

Public Testimony Sign-Up Sheet

Agenda Item C-6 CDO Program

	NAME (PLEASE PRINT)	AFFILIATION
1	Wanetta Agnes	Western Alaska Community Development Association
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

MEMORANDUM

TO: Council and AP Members
FROM: Chris Oliver *Chris*
Executive Director
DATE: May 30, 2007
SUBJECT: Community Development Quota (CDQ) Program

ESTIMATED TIME
4 HOURS

ACTION REQUIRED

- a) Review of legal opinion on the roles and responsibilities of the Council, CDQ Panel, and NMFS, resulting from MSA amendments; action as necessary (T)
- b) Initial Review/Final Action on regulation of harvest regulatory amendment

BACKGROUND

- a) Review of legal opinion and discussion paper related to MSA amendments; action as necessary

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 was published 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. The proposed rule for Amendment 80 was published in the Federal Register on May 30, 2007 (72 FR 30052). Comments must be received by June 29, 2007.
- **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.** (Also see part b of this action memo below.) NMFS is preparing a regulatory amendment 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.” Council initial review and final action are both scheduled for this June 2007 Council meeting. The proposed action 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 has been in the process of developing a legal opinion related to the roles and responsibilities of the Council, CDQ Panel, and NMFS, resulting from the MSA amendments. At this time, the opinion is undergoing internal review. If released during the week of the June Council meeting, the opinion will be provided to the Council.**

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 MSA amendments. 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)**.

The Council’s action at this meeting is to review the legal opinion, if available, and take action as necessary. It may be necessary for staff to prepare a discussion paper for a subsequent meeting assessing the legal opinion, making recommendations about FMP or regulatory amendments that still need to be implemented, and identifying the Council’s role in that process.

b) Initial Review/Final Action on regulation of harvest regulatory amendment

NMFS has prepared an Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis evaluating three alternatives to modify fishery management regulations for the halibut, sablefish, and pollock CDQ fisheries conducted in the BSAI. Proposed changes to 50 CFR 679 include revising CDQ regulations associated with fisheries observer coverage requirements, bycatch retention, vessel licensing, and reporting requirements to ensure that they are no more restrictive than the regulations in effect for comparable individual fishing quota fisheries and fisheries managed with cooperatives. **These proposed regulatory amendments are necessary to comply with the requirements of the MSA, as amended by the Coast Guard Act of 2006.**¹

In general, the three alternatives under consideration are as follows:

Alternative 1. No action (status quo). Do not amend CDQ fisheries management regulations. This alternative would maintain the existing regulatory requirements for the sablefish, halibut, and crab CDQ fisheries of the BSAI. No changes to regulations would be made to revise CDQ-specific regulations so that they are equivalent to regulations in effect for comparable IFQ fisheries or fisheries managed with cooperatives. There currently are three IFQ fisheries (fixed gear sablefish, halibut, and crab) and one fishery operating under cooperatives (the BS pollock fishery). Maintaining existing CDQ fishery management regulations would not comply with the new requirements of the Magnuson-Stevens Act.

Alternative 2. Revise regulations associated with the halibut, sablefish, and pollock CDQ fisheries so that they are not more restrictive than regulations governing IFQ fisheries or fisheries managed with cooperatives. The sablefish CDQ fishery would continue to be managed with other groundfish CDQ fisheries. Alternative 2 would amend specific sections in 50 CFR 679 related to the regulation of harvest of the CDQ fisheries.

Alternative 3. Revise regulations associated with the halibut, sablefish, and pollock CDQ fisheries so that they are not more restrictive than regulations governing IFQ fisheries or fisheries managed with cooperatives. Alternative 3 would amend the same regulations in 50 CFR 679 that are described under Alternative 2. In addition, the management of the fixed gear sablefish CDQ fisheries would be integrated into the regulations governing the IFQ fisheries.

NMFS recommends Alternative 2 as its preliminary preferred alternative for this action. In brief, the selection of Alternative 2 is primarily based on an evaluation of the potential changes that each alternative would have on the sablefish CDQ fishery. NMFS contends that Alternative 2 would result in the least disruptive change to the CDQ groups and CDQ fisheries, while meeting the regulation of harvest requirements in the Magnuson-Stevens Act. Under Alternative 2, CDQ groups would not be subject to sablefish CDQ permits and additional IFQ-related reporting requirements, nor would NMFS need to implement such requirements. Furthermore, retaining fixed gear sablefish under the comprehensive groundfish CDQ accounting and management system makes it easier for NMFS to monitor the catch and transfer of the multiple categories of sablefish CDQ allocated to the CDQ Program and CDQ groups.

