



MEMORANDUM

TO: Council and AP Members
FROM:  Chris Oliver 
Executive Director
DATE: March 13, 2007
SUBJECT: Community Development Quota (CDQ) Program

ESTIMATED TIME
2 HOURS

ACTION REQUIRED

- a) Status report on the CDQ Program and Magnuson Stevens Act amendments

BACKGROUND

Staff previously provided the Council with a status report of recent Congressional legislation that made significant changes to the western Alaska Community Development Quota (CDQ) Program. 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. Subsequent to this action, the MSA was reauthorized on January 12, 2007, and included several more changes to Section 305(i). Section 305(i)(1) of the MSA, as recently revised, is attached as Item C-6(a).

The MSA amendments address fisheries management, allocations, and oversight of the CDQ Program. At its October 2006 meeting, the Council was provided with an outline of the various MSA amendments to the CDQ Program and the intended regulatory vehicles for implementing these provisions. Several of the provisions of the Act are already included in the appropriate analyses, and these are expected to be implemented in Federal regulations in 2007 and 2008. Those provisions currently underway include:

- **BSAI Amendment 85.** The MSA reauthorization increased the CDQ Pacific cod allocation from 7.5% to 10.7% of the BSAI Pacific cod TAC, effective January 1, 2008. This increase will be implemented in Federal regulation through Am. 85, which pertains to BSAI Pacific cod allocations for all sectors and is scheduled to be implemented January 1, 2008. Language was also included in HR 5946 to trigger the CDQ increase in 2007, if a sector of the BSAI Pacific cod fishery forms a fishing cooperative in 2007. The proposed rule for Am. 85 was published in early February (72 FR 5654, 2/7/07), and the comment period closed March 26.
- **BSAI Amendment 80.** The proposed rule for Amendment 80 is being prepared to be consistent with the MSA requirement that 10.7% of the TAC of each directed fishery in the BSAI (except pollock, sablefish, halibut, and crab) be allocated to the CDQ Program starting on January 1, 2008. Revisions to the list of species that will be allocated to the CDQ Program and the 10.7% allocations starting in 2008 also were included in the 2007 and 2008 final specifications for the BSAI groundfish fisheries.

- **Regulatory amendment for CDQ transfers after overages.** NMFS is preparing a proposed rule that would implement the new MSA requirement that “Voluntary transfers by and among eligible entities shall be allowed, whether before or after harvesting.” The Council’s December 2005 recommendation to allow transfers after overages for halibut PSQ also will be included in this proposed rule. NMFS is currently allowing transfers after overages for groundfish and halibut CDQ under the authority of the MSA. Regulatory amendments will revise NMFS regulations by the end of 2007 to be consistent with the MSA. The State of Alaska has been notified that the MSA requirement to allow transfers after overages also applies to the crab CDQ allocations.
- **Regulatory amendment for regulation of harvest.** NMFS is preparing a proposed rule to revise observer coverage, catch retention, and LLP requirements to comply with the new MSA requirement that the “harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated...in a manner no more restrictive than for other participants in the applicable sector, including with respect to the harvest of nontarget species.” This proposed rule would make revisions in the regulations governing the harvest of pollock, halibut, and sablefish CDQ. NMFS’s goal is to publish a final rule implementing these revisions for the 2008 CDQ fisheries.

The above provisions of the MSA relate primarily to CDQ allocations and fisheries management issues. There are also several additional administrative and oversight issues that may require changes in Federal regulations and possibly amendments to the BSAI Groundfish FMP and BSAI King and Tanner Crab FMP. Some of these are relatively complicated and require significant analysis and/or legal interpretation from NOAA GC. **NOAA GC intends to provide a legal opinion in early May 2007, related to the roles and responsibilities of the Council, CDQ Panel, and NMFS, resulting from the MSA amendments. The legal opinion would be sent to the Council prior to the June Council meeting, and review of the opinion could be scheduled for the June meeting.**

Note that several months ago, the Western Alaska Community Development Association (CDQ Panel) sent a letter to the Acting Administrator of the NMFS, Alaska Region, providing the CDQ Panel’s interpretation of the authority given to the CDQ Panel under the amendments to the MSA. This letter (11/28/06), and NMFS’s response (12/1/06), are provided as **Item C-6(b)**. A subsequent letter from the CDQ Panel, providing additional legal analysis about the CDQ Panel’s authority under the MSA, was received by NMFS in January. This letter (1/16/07), and NMFS’s response (1/24/07), are provided as **Item C-6(c)**. Senator Murkowski also recently provided a letter to the Secretary of Commerce regarding MSA amendments affecting the CDQ Program and the authority of the CDQ Panel (2/15/07). This letter and the Secretary’s response are provided as **Item C-6(d)**.

