each species under subparagraph (C) shall be extended by the State for the next 10-year period; and **(II)** the State may determine, or the Secretary may determine (if State law prevents the State from making the determination), and implement an appropriate reduction of up to 10 percent of the entity's allocation for each species under subparagraph (C) for all or part of such 10-year period.

(iv) Reallocation of reduced amount.—If the State or the Secretary reduces an entity's allocation under clause (iii), the reduction shall be reallocated among other entities participating in the program whose allocations are not reduced during the same period in proportion to each such entity's allocation of the applicable species under subparagraph (C).

The State is required to conduct the decennial review and evaluation of the CDQ group's performance based on criteria in (H)(ii). The CDQ Panel is required to participate in the process.

(H)(iii)(II) authorizes the State to adjust up to 10 percent of a CDQ group's percentage allocation. If State law prevents the State from undertaking this responsibility, the MSA authorizes the Secretary of Commerce to adjust allocations. On July 28, 2006, NMFS wrote a letter to the State asking it to make a determination about its legal authority to conduct the allocation adjustments authorized by the MSA. NMFS has not yet received a response from the State.

The analysis of alternatives to implement this subparagraph will differ depending on the State's authority to conduct allocation adjustments and the role required for the Secretary of Commerce. Staff advises analyzing these alternatives in an FMP and regulatory amendment package separate from revised Amendment 71/22. Regulations for the decennial review and allocation adjustment process are not needed as soon as regulations for other provisions of the Coast Guard Act (first review not required until 2012). In addition, addressing this subparagraph in a separate FMP and regulatory amendment package would provide the State more time to respond to NMFS's letter.

<p>(I) Secretarial Approval Not Required.—Notwithstanding any other provision of law or regulation thereunder, the approval by the Secretary of a community development plan, or an amendment thereof, under the program is not required.</p>	<p>NMFS issued an interpretation and interim policy suspending enforcement of requirements to submit Community Development Plans (CDPs), amendments to CDPs, the annual budget report, and the annual budget reconciliation report on August 30, 2006. Regulations for these requirements should be removed as soon as possible through Amendment 71/22. Any new requirements for CDPs would be considered in the FMP and regulatory amendment package for the decennial review and allocation adjustment process under subparagraph (H).</p>
<p>(J) Community Development Plan Defined.—In this paragraph, the term ‘community development plan’ means a plan, prepared by an entity referred to in subparagraph (D), for the program that describes how the entity intends—(i) to harvest its share of fishery resources allocated to the program, or (ii) to use its share of fishery resources allocated to the program, and any revenue derived from such use, to assist its member villages with projects to advance economic development, but does not include a plan that allocates fishery resources to the program.</p>	<p>(H)(ii)(IV) requires information from the CDPs to be used in the decennial review of the CDQ group’s performance. Therefore, some form of a CDP will continue to be part of the CDQ Program. Assessment of the future role of the CDP will be included in the FMP and regulatory amendment package developed for the decennial review and allocation adjustment process under subparagraph (H).</p>



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

September 25, 2006

MEMORANDUM FOR: Doug Mecum
Acting Regional Administrator, Alaska Region

Sue Salvesson
Assistant Regional Administrator for Sustainable Fisheries,
Alaska Region

THROUGH: Lisa L. Lindeman *Lisa Lindeman*
Alaska Regional Counsel

FROM: *Lauren Smoker*
Lauren Smoker
Attorney, NOAA General Counsel

SUBJECT: Section 305(i)(1)(B) of the Magnuson-Stevens Act and its
applicability to Amendment 85

This memorandum responds to your request for a legal opinion concerning specific language in section 305(i)(1)(B) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the section's applicability to Amendment 85 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP).

STATEMENT OF ISSUES

- (1) What is the meaning of the phrase "directed fishing allocation" in section 305(i)(1)(B)(ii)(I) of the Magnuson-Stevens Act?
- (2) What is the meaning of the word "establishment" in section 305(i)(1)(B)(ii)(I)?
- (3) Does section 305(i)(1)(B)(ii)(I) require that Amendment 85 include a directed fishing allocation of 10 percent of Pacific cod to the CDQ program?