Note that in the analysis for this action, NMFS proposed extending a prohibition against discarding rockfish and cod if IFQ is on board to the halibut and sablefish CDQ fisheries as part of both Alternative 2 and 3. This proposal was intended to add consistency across similar fisheries, given that IFQ and CDQ may be fished concurrently. However, NMFS now realizes that this change could require many vessels in the halibut CDQ fishery to acquire a Federal fisheries permit. This effect is not addressed in the analysis, nor is it NMFS' intent

¹The regulation of harvest section is in Section 305(i)(1)(B)(iv) of the MSA.

to introduce additional permitting requirements for the halibut CDQ fishery. Thus, contrary to the language in the analysis, NMFS does not support including this particular element as part of the preferred alternative.

The analysis was mailed to you on May 15, and the executive summary is attached as **Item C-6(e)**. The Council has scheduled both initial review of the draft analysis and final action at this June Council meeting.

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 Chefnak, 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 CO.
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



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

Alaska,
Arka,
False Pass,
Nihoa Lagoon,
Nikolaki,
St. George

November 28, 2006

Via Facsimile: 907-586-7249



Alutian
Cordova
Dillingham
Egavik
Ekwok
Etah
King Salmon
Laredo
Mendocino
Nemok
Pilot Point
Port Heiden
Portage Creek
South Naknek
Togiak
Twin Hills
Ugashik

Douglas Mecum
Deputy Administrator, Alaska Region
National Marine Fisheries Service

Re: Panel Authority and Implementation of Amended Section 305(i)(1) of the
Magnuson-Stevens Fishery Conservation and Management Act

Dear Doug:

As Chair of the Community Development Quota Program Panel, and on behalf of its six member groups, I write to address some of the legal issues raised by the recent amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA).



St. Paul

Panel's authority. When Congress adopted the Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act), it established the Community Development Quota Program Panel (the Panel) each of whose six members represents one of the CDQ groups.



Chavak
Chitanaik
Eli
Goodness Bay
Hoopers Bay
Kipuk
Kumpuk
Kwigiluk
Matoryk
Napakik
Nepakik
Nerok
Nighmoo
Oscarville
Pavlov
Qashuk
Sourton Bay
Tahook Bay
Tumuk

As they constitute the Panel and begin carrying out its work as directed by Congress, the six CDQ groups find that there may be some question about the extent of the Panel's authority. The issue first arose at the October 2006 meeting of the North Pacific Fishery Management Council (Council), when the National Marine Fisheries Service (NMFS) distributed a "Staff discussion paper" setting out NMFS' plans for adopting regulations to put the Coast Guard Act into effect. That 34-page paper, which "is intended to provide an overview of the effects of the Coast Guard Act and a proposed plan for implementation of these amendments," mentions the Panel only very incidentally, and does not discuss its authority or responsibility at all. The CDQ groups hope that this omission does not imply a reading of the Coast Guard Act that would accord the Panel little authority or significance. As you might imagine, Panel members believe that the Coast Guard Act confers on the Panel considerable discretion and authority.



Stebbins
St. Michael
Ugashik
Shaktolik
Koyuk
Ellis
Gobovik
White Mountain
Nassau
Teller
Brewer Mission
Wahne
Diomede
Gambell
Seavooq

Coast Guard Act. The Coast Guard Act section on the CDQ program (Section 416) includes numerous references to the Panel. At the core is subparagraph (a)(1)(G), which establishes the Panel and sets its membership and functions:

(G) ADMINISTRATIVE PANEL.—



Atkasook
Erumok
Geyling
Kadik
Mountain Village
Nassau Inuk

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 2 of 6

(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.

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 3 of 6

(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.

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 4 of 6

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)).

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 5 of 6

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
Page 6 of 6

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.