Except to receive this status report, there is no action for the Council at this meeting under this agenda item. The Council could schedule a review of the legal opinion for the June meeting and take action as deemed necessary. Depending on the timing of the release of the legal opinion, the Council could also consider tasking staff at this meeting to analyze the legal opinion and provide a discussion paper at the June Council meeting outlining whether the Council has further responsibilities for implementing additional provisions of the MSA, and if so, potential alternatives for consideration. Some issues may not require Federal regulations; those could also be identified in the discussion paper. If there is not sufficient time to develop a discussion paper for the June meeting, it could be scheduled for October.

SEC. 305(i)(1) of the MSA, as amended by the Coast Guard Act (July 2006) and the MSA reauthorization (December 2006).
Revised 2/5/07.

(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 total allocation (directed and nontarget combined) of 10.7 percent effective January 1, 2008; 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 total allocation (directed and nontarget combined) of 10.7 percent.

The total allocation (directed and nontarget combined) for a fishery to which subclause (I) or (II) applies may not be exceeded.

The following paragraph also was included in the MSA reauthorization (HR 5946), but this language is not an amendment to the MSA.

EFFECTIVE DATE.—*The allocation percentage in subclause (I) of section 305(i)(1)(B)(ii) of the Magnuson-Stevens Fishery Conservation and Management Act (16*

U.S.C. 1855(i)(1)(B)(ii)), as amended by paragraph (1) of this subsection, shall be in effect in 2007 with respect to any sector of a fishery to which such subclause applies and in which a fishing cooperative is established in 2007, and such sector's 2007 allocation shall be reduced by a pro rata amount to accomplish such increased allocation to the program. For purposes of section 305(i)(1) of that Act and of this subsection, the term "fishing cooperative" means a fishing cooperative whether or not authorized by a fishery management council or Federal agency, if a majority of the participants in the sector are participants in the fishing cooperative.

(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. Voluntary transfers by and among eligible entities shall be allowed, whether before or after harvesting. Notwithstanding the first sentence of this subparagraph, seven-tenths of one percent of the total allowable catch, guideline harvest level, or other annual catch limit, within the amount allocated to the program by subclause (I) or subclause (II) of subparagraph (B)(ii), shall be allocated among the eligible entities by the panel established in subparagraph (G), or allocated by the Secretary based on the nontarget needs of eligible entities in the absence of a panel decision.

(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, Diomedea, 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:

(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.



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

December 1, 2006

RECEIVED
DEC - 1 2006

N.P.F.M.C.

Morgen Crow, Chair
Community Development Quota Panel
Western Alaska Community Development Association
711 H Street, Suite 200
Anchorage, Alaska 99501

Dear Mr. Crow:

Thank you for your letter of November 28, 2006, providing the Western Alaska Community Development Association's interpretation of the authority of the community development quota program administrative panel (CDQ Panel). As you stated, the CDQ Panel was established by Congress through amendments to section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) that were made by the Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act).

When the Coast Guard Act was passed in July 2006, we recognized the need to interpret all aspects of the MSA amendments, including allocations to the CDQ Program, management of the CDQ fisheries, changes that would be required in several fishery allocation programs that were under development, eligibility requirements for the program, and the decennial review and allocation adjustment process. In addition, we recognized the need to interpret the authority and responsibility of the Secretary of Commerce, the North Pacific Fishery Management Council (Council), the State of Alaska, and the CDQ Panel under these amendments. However, we had to prioritize our requests for legal assistance from NOAA General Counsel. We placed the highest priority on addressing situations where Federal regulations are now inconsistent with the MSA, incorporating required changes into two Council fishery allocation programs without delaying implementation of these allocation programs, revising allocations to the CDQ Program for 2007 as required by the MSA, and answering the CDQ Panel's question about its status under the Federal Advisory Committee Act. The fact that we were unable to assess the authority of the CDQ Panel prior to the October 2006 Council meeting was not a result of a specific determination about the authority of the CDQ Panel, but rather the consequence of the priority that we placed on the issues that the MSA now requires us to address.