SHORT ANSWERS

- (1) Although undefined, the meaning of the phrase "directed fishing allocation" in section 305(i)(1)(B)(ii)(I) is plain given the statutory language of section 305(i)(1)(B) and the Magnuson-Stevens Act. "Directed fishing allocation" means an amount of fish allocated to the Western Alaska Community Development Quota (CDQ) Program that is for directed fishing and that does not include amounts needed for incidental catch or



bycatch. Amounts needed for incidental catch and bycatch would be in addition to the statutorily prescribed directed fishing allocation.

(2) Although undefined, only one reasonable interpretation of the word “establishment” is available given the statutory language of the Magnuson-Stevens Act. The plain meaning of the word “establishment” is the date on which fishing commences under an approved quota program, fishing cooperative, sector allocation or other rationalization program. If Amendment 85 is approved by NMFS, the changes mandated by section 305(i)(1)(B)(ii)(I) will take effect on the date fishing commences under the Amendment 85 BSAI Pacific cod allocations.

(3) Because Amendment 85 is a sector allocation program, it must include measures that are consistent with section 305(i)(1)(B)(ii)(I) when the North Pacific Fishery Management Council (Council) submits it to the Secretary for review in accordance with sections 304(a) and (b) of the Magnuson-Stevens Act. A statement within the legislative history that indicates different effective dates for section 305(i)(1)(B)(ii)(I) in regards to Pacific cod does not override the statutory language.

BACKGROUND

A. Amendment 85

In April 2006, the Council adopted Amendment 85 to the FMP. Among other things, Amendment 85 would allocate specific percentages of BSAI Pacific cod among various non-CDQ sectors currently operating in the fishery as follows:

Jig Catcher Vessels (CVs)	1.4%	Pot Catcher Processors (CPs)	1.5%
<60' Hook-and-line/Pot CVs	2.0%	Hook-and-line CPs	48.7%
≥60' Hook-and-line CVs	0.2%		
≥60' Pot CVs	8.4%	AFA Trawl CPs	2.3%
Trawl CVs	22.1%	Non-AFA Trawl CPs	13.4%

When the Council adopted Amendment 85, the CDQ Program was receiving 7.5 percent of the annual BSAI Pacific cod TAC. The CDQ Program’s allocation of BSAI Pacific cod included both directed fishing and nontarget needs and was subtracted from the TAC before the TAC was further subdivided. The Council has not yet submitted Amendment 85 for Secretarial review, but is expected to submit it before the end of 2006.

B. The Coast Guard and Maritime Transportation Act of 2006

The Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act) was enacted on July 11, 2006. Pub. L. No. 109-241, 120 Stat. 516. Section 416 of the Coast

Guard Act amends section 305(i)(1) of the Magnuson-Stevens Act,¹ establishing a number of new provisions for the CDQ Program.

Section 305(i)(1)(B) governs allocations to the CDQ Program. Section 305(i)(1)(B)(i) states:

IN GENERAL.- Except as provided in clause (ii), the annual percentage of the total allowable catch . . . allocated to the program in each directed fishery of the Bering Sea and Aleutian Islands shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006, for the program. The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and nontarget needs based on existing practice with respect to the program as of March 1, 2006, for each fishery.

Given this language, the current Pacific cod allocation to the CDQ Program of 7.5 percent of the BSAI Pacific cod TAC would continue. The allocation includes both directed fishing and nontarget needs as that was the management practice with regards to Pacific cod as of March 1, 2006. However, section 305(i)(1)(B)(ii)(I) describes an exception to the general rule. It states:

Notwithstanding clause (i) – (I) the allocation under the program for each directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) shall be a directed fishing allocation of 10 percent upon the establishment of a quota program, fishing cooperative, sector allocation, or other rationalization program in any sector of the fishery.

Congress did not define the phrase “directed fishing allocation” or the word “establishment” in either the Coast Guard Act or the Magnuson-Stevens Act.

ANALYSIS

A. Meaning of the Phrase “Directed Fishing Allocation” As Used In Section 305(i)(1)(B)(ii)(I)

The CDQ Program currently receives 7.5 percent of the BSAI Pacific cod TAC, and the allocation includes both directed fishing and nontarget needs. As a result, 7.5 percent of the Pacific cod TAC is the total maximum amount that may be caught by participants in the CDQ Program while fishing in any CDQ fishery.²

¹Prior to the Coast Guard Act, section 305(i)(1) of the Magnuson-Stevens Act included several provisions for the CDQ Program that were added by the Sustainable Fisheries Act in 1996 (Pub. L. No. 104-297, 110 Stat. 3559).