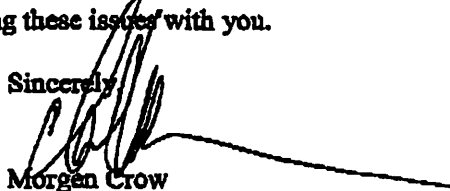
The "aspects of the program not otherwise addressed in this paragraph" include matters, e.g., the incidental catch of cod by vessels fishing in the CDQ program, that lie within the Council's authority to recommend to the Secretary amendments to FMPs. Recommendations directly to the Secretary will concern 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

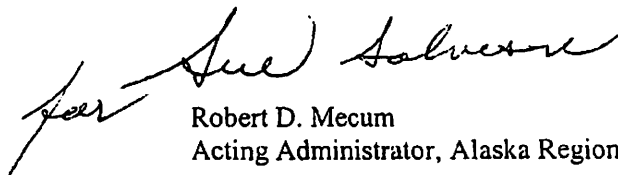
Morgen Crow, Chair
Community Development Quota Panel
Western Alaska Community Development Association
711 H Street, Suite 200
Anchorage, Alaska 99501

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


Akutan,
Ada,
False Pass,
Nelsoe Lagoon,
Nikilidi,
St. George

January 16, 2007

Via Facsimile: 907-586-7249



Aleknagik
Chena Point
Dillingham
Eggnik
Ekwok
Esk
King Salmon
Lewick
Manokotuk
Nainok
Pilot Point
Port Heiden
Portage Creek
South Nakatuk
Tokeik
Twin Hills
Ugashik

Douglas Mecum
Deputy Administrator, Alaska Region
National Marine Fisheries Service

Re: CDQ Program Panel Authority

Dear Doug:


St. Paul Island

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.



Chevik
Chetavik
Eak
Goodnews Bay
Hooper Bay
Kipnuk
Knapik
Kwigillinguk
Mekoryuk
Nepuk
Nepukik
Newok
Niginuak
Oscarville
Pitmeak
Quinhagak
Scouters Bay
Tobruk Bay
Tunuk
Tunuk

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.



Seabirds
St. Michael
Ushakot
Shakoolik
Koyuk
Elim
Gilevna
White Mountain
Nome
Teluk
Seward
Wain
Dionade
Gambel
Sevotaga

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:



Aleknagik
Ekwok
Gryling
Kauke
Mountain Village
Nainok

January 16, 2007
Page 2 of 4

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.

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.

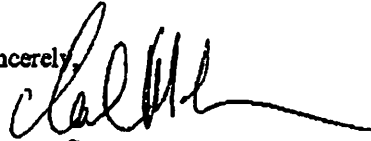
In addition to the notice procedure, over the next 90 days the Panel will develop draft regulations, which it will petition NMFS to adopt. We look forward to working with NMFS in that petition process.

22-01-2007 14:50 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

APICDA



Akiutan,
Atka,
False Pass,
Nehan Lagoon,
Nikolaki,
St. George

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

January 16, 2007



Alchamgak
Clarks Point
Dillingham
Egveit
Erkok
Eruk
King Salmon
Levelock
Manokotuk
Nalae
Pilot Point
Port Helden
Portage Creek
South Naknek
Togiak
Twin Hills
Ugashik

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

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



St. Paul Island

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.



Chevak
Cheforak
Eck
Goodnews Bay
Hooper Bay
Kipruk
Kongiganak
Kwigillingok
Mezaryuk
Napaklak
Napaklak
Newok
Nightmute
Oscarville
Pliginsk
Quinhagak
Summers Bay
Tobacco Bay
Tusovuk
Tusovuk

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.



Stebbins
St. Michael
Unalakleet
Sheltonville
Koyuk
Eliak
Golovin
White Mountain
Nome
Teller
Breivig Mission
Wales
Diomedes
Gambell
Savoonga

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.



Alchamgak
Emmonak
Grayling
Kotik
Mountain Village
Nunam Iqua

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, shorttraker rockfish, rougheye 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

14674/5620
S-LA-PCO

3/13/07

07-000620



UNITED STATES DEPARTMENT OF COMMERCE
The Under Secretary of Commerce
for Oceans and Atmosphere
Washington, D.C. 20230

MAR 5 2007

MEMORANDUM FOR THE SECRETARY

FROM: Conrad C. Lautenbacher, Jr. *fill in*
Vice Admiral, U.S. Navy (Ret.)
Under Secretary of Commerce for
Oceans and Atmosphere

SUBJECT: Western Alaska Community Development Quota Program

Forwarded for your approval and signature is a letter in response to Senator Lisa Murkowski's request you implement provisions of section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act related to the Community Development Quota (CDQ) administrative panel consistent with the conference committee report on the Coast Guard and Maritime Transportation Act of 2006.