We have requested a written legal opinion from NOAA General Counsel about the authority of the Secretary of Commerce, the Council, the State of Alaska, and the CDQ Panel to address questions that we have identified, to respond to questions the CDQ Panel asked in August 2006, and to respond to the Council's October 2006 request for information about its role in interpreting and implementing section 305(i)(1) of the MSA. Your November 28, 2006, letter provides additional information about the issues that the CDQ Panel would like to see addressed



in the legal opinion and the conclusions that you have made about these issues. We have asked NOAA General Counsel to consider your analysis as it prepares its legal opinion. We will provide you a copy of the legal opinion as soon as it is released. In the meantime, we welcome any additional input that you have on these questions or any other issue of concern to the CDQ Panel.

Sincerely,



Robert D. Mecum
Acting Administrator, Alaska Region

cc: NPFMC

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
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(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.

The Coast Guard Act's subparagraph setting eligibility standards for CDQ groups, significantly, requires them to acquiesce to the Panel's authority (the Panel-related provisions are shown in bold):

(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:

(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.

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Deputy Administrator, Alaska Region
November 28, 2006
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(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).

The new law also requires the Panel, in subparagraph (a)(1)(H), to “establish a system to be applied [in the decennial review] that allows each entity participating in the program to assign relative values to ... criteria to reflect the particular needs of its villages.”

Conference Report. The Conference Report briefly describes each portion of the Conference substitute. It characterizes the Panel thus:

The Conference substitute establishes a community development quota program panel. The CDQ Panel will consists consist [sic] 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.

Conference Report, p. 78.

Panel's mandate. As set out above, Congress has ordered three Panel functions: Subparagraph (G) directs the Panel (1) to “administer those aspects of the [CDQ] program not otherwise addressed in this paragraph,”^{1/} and (2) to coordinate and facilitate activities of the entities under the program; and subparagraph (H) requires the Panel (3) to establish a system for the State's use in its decennial review, the first of which will occur in 2012.

Panel's discretion. The above-quoted subparagraph 416(a)(1)(G) permits the Panel to choose, in administering the aspects of the program that fall into its purview, whether to do so through private contractual arrangement or through recommendations to the appropriate governmental entity. (This recommendation function is discussed further below.)

^{1/} As you know, the “paragraph” is the entire CDQ program portion of the new law.

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Construction. As you may know, the Ninth Circuit Court of Appeals generally relies on the "plain meaning" rule in construing statutes: a court will apply the plain meaning of a statute, along with legislative history, unless to do so would yield an absurd result. The court follows the lead of the United States Supreme Court in applying this rule. "When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Camacho v. Bridgeport Financial, Inc.*, 420 F.3d 1078 (9th Cir. 2005), quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

The language of Sec. 416(a)(1)(G) is very plain indeed – it requires the Panel to administer every aspect of the CDQ program that the rest of the CDQ provisions do not address. The CDQ groups acknowledge that the paragraph does address the following aspects, which therefore are not left to the Panel's administration:

- Allocations, including harvesting and processing ((a)(1)(B) and (C));
- identification of eligible participating communities ((a)(1)(D));
- CDQ group eligibility standards, including governance, investment types, and annual statement of compliance ((a)(1)(E));
- requirements for and limits to oversight of CDQ groups and share ownership and annual reports to communities ((a)(1)(G));
- the State's decennial review of each group's performance (based on criteria to be set by the Panel) and adjustment of allocations based on the review ((a)(1)(H)); and
- the definition of a community development plan ((a)(1)(J)).^{2/}

The CDQ groups hope that NMFS staff's failure to mention the Panel does not evidence a reading of the phrase "not otherwise addressed" to include in the Panel's authority no aspect of the program on which the paragraph even arguably touches. We expect that such a narrow view of the Panel's authority would find little support within your office. The CDQ groups would look instead to the broad statement of the Conference Report, which describes the Panel as a body that "removes the need for

^{2/} The paragraph mentions community development plans elsewhere, but only in the following contexts, none of which detracts from the Panel's mandate to administer all but the definition of CDPs: (1) an explicit statement that the Secretary has no approval authority for such plans or their amendments ((a)(1)(I)); (2) a specification that CDQ groups are exempt from State regulation of their community development plans ((a)(1)(F)(iv)); and (3) a requirement that the Panel establish a system for the CDQ groups' use in the decennial review, including as one criterion the groups' "[a]chieving of the goals of the entity's community development plan" ((a)(1)(H)(ii)(IV)).

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governmental oversight of the CDQ program." "Oversight" is supervision, which for the CDQ program has been historically a function of both State and federal agencies. When this phrase is read with the language of (G) that directs the Panel to administer all aspects not otherwise addressed, and with the limited items addressed in Section 416, it is clear that Congress intended to place considerable authority in the Panel. Any other interpretation would contradict the Conference's word "removes"; had the Conference, in establishing the Panel, intended merely to "limit" governmental oversight, it would have said so.