²A CDQ group is prohibited from catching Pacific cod in amounts that exceed the group’s allocation of Pacific cod. 50 C.F.R. §679.7(d)(5). Any CDQ group that catches Pacific cod in excess of their allocation is in violation of the regulations and could be subject to enforcement action.

Section 305(i)(1)(B)(ii)(I) increases the percentage allocated to the CDQ Program to 10 percent if a quota program, fishing cooperative, sector allocation, or other rationalization program is established in any sector of the fishery. However, a question arises as to whether the increased allocation includes both directed fishing and nontarget needs (thus capping the new allocation to the CDQ Program at 10 percent) or whether the increased allocation includes only directed fishing needs (thereby creating a new allocation to the CDQ Program that is actually greater than 10 percent because incidental catch and bycatch of CDQ program participants are not counted against the 10 percent allocation). Congress described the new allocation in section 305(i)(1)(B)(ii)(I) as a “directed fishing allocation” but did not define the phrase. In order to accurately allocate an appropriate amount of a BSAI directed fishery, such as Pacific cod, to the CDQ Program under section 305(i)(1)(B)(ii)(I), an interpretation of the phrase “directed fishing allocation” is necessary.

Given the statutory language of section 305(i)(1)(B), the plain meaning of the phrase “directed fishing allocation” is an amount of fish allocated to the CDQ Program that is for directed fishing and does not include incidental catch and bycatch.³ Amounts necessary for incidental catch and bycatch would be in addition to the statutorily prescribed directed fishing allocation. In section 305(i)(1)(B)(i), Congress specified that the CDQ allocation would be either a directed fishing allowance or include directed fishing and nontarget needs. Congress therefore understood and clearly distinguished between CDQ allocations that are solely for directed fishing and CDQ allocations that include both directed fishing *and* nontarget (incidental catch and bycatch) needs. In section 305(i)(1)(B)(ii)(I), however, Congress used the phrase “directed fishing” to describe the allocation to the CDQ Program. Use of the phrase “directed fishing” indicates that the allocation is solely for directed fishing and does not include incidental catch or bycatch amounts.

The language in 305(i)(1)(B)(ii)(I) also specifies two changes to the general CDQ Program allocations set forth in section 305(i)(1)(B)(i) when a quota program, fishing cooperative, sector allocation, or other rationalization program is established. Congress increased the percentage allocated to the CDQ Program when such a program is established,⁴ and specified a directed fishing allocation. The CDQ pollock fishery, which is exempt from section 305(i)(1)(B)(ii)(I), is the only CDQ directed fishery that is a

³Rules of statutory interpretation provide that the meaning of a statute is plain when the language is clear and unambiguous on its face (*i.e.*, not contradicted by other language in the same act), admits of no more than one meaning, and is not unreasonable or illogical in its operation. Sutherland Stat. Construction §45:02; 46:01 (6th Ed.). Ambiguity exists “when a statute is capable of being understood by reasonably well-informed persons in two or more different senses. Sutherland Stat. Construction §45:02 (6th Ed.). Words or phrases not defined by the statute do not necessarily mean that the word or phrase is ambiguous and subject to agency interpretation; rather, undefined words and phrases are to be interpreted as taking their ordinary, contemporary, common meaning unless the ordinary meaning fails to fit within the statutory text as a whole. *See AFL-CIO v. Glickman*, 215 F.3d 7, 10 (D.C. Cir. 2000) (lack of statutory definition does not render a term ambiguous, but, instead, it simply leads a court to give the term its ordinary, common meaning.)

⁴With the exception of the CDQ halibut, fixed-gear sablefish, pollock, and crab fisheries, which are specifically excluded from section 305(i)(1)(B)(ii)(I), the CDQ Program currently receives 7.5 percent of the annual TACs for all groundfish fisheries allocated to the CDQ Program.

directed fishing allowance. If Congress had intended to continue the existing allocation method that includes both directed fishing and nontarget catch for the remainder of the CDQ directed fisheries, it could have used language that only increased the allocation percentage. Instead, Congress specifically identified a directed fishing allocation in addition to the increased allocation.⁵