Also, of course, a very narrow interpretation of "not otherwise addressed," in a way that deletes, or all but deletes, the Panel's authority and significance, would nullify the statute's establishment of and directives to the Panel. An interpretation that renders this key portion of the new statute meaningless would not withstand judicial scrutiny.

Authority to recommend regulatory revisions. A second matter of interest raised by the NMFS Staff discussion paper is the Secretary of Commerce's implementation of Section 305(i)(1) of the MSA as amended by Section 416 of the Coast Guard Act.

In order to implement amended section 305(i)(1) of the MSA, among other necessary regulatory actions, the Secretary must amend 50 C.F.R. 679.1(e), amend several definitions contained in 50 C.F.R. 679.2, and rewrite 50 C.F.R. 679.30. At page 21 of its Staff discussion paper, NMFS indicates that it intends to recommend to the Secretary that he make those regulatory changes through Amendment 71 to the BSAI groundfish fishery management plan (FMP) and Amendment 22 to the crab FMP.

There are two significant legal problems with that approach. The first problem is that Congress has not delegated the Secretary authority to address the regulatory issues above-listed through FMPs, since those issues relate to the generic operation of the western Alaska CDQ program, rather than to the participation of the six CDQ groups in particular fisheries that the Secretary oversees through regulations that implement particular FMPs.

Section 303(a) and (b) of the MSA lists fourteen provisions that the Council shall recommend, and twelve discretionary provisions that the Council may recommend, for the Secretary's inclusion in an FMP. None of those provisions authorizes the Secretary to include in an FMP generic subject matters that relate to CDQ groups' participation in the CDQ program generally. If NMFS has a different view, we would appreciate NMFS' identifying the specific provisions of section 303(a) and/or (b) of the MSA that it believes delegate to the Secretary authority to implement amended section 305(i)(1) of the MSA through the BSAI groundfish and crab FMPs.

The second problem is that the paper, as discussed at more length above, omits to mention (other than in passing, in Tables 1 and 5) the CDQ Panel that Congress established in amended section 305(i)(1)(G) of the MSA. Nor does the paper acknowledge the authority that Congress delegated to the Panel to elect to submit to the Secretary directly its recommendations regarding regulatory matters. Instead, the staff

Mr. Douglas Mecum
 Deputy Administrator, Alaska Region
 November 28, 2006
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discussion paper indicates that NMFS believes these matters should be handled through Council recommendations to the Secretary regarding amendments to FMPs.

Again, in pertinent part, amended section 305(i)(1)(G)(iii) provides that 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*" (emphasis added). The Panel has a choice of carrying out its duty to administer aspects of the program by either entering into private contracts or submitting recommendations directly to the Council, Secretary, or State.

The "aspects of the program not otherwise addressed in this paragraph" include matters, e.g., the incidental catch of cod by vessels fishing in the CDQ program, that lie within the Council's authority to recommend to the Secretary amendments to FMPs. Recommendations directly to the Secretary will concern regulations that do not implement FMPs, such as the needed rewrite of 50 C.F.R. 679.30; to the State, the Panel will recommend content of the State laws described in amended section 305(i)(1)(F)(ii) and (iii) of the MSA.

In sum, NMFS should advise the Secretary not to undertake a stand-alone rulemaking that amends 50 C.F.R. 679.1(e), amends any definition in 50 C.F.R. 679.2, or rewrites 50 C.F.R. 679.30, until the Secretary first receives, and then evaluates, the Panel's recommendations.

Conclusion. The Panel hopes to discuss with NMFS the CDQ groups' and NMFS' positions with regard to the breadth of the CDQ Panel's authority, both in administering aspects of the CDQ program and in recommending regulations to the Secretary and the State. We believe that NMFS and the CDQ groups can reach an accommodation of both positions that will give effect to the Coast Guard Act while advancing the goals of the agencies and the groups.

We look forward to discussing these issues with you.

Sincerely,



Morgan Crow
 Chair, Community Development Quota Panel

cc: Bill Hogarth, Assistant Administrator for Fisheries, NMFS
 Sam Rauch, Deputy Assistant Administrator, NMFS
 Dr. James Balsiger, Administrator, Alaska Region, NMFS
 Chris Oliver - Executive Director, North Pacific Fishery Management Council



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

January 24, 2007

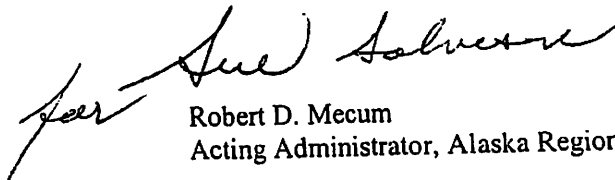
Morgen Crow, Chair
Community Development Quota Panel
Western Alaska Community Development Association
711 H Street, Suite 200
Anchorage, Alaska 99501

Dear Mr. Crow:

Thank you for your letter of January 16, 2007, providing additional legal analysis about the Western Alaska Community Development Association's (WACDA's) interpretation of its authority under the Magnuson-Stevens Fishery Conservation and Management Act. This information supplements your November 28, 2006, letter on this same topic and discussions we had at a meeting with WACDA's Implementation Committee on December 20, 2006.

We have provided your letter to NOAA General Counsel and have asked that they consider this additional analysis as they prepare a legal opinion that we have requested about the authority of the CDQ administrative panel (WACDA), NMFS, the North Pacific Fishery Management Council.

Sincerely,


Robert D. Mecum
Acting Administrator, Alaska Region

cc: NPFMC



Western Alaska Community Development Association
711 H Street, Suite 200 • Anchorage, Alaska 99501

January 16, 2007

Via Facsimile: 907-586-7249

Douglas Mecum
Deputy Administrator, Alaska Region
National Marine Fisheries Service

Re: CDQ Program Panel Authority

Dear Doug:

The Western Alaska Community Development Association appreciates the NOAA/NMFS staff's meeting on December 20, 2006, with WACDA's Implementation Committee. The meeting was positive, productive and quite helpful in WACDA's undertaking the duties of the Community Development Quota Program Panel.

Panel established. In Subparagraph (a)(1)(G) of Section 416 of the Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act), Congress established the Community Development Quota Program Panel (the Panel), each of whose six members represents one of the CDQ entities:

(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.

Legislative history. The congressional Conference Report on the Coast Guard Act (at page 78) characterizes the Panel as having broad authority over the CDQ program, removing the need for governmental oversight, so long as it works under unanimous consent of the six CDQ entities:



Aktara,
Atna,
False Pass,
Nedene Lagoon,
Nikiliki,
St. George



the CDQ
Aldasagik
Chena Point
Dillingham
Egagik
Ekwok
Etah
King Salmon
Lewickok
Manaktokak
Nasook
Pilot Point
Port Heiden
Portage Creek
South Nakat
Togalak
Twin Hills
Ugashik



St. Paul Island



Chevak
Chetoruk
Eek
Goodnews Bay
Hooper Bay
Kipnuk
Kongiganak
Kwigillingak
Mekoryuk
Napaklik
Nepuklik
Newtok
Niginnoo
Ouzuvik
Pitmeag
Quilbagak
Seaman Bay
Tulmuk Bay
Tumalik
Tuzonek



Sukhtin
St. Michael
Ukalektok
Shakoolik
Koyuk
Elim
Galevin
White Mountain
Nana
Talar
Frawig Mission
Wales
Dinorok
Gambell
Savoonga



Aktara
Emmett
Graying
Kotik
Mountain Village
Nutan Igaa

The Conference substitute establishes a community development quota program panel. The CDQ Panel will consist [sic] 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.

In order to "remove the need for governmental oversight of the CDQ program," Congress charged the Panel to perform three functions: Subparagraph (G) directs the Panel (1) to "administer those aspects of the [CDQ] program not otherwise addressed in [the Coast Guard Act]" and (2) to coordinate and facilitate activities of the entities under the program; and subparagraph (H) requires the Panel (3) to establish a system for the State's use in its decennial review, the first of which will occur in 2012.

Construction. The Ninth Circuit Court of Appeals generally relies on the "plain meaning" rule in construing statutes: a court will apply the plain meaning of a statute, along with legislative history, unless to do so would yield an absurd result. The court follows the lead of the United States Supreme Court in applying this rule. "When the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms." *Camacho v. Bridgeport Financial, Inc.*, 420 F.3d 1078 (9th Cir. 2005), quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

The Panel points to the broad statement of the Conference Report, quoted above, which describes the Panel as a body that "removes the need for governmental oversight of the CDQ program." "Oversight" is supervision, which for the CDQ program has been historically a function of both State and federal agencies. When this phrase is read with the language of (G) that directs the Panel to administer all aspects not otherwise addressed, and with the limited items addressed in Section 416, as discussed below, it is clear that Congress intended to place considerable authority in the Panel. Any other interpretation would contradict the Conference's word "removes"; had the Conference, in establishing the Panel, intended merely to "limit" governmental oversight, it would have said so.