Although the meaning of the phrase is plain from the statutory language, additional support for such an interpretation can be found in the legislative history for section 305(i)(1)(B)(ii). 152 CONG. REC. S6,042 (daily ed. June 19, 2006) (statements of Sen. Murray and Sen. Stevens). In an exchange between Senators Murray and Stevens, Senator Murray stated her interpretation of section 305(i)(1)(B)(ii) and its reference to a 10 percent directed fishing allocation “as a directed fishing allowance which does not include incidental catch.” *Id.* After explaining that CDQ allocations are currently managed as hard caps, which include both directed and incidental catch of the CDQ groups, Senator Murray asked Senator Stevens if he intended “to change the current manner in which the council sets CDQ allocations in these fisheries, from a hard cap allocation to a directed fishing allocation.” *Id.* Senator Stevens replied that he did. *Id.* This further supports an interpretation that CDQ allocations under this paragraph would not include non-target needs.

B. Meaning of the Word “Establishment” As Used In Section 305(i)(1)(B)(ii)(I)

A question has been raised regarding when the CDQ allocations under section 305(i)(1)(B)(ii)(I) will be effective. Therefore, an interpretation of the word “establishment” as used in that section is necessary. In the Magnuson-Stevens Act rulemaking process, there are two distinct dates on which a quota program, fishing cooperative, sector allocation, or other rationalization program could be “established:” (1) the earliest date on which a rule can be effective under the APA, which is generally 30 days after publication of the final rule,⁶ or (2) the date on which fishing commences under the approved program.⁷ NMFS publishes final rules for these types of programs at various times during the fishing year. However, fishing typically commences under these types of programs at the beginning of a fishing year following issuance of a final rule

⁵An examination into whether some interpretive insight can be gained through Congress’ use of “directed fishing allocation” versus “directed fishing allowance” does not bear fruit. In section 305(i)(1)(B)(i), Congress recognized two types of percentages for the CDQ Program; either the percentage is a directed fishing allowance that excludes nontarget needs or it includes both directed fishing and nontarget needs. Although “directed fishing allocation” is not identical to “directed fishing allowance,” the difference does not support a conclusion that Congress intended a directed fishing allocation to include both directed fishing and nontarget needs. Congress did not describe percentages that include both directed fishing and nontarget needs as directed fishing allocations. Therefore, the appropriate focus should be on the words “directed fishing,” which are the words Congress used to describe the allocation.

⁶A final rule may be effective earlier than 30 days after publication of the final rule if the agency has good cause to shorten or waive the APA’s 30-day cooling off period. 5 U.S.C. 553(d).

⁷Under quota programs, fishing cooperatives, and other rationalization programs, there can be interim dates, such as application deadlines, that fall after publication of the final rule but prior to the commencement of fishing under such programs. While these dates have importance to the overall implementation of the program, none of them permit participants to begin fishing under such programs.

mainly to avoid the disruption that would likely occur to existing sectors and allocations with a mid-year effective date. If “establishment” means the earliest possible date by which a rule can be effective, *i.e.*, no later than 30 days after publication of the final rule in the *Federal Register*, then regulatory adjustments for the CDQ Program likely would be effective during a mid-point in the fishing year and therefore adjustments of allocations to other sectors would be required to accommodate the increase to the CDQ Program. If “establishment” means the date on which fishing commences under one of these programs, then regulatory adjustments for the CDQ Program in Amendment 85 would be effective at the same time the Amendment 85 non-CDQ sector allocations are effective.

The word “establishment” is not defined in the Magnuson-Stevens Act or in the Coast Guard Act. In such cases, the rules of statutory construction provide that the ordinary, common meaning of the word should be applied.⁸ The common definition of the word “establishment” is “to bring into existence, create, make, start, originate, found or build.”⁹ This definition lends support to using the fishing commencement date, as that is the date on which the program exists or starts. While publication of a final rule is the first step in starting or bringing into existence such programs, the program itself does not go into effect until the beginning of the next fishing year, even if that is more than 30 days after issuance of the final rule.

Also, Congress used the word “establishment” as opposed to “effective date” or “promulgate.” The Magnuson-Stevens Act currently uses the word “promulgate” in reference to issuance of final regulations or rules.¹⁰ “Promulgate” is not defined in the Magnuson-Stevens Act, but has been interpreted by NMFS to mean publication of regulations in the *Federal Register*, consistent with the word’s common meaning (“to make known by open declaration; to make public as having the force of law; to announce officially”).¹¹ Because Congress was well aware of the word “promulgate” and its meaning, and used a different word in section 305(i)(1)(B)(ii)(I), it is consistent with the rules of statutory construction to conclude that Congress intended “establishment” to have a meaning different from “promulgate” and the date of publication of regulations in the *Federal Register*.¹²

Finally, the statutory language creates a tie between the CDQ Program receiving the benefits from an increased directed fishing allocation and the non-CDQ sector(s) receiving the benefits from one of the specified programs. For the reasons provided above, fishing typically commences under one of the specified programs at the start of a fishing year. To interpret “establishment” as meaning the earliest possible effective date would de-link the CDQ and non-CDQ sectors because they would not receive benefits simultaneously.

⁸Sutherland Stat. Construction § 47:28 (6th Ed.).

⁹Webster’s 3rd New International Dictionary.

¹⁰See sections 304(b)(3), 305(c), 305(d), and 305(f) of the Magnuson-Stevens Act.

¹¹Webster’s 3rd New International Dictionary.

¹²Sutherland Stat. Construction §46:06 (6th Ed.).

Based on the foregoing, only one reasonable interpretation of the word “establishment” is available given the statutory language of the Magnuson-Stevens Act. The meaning of the word “establishment” is the date on which fishing commences under an approved quota program, fishing cooperative, sector allocation or other rationalization program. Therefore, the changes to the CDQ Program allocation contemplated in section 305(i)(1)(B)(ii)(I) would take effect when fishing under one of these types of programs commences.

C. Inclusion of provisions consistent with section 305(i)(1)(B)(ii)(I) in Amendment 85

Sections 304(a) and (b) of the Magnuson-Stevens Act require that FMPs, FMP amendments, and regulations be consistent with the provisions of the Magnuson-Stevens Act and other applicable law. Section 305(i)(1)(B)(ii)(I) became effective on July 11, 2006, the date of enactment of the Coast Guard Act. Therefore, any FMP, FMP amendment, or regulation submitted to the Secretary that is a quota program, fishing cooperative, sector allocation, or other rationalization program now must include provisions for a directed fishing allocation of 10 percent to the CDQ Program to be consistent with the Magnuson-Stevens Act, as amended by the Coast Guard Act. Because Amendment 85 would allocate specific percentages of BSAI Pacific cod among a number of fishing sectors, Amendment 85 is a sector allocation program. As such, it must include measures that are consistent with the changes mandated by section 305(i)(1)(B)(ii)(I) when it is submitted to the Secretary for review in accordance with section 304(a).

Although the statutory language is clear, a statement is included in the legislative history for the Coast Guard Act that says, with respect to Pacific cod, “the new CDQ allocations under section 416 are not intended to take effect until full rationalization of that fishery, or January 1, 2009, whichever date is earlier.” 152 CONG. REC. S6,042 (daily ed. June 19, 2006) (statement of Sen. Stevens). The rules of statutory construction provide that if the statutory language is clear and unambiguous, the language of the statute controls.¹³ Additionally, the Supreme Court has recognized that:

statutory language might not be conclusive if there is a ‘clearly expressed legislative intention to the contrary,’ to which the Court usually adds two propositions: this would be a ‘rare and exceptional’ circumstance; and Congress expresses itself in the language of the statute.

Southeast Shipyard Ass’n v. U.S., 979 F.2d 1541, 1545 (D.C. Cir. 1992) (Emphasis added).

The floor statement made by Senator Stevens quoted above appears to express his intention for Pacific cod, contrary to the statutory language of section 305(i)(1)(B)(ii)(I). Even so, the statutory language (1) makes no reference to the two triggers identified in the statement, (2) can be rationally implemented as currently worded, and (3) is not

¹³Sutherland Stat. Construction §45:02 (6th Ed.).

inconsistent with other provisions of the Magnuson-Stevens Act. To give meaning to the statement, many additional words would have to be added to the statutory language, contrary to the tenets of statutory construction.¹⁴ Congress clearly expressed itself in the language of the statute, and therefore the statutory language is controlling.