A very narrow interpretation of "not otherwise addressed," in a way that deletes, or all but deletes, the Panel's authority and significance, would nullify the statute's establishment of and directives to the Panel. An interpretation that renders this key portion of the new statute meaningless would not withstand judicial scrutiny. *See American Trucking*, 531 U.S. 457 (2001).

Aspects addressed. In administering the CDQ program, the Panel may act through private contractual arrangements or through recommendations to the appropriate governmental entity. Congress did not make clear which program aspects could be undertaken by contract and which aspects would be left to mere advice of affected agencies, except to note that the Panel was bound by those aspects of the law "addressed" in the Act, which will be administered by the National Marine Fisheries Service or other governmental agencies. As a result, the CDQ Panel has concluded that Congress intended it to administer all aspect of the CDQ program through private contractual arrangements, including the administration of Panel operations, except for the following six elements of the program that

January 16, 2007

Page 3 of 4

are "addressed" within the meaning of the Act. In these six instances, the Panel will limit its role to the advisory capacity when necessary. The Panel will adopt administrative definitions and procedures by contractual agreement, binding on the Panel entities.

1. CDQ program purposes and the regulation of fish harvesting and processing, establishment of fish harvesting and processing rights and CDQ program allocations (Sec. 416(a)(1)(A), (B) and (C)).
2. Identification of eligible participating communities and their respective assignments to the six named CDQ entities (Sec. 416(a)(1)(D)).
3. CDQ entity eligibility standards, including governance, investment types, and annual statement of compliance (Sec. 416(a)(1)(E)). However, since such definitions are not addressed in the legislation, the Panel will adopt by contract definitions to implement the reasonable administration of the eligibility requirements, since such definitions were not addressed in the legislation, including such terms as "resident fishermen," "annual investments," "not fishery-related," "fisheries-related projects," the process for selecting members of the entity boards of directors from the villages, and the contents of the Annual Statement of Compliance.
4. Excessive share ownership, harvesting, and processing limitations on CDQ entities and requirements for State regulation of CDQ entities established by the Coast Guard Act (Sec. 416(a)(1)(F)). However, since it is not addressed in the legislation, the Panel will adopt by contract the process and contents of the annual reports submitted to the entities' member villages.
5. The State of Alaska's decennial review of each entity's performance (based on criteria to be set by the Panel), any adjustment of allocations based on the review, and any reallocation (Sec. 416(a)(1)(H)). However, since it is not addressed in the legislation, the Panel will establish by contract the system and criteria under which each of the six entities shall be measured consistent with the Coast Guard Act.
6. The definition of a community development plan (Sec. 416(a)(1)(J)). However, since it is not addressed in the legislation, the Panel will adopt by contract the contents and time frame for submission of these plans, and the method for review and distribution to its board of directors and other interested parties.

Because of the Panel's unique authority and responsibility under the Coast Guard Act, we urge NMFS to consult the Panel when NMFS undertakes rulemaking related to the six areas that are in NMFS' purview. For its part, the Panel is developing a procedure for providing notice to NMFS of all its unanimous decisions, including private contractual arrangements.

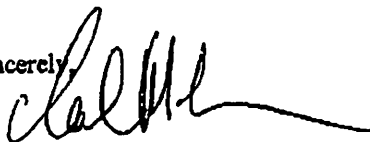
In addition to the notice procedure, over the next 90 days the Panel will develop draft regulations, which it will petition NMFS to adopt. We look forward to working with NMFS in that petition process.

22-01-2007 14:59 From

T-638 P.005/005 F-239

January 16, 2007
Page 4 of 4

Sincerely,



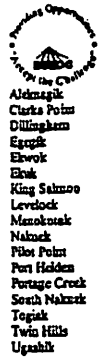
Morgen Crow
Chair, Community Development Quota Panel

cc: Bill Hogarth, Assistant Administrator for Fisheries, NMFS
Sam Rauch, Deputy Assistant Administrator, NMFS
Dr. James Balsiger, Administrator, Alaska Region, NMFS



**Western Alaska Community Development Association
711 H Street, Suite 200 . Anchorage, Alaska 99501**

January 16, 2007

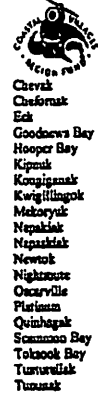


Sue Salvesson, Assistant Regional Administrator
Sustainable Fisheries Division
Alaska Region, NMFS
Juneau Alaska
Attn: Ellen Walsh

Submitted via E-mail to 2007tacspecc@noaa.gov
with the subject line: 2007 Proposed Specifications



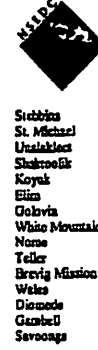
Dear Ms. Salvesson,
The CDQ Panel offers these comments on the 2007 TAC Specifications as they pertain to the 2007 Allocations to the CDQ Program.



Summary
The CDQ Panel requests that NMFS define 'directed fishery' as the Target Species list in the December 2005 Council action. It was the most current definition available on March 1, 2006. We also note that in common usage, 'directed fishery' and 'target fishery' are synonymous.

Table 1. Target species categories (by TAC and CDQ Reserve category)	
Area or subarea	Species
BS, AI, and Bogoslof	Pollock
BSAI	Pacific cod
BS and AI	Sablefish (fixed gear)
BS and AI	Sablefish (non-gear specific)
EAI/BS, CAI, and WAI	Atka mackerel
BSAI	Yellowfin sole
BSAI	Rock sole
BS	Greenland turbot
BSAI	Flathead sole
EAI, CAI, and WAI	Pacific Ocean perch
BSAI	Arrowtooth flounder

The recommended change would include CDQ allocations for Bogoslof pollock and BSAI non-gear specific sablefish, while not making allocations to the CDQ program for 'other flatfish' and Alaska plaice.



Analysis

The relevant text passages from the proposed rule for 2007 specifications (PR), page 75461, are:

New section 305(i)(1)(B)(i) of the MSA addresses allocations to the CDQ Program. It 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, for the program."

The PR leaves out the last sentence of the MSA section referenced above:

"The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and non-target needs based on existing practice with respect to the program as of March 1, 2006 for each fishery."

Then continues:

... As a result of the changes to section 305(i)(1), the MSA requires apportionments to the CDQ reserves of those directed fishery TAC categories for which a percentage was approved by the Secretary or established by Federal law as of March 1, 2006.

In 2006, the only TAC category for which a percentage was not approved or established for the CDQ Program was squid. Therefore, squid would continue to not be allocated to the CDQ Program.

For the TAC categories other than squid, those that did not have a directed fishery in the BSAI in 2006 were Bogoslof pollock, trawl sablefish, Bering Sea Pacific ocean perch, northern rockfish, shortraker rockfish, rougheve rockfish, "other rockfish," and "other species."

Therefore, based on NMFS' interpretation of the MSA, apportionments from these TAC categories to the CDQ Program will no longer be made.

From the Oct. 06 Staff MSA Amendment Discussion Paper to NPFMC, p. 3 and 4

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." [and] "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....

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.

PR Definition of Directed Fishery

A 'directed fishery' is therefore effectively defined in the Proposed Rule as open to directed fishing at some time during the year which is primarily due to having a large enough TAC to manage.

That definition does not take into account whether the species is targeted or incidental catch in actual CDQ fisheries, nor does it consider the possibility that some existing CDQ target fisheries may not be targeted by non-CDQ sectors. The CDQ target fisheries left out are primarily non-gear specific BS and AI sablefish.

Potential conflict with Regulation of Harvest provision 305 (i)(1)(B)(iv)

The PR definition also has the effect of including hard cap management of the incidental catch species:

'other' flatfish; and
Alaska plaice.

Including these could be constraining on the CDQ fisheries, while the equivalent Amdt. 80 fisheries would not be so constrained. It is our opinion that in choosing the directed fishery definition, this provision must also be considered. Also note the 'squid box' reference in the Conference Report.

Alternative Definition

An alternative definition of directed fishery is to equate 'directed' with 'target' fishery. The NPFMC passed the list of CDQ target fisheries in Table 1 at the Dec. 2005 meeting. This should be considered existing practices when the MSA was passed in March 2006. The context for the Council decision was whether to remove TAC categories from hard cap management.

From the MSA amendment:

"The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and non-target needs..."

From the Sept. 2005 Analysis:

"There are two general categories of species or species groups caught in the CDQ fisheries: target species and incidental catch species. Target species are those species of economic importance that are caught as the primary focus of a given fishery. Incidental catch species are those species caught incidentally, or as bycatch, along with target species.