CONCLUSION

For the reasons explained above, "directed fishing allocation" means an amount of fish allocated to the CDQ program that is for directed fishing and does not include incidental catch or bycatch; such amounts would be in addition to the 10 percent directed fishing allocation. "Establishment" as used in section 305(i)(1)(B)(ii)(I) means the date on which fishing commences under an approved quota program, fishing cooperative, sector allocation or other rationalization program. Finally, Amendment 85 is a sector allocation program and as such it must include measures that are consistent with section 305(i)(1)(B)(ii)(I) when it is submitted to the Secretary for review in accordance with sections 304(a) and (b). If Amendment 85 is approved by NMFS, the CDQ Program will receive a 10 percent directed fishing allocation of Pacific cod, amounts of Pacific cod necessary for incidental catch and bycatch will be in addition to the 10 percent directed fishing allocation, and the directed fishing allocation of Pacific cod to the CDQ Program will not take effect until the date on which fishing under the Amendment 85 BSAI Pacific cod allocations commences.

cc: GCAK, GCF

¹⁴Sutherland Stat. Construction §47:38 (6th Ed.).

Western Alaska CDQ Administrative Panel
Comments by Morgen Crow to the
North Pacific Council and Advisory Panel
October 2006

Earlier this year, Congress amended the Magnuson-Stevens Act section governing the western Alaska CDQ program.

The CDQ amendments were enacted on July 12, 2006 as part of Public Law 109-241, and all six CDQ groups are optimistic about the improvements made.

Among other things, the amendments created a new CDQ Panel to help administer the CDQ program.

All six groups have a seat on this Panel, and all decisions of the Panel must be made by unanimous agreement of the six Panel members.

I'm here as the interim chair of the Panel.
With me is Larry Cotter, the interim vice chair of the Panel.

Our secretary is Robin Samuelsen, and our treasurer is Eugene Asicksik.

The Panel is rounded out by Phillip Lestenkof and Billy Charles.

I am pleased to report that we are working together and making incredible progress for the CDQ program and our region's residents.

(1) Panel Organization

The six CDQ groups have been meeting since early August, including through a number of committees on which all six CDQ groups serve.

Our first "official" CDQ Panel meeting was held on September 6, 2006 in Anchorage.

At that meeting, we agreed to organize as a 501(c)(4) non-profit under the laws of the State of Alaska.

We have adopted Articles of Incorporation and Bylaws for the new corporation.

In accordance with the new Bylaws, the CDQ Panel's first annual meeting will take place the week of October 23 in Anchorage.

At the annual meeting in October, we will elect our first slate of officers, each of whom will serve one-year terms.

(2) Vision Statement

At the annual meeting, we will continue work on a general vision statement for the Panel.

(3) FACA

NOAA GC has determined that the new CDQ Panel is not subject to the Federal Advisory Committee Act.

It is our expectation that the Panel and CDQ groups will provide even better information to our communities and people than if FACA did apply.

(4) Standardized Community Reporting

Among the actions taken thus far, the Panel is developing a policy regarding the submission of our annual financial reports to our member communities and residents.

The CDQ Blue Ribbon Panel recommended that these reports be similar to the reports prepared annually by ANCSA Native corporations.

So far, the Panel has reviewed not only the ANCSA requirements, but also the federal requirements for non-profits in the IRS form 990.

We are moving toward a policy that will combine the ANCSA requirements with the 990 requirements – and be even more comprehensive than that discussed by the Blue Ribbon Committee.

We intend to develop a report that will address public disclosure requirements and provide our communities and their residents with a complete picture of the financial and business activities of their CDQ group.

The CFO's of each CDQ group are preparing draft reports based on 2005 for review by the CDQ Panel and CDQ groups.

The Panel will finalize the policy and a standardized format for the annual reports that will be submitted by each CDQ group to their communities and residents for calendar year 2006 activities.

(5) Investment Policy

The CDQ Panel has reviewed the new CDQ investment policy in the statute and has unanimously agreed on a number of related details that will govern investments by the six CDQ groups, including:

- (1) Up to 20 percent of CDQ royalties and distributions from fisheries investments will be allowed for in-region, non-fisheries projects by CDQ groups;
- (2) Compliance with the investment policy will be measured on a 10-year basis, as envisioned under the 10-year allocation review in the statute;
- (3) For purposes of non-fishery investments, the term region will mean "the geographic area surrounding the member villages within 50 nautical miles of the baseline of the Bering Sea";
- (4) An investment will be considered "fisheries related" if its primary purpose is fisheries related, a policy consistent with the NOAA GC opinion on this topic;
- (5) The past investment practices of each CDQ group, which are allowed under the statute, will be allowed for all six groups; and
- (6) The Panel is developing a standard format for the annual investment compliance statement required for all six groups.