The following statement is equally valid:

Target species are those species of economic importance that are caught as the primary focus of a directed fishery.

and directed fishery could be defined as:

A directed fishery is one where a particular species is the target or primary economic focus of the CDQ fishery as recognized by the NPFMC in the list adopted in December, 2005 and repeated in Table 1.

Thank you for your consideration. Please call if you have any questions.

Sincerely,



Morgen Crow
Chairman, CDQ Panel



THE SECRETARY OF COMMERCE
Washington, D.C. 20230

Item C-6(d)

March 12, 2007

The Honorable Lisa Murkowski
United States Senate
Washington, D.C. 20510

Dear Senator Murkowski:

Thank you for your letter regarding amendments to the Magnuson-Stevens Fishery Conservation and Management Act related to the Western Alaska Community Development Quota (CDQ) Program.

The National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) has requested a legal memorandum from NOAA General Counsel on the authority of the CDQ administrative panel for management and oversight of the CDQ Program relative to the authority, roles, and responsibilities of the Secretary of Commerce and the North Pacific Fishery Management Council. This legal memorandum will provide an interpretation of the authority of the CDQ administrative panel under the amendments made by both the Coast Guard and Maritime Transportation Act of 2006 and the Magnuson-Stevens Reauthorization Act. NMFS has provided a copy of your letter and all correspondence it has received from the CDQ administrative panel about interpretation of the Magnuson-Stevens Act, to NOAA General Counsel for its consideration during preparation of this legal memorandum. NMFS will keep you informed about its actions with regard to the CDQ administrative panel and implementation of the Magnuson-Stevens Act amendments.

If you have any questions, please contact me or Nat Wienecke, Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663.

Sincerely,

A handwritten signature in black ink, appearing to read "Carlos M. Gutierrez".

Carlos M. Gutierrez

LISA MURKOWSKI
ALASKA

COMMITTEES:
ENERGY AND NATURAL RESOURCES
RANKING MEMBER
SUBCOMMITTEE ON ENERGY

FOREIGN RELATIONS
RANKING MEMBER, SUBCOMMITTEE ON
EAST ASIAN AND PACIFIC AFFAIRS

HEALTH, EDUCATION, LABOR,
AND PENSIONS
INDIAN AFFAIRS

United States Senate

WASHINGTON, DC 20510-0203

(202) 224-6065
(202) 224-6301 FAX

February 15, 2007

The Honorable Carlos Gutierrez
Secretary of Commerce
1401 Constitution Avenue, NW.
Washington, DC 20230

Re: Western Alaska Community Development Quota Program

Dear Secretary Gutierrez:

The Western Alaska Community Development Quota (CDQ) program, now in its 15th year, has been a success in enabling the isolated and economically disadvantaged communities of Western Alaska to participate in the benefits of the Bering Sea and Aleutian Islands fisheries. The communities are represented by six CDQ entities, also known as CDQ groups. The Alaska congressional delegation takes pride in the program and looks forward to its continued success.

In the Coast Guard and Maritime Transportation Act of 2006, Congress enacted a provision that creates a new CDQ panel composed of all six CDQ groups and prescribes that the panel may only act by unanimous vote of all its members. This provision, section 305(i)(1)(G) of the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), charges the CDQ panel with "administer[ing] those aspects of the [CDQ] program not otherwise addressed" in section 305(i)(1) of the MSFCMA. By establishing the panel, Congress intended to enable the six CDQ groups themselves, acting collectively, to assume responsibility for the administration of their own program. I understand that the CDQ panel has been organized as the Western Alaska Community Development Association and has begun its work.

One of the panel's most important first tasks will be to develop the new package of regulations to replace the CDQ program regulations that were first promulgated in 1992, and then revised in 1998. The 2006 amendment of section 305(i) seeks to provide the CDQ groups with substantial autonomy to develop these regulations, while contemplating that the CDQ panel will submit its work product for your review and promulgation.

07-000620

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(907) 843-1833

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It is my understanding that there may be different interpretations as to the authority of the CDQ panel. As you proceed with implementation of the CDQ amendments in the 2006 Coast Guard Act, I ask that you implement the CDQ panel provision in a way that gives the CDQ panel full authority over all aspects of the CDQ program not addressed by section 305(i) and that is consistent with the conference committee's direction that the panel "removes the need for governmental oversight of the CDQ program."

I would appreciate being kept informed of your Department's actions as they relate to the new relationship with the CDQ panel.

Sincerely,



Lisa Murkowski
United States Senator