(6) Decennial Review

Under the statute, the Panel is tasked with establishing a system to allow each group to prioritize its goals for the 10-year CDQ allocation review.

The Panel has already had some conversations with NMFS and the State of Alaska about this, and we plan to form a committee to begin work on the topic at our annual meeting in October.

(7) Special Thanks to Council, Governor, Blue Ribbon

On behalf of the six CDQ groups, I would like to thank you, the North Pacific Council for recommending that the CDQ Blue Ribbon Panel be formed. Many of us had doubts, but it was the right thing at the right time, and we are grateful.

We also wish to thank Governor Murkowski for taking the Council's advice and appointing the Blue Ribbon Panel. This will be remembered as an important part of his legacy as our Governor.

Finally, a special thanks to Ed Rasmuson and Stephanie Madsen for serving on the Blue Ribbon Panel.

The Blue Ribbon Panel's report became the foundation for the amendments enacted by Congress, which were necessary for the further maturation of our program.

The Blue Ribbon Panel proposed to end the bi-annual and tri-annual CDQ allocation battles, which were extremely divisive and counter-productive .

That recommendation is the main reason I am able to appear before you today on behalf of all six CDQ groups and on behalf of the 65 Alaskan communities and 29,000 Alaskans that we serve.

We are working together – really working together.
The people of western Alaska will be the main beneficiaries.

Hopefully, this Council and the fisheries management process will also benefit, as the CDQ sector becomes a more constructive voice for you than we've been in the recent past.

Thank you again.

Western Alaska CDQ Administrative Panel
Comments by Morgen Crow to the
North Pacific Council and Advisory Panel
October 2006

Earlier this year, Congress amended the Magnuson-Stevens Act section governing the western Alaska CDQ program.

The CDQ amendments were enacted on July 12, 2006 as part of Public Law 109-241, and all six CDQ groups are optimistic about the improvements made.

Among other things, the amendments created a new CDQ Panel to help administer the CDQ program.

All six groups have a seat on this Panel, and all decisions of the Panel must be made by unanimous agreement of the six Panel members.

I'm here as the interim chair of the Panel.

With me is Larry Cotter, the interim vice chair of the Panel.

Our secretary is Robin Samuelsen, and our treasurer is Eugene Asicksik.

The Panel is rounded out by Phillip Lestenkof and Billy Charles.

I am pleased to report that we are working together and making incredible progress for the CDQ program and our region's residents.

(1) Panel Organization

The six CDQ groups have been meeting since early August, including through a number of committees on which all six CDQ groups serve.

Our first "official" CDQ Panel meeting was held on September 6, 2006 in Anchorage.

At that meeting, we agreed to organize as a 501(c)(4) non-profit under the laws of the State of Alaska.

We have adopted Articles of Incorporation and Bylaws for the new corporation.

In accordance with the new Bylaws, the CDQ Panel's first annual meeting will take place the week of October 23 in Anchorage.

At the annual meeting in October, we will elect our first slate of officers, each of whom will serve one-year terms.

(2) Vision Statement

At the annual meeting, we will continue work on a general vision statement for the Panel.

(3) FACA

NOAA GC has determined that the new CDQ Panel is not subject to the Federal Advisory Committee Act.

It is our expectation that the Panel and CDQ groups will provide even better information to our communities and people than if FACA did apply.

(4) Standardized Community Reporting

Among the actions taken thus far, the Panel is developing a policy regarding the submission of our annual financial reports to our member communities and residents.

The CDQ Blue Ribbon Panel recommended that these reports be similar to the reports prepared annually by ANCSA Native corporations.

So far, the Panel has reviewed not only the ANCSA requirements, but also the federal requirements for non-profits in the IRS form 990.

We are moving toward a policy that will combine the ANCSA requirements with the 990 requirements – and be even more comprehensive than that discussed by the Blue Ribbon Committee.

We intend to develop a report that will address public disclosure requirements and provide our communities and their residents with a complete picture of the financial and business activities of their CDQ group.

The CFO's of each CDQ group are preparing draft reports based on 2005 for review by the CDQ Panel and CDQ groups.

The Panel will finalize the policy and a standardized format for the annual reports that will be submitted by each CDQ group to their communities and residents for calendar year 2006 activities.

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