You state 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. You also state NMFS has provided a copy of Senator Murkowski's letter, and all correspondence received from the CDQ administrative panel about interpretation of the Magnuson-Stevens Act, to NOAA General Counsel for its consideration during preparation of the legal memorandum. You state further NMFS will keep Senator Murkowski informed about its actions with regard to the CDQ administrative panel and implementation of the Magnuson-Stevens Act amendments.

Recommendation:

That you sign the attached letter.

Clearances: See attached NOAA clearance sheet.

Executive Secretarial Clearance:

Tracey Rhoades
Tracey Rhoades

3/12/07
Date

THE ADMINISTRATOR



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

Executive Summary

Background and purpose of this action

This document evaluates proposed regulatory amendments to revise fishery management regulations associated with the Community Development Quota (CDQ) Program. These revisions are associated with statutory changes made to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) in 2006. Affected fisheries include the halibut CDQ, fixed gear sablefish CDQ, and pollock CDQ fisheries. Proposed regulatory changes include revising regulations associated with fisheries observer coverage requirements, bycatch retention, vessel licensing, recordkeeping, and catch reporting to ensure that they are no more restrictive than the regulations in effect for comparable individual fishing quota (IFQ) fisheries and fisheries managed with cooperatives. The proposed revisions address regulations that may be considered more “restrictive” because they subject CDQ fishery participants to additional costs, to additional catch reporting requirements, or that were designed to control some aspect of CDQ fishing activities beyond measures in place for comparable fisheries.

This action is necessary to ensure that CDQ fishery management regulations in 50 CFR part 679 are consistent with the Magnuson-Stevens Act. The Magnuson-Stevens Act requires that the “harvest of allocations under the [CDQ] 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.” This proposed action would make revisions to regulations governing the halibut, sablefish, and pollock CDQ fisheries to ensure that they are no more restrictive than those in place for comparable IFQ fisheries or fisheries managed with cooperatives.

This action is being presented for consideration by the North Pacific Fishery Management Council (Council). NMFS is requesting that the Council both conduct initial review of, and take final action on, this action at the June 2007 Council meeting.

Alternatives considered for this action

This analysis assesses three alternatives. The first is a status quo alternative. The second and third alternatives address the requirement in section 305(i)(1)(B)(iv) of the Magnuson-Stevens Act that the regulation of harvest in CDQ fisheries shall be no more restrictive than regulations associated with the harvest of comparable IFQ fisheries or cooperative fisheries. NMFS has not identified any aspects of the crab CDQ fisheries that are managed more restrictively than the crab IFQ fishery; therefore, no changes to crab CDQ regulations in 50 CFR parts 679 or 680 are proposed by this action.

Alternative 1. Status quo—do not amend CDQ fisheries management regulations.

Alternative 1 is the status quo alternative. This alternative would maintain the existing regulatory requirements for the sablefish, halibut, and crab CDQ fisheries of the BSAI. No changes to regulations would be made to revise CDQ-specific regulations so that they are equivalent to regulations in effective for comparable IFQ fisheries or fisheries managed with cooperatives. There currently are three IFQ fisheries (fixed gear sablefish, halibut, and crab) and one fishery conducted with cooperatives (the BS pollock fishery).

While the CDQ fisheries generally are a subset of comparable IFQ and fisheries managed with cooperatives, some of the regulations for the CDQ fisheries impose different conditions than those in place for similar non-CDQ fisheries. Regulations that may be considered more restrictive include those associated with catch retention and accounting, observer coverage, vessel licensing, and recordkeeping. Maintaining existing CDQ fishery management regulations would not comply with the requirements of the Magnuson-Stevens Act.

Alternative 2. Revise regulations associated with the halibut, sablefish, and pollock CDQ fisheries so that they are not more restrictive than regulations governing IFQ fisheries or fisheries managed with cooperatives. The sablefish CDQ fishery would continue to be managed with other groundfish CDQ fisheries.

Alternative 2 would amend specific sections in 50 CFR part 679 related to the regulation of harvest of the CDQ fisheries. The general changes proposed for Alternative 2 would:

- exempt vessels fishing for sablefish CDQ from having to have a LLP license,
- revise definitions in section (§) 679.2 to add definitions of sablefish CDQ and pollock CDQ fishing and to include a sablefish CDQ exemption in the definition of “license limitation groundfish,”
- revise § 679.5 to remove a requirement that CDQ groups annually submit a request to NMFS to designate specific vessels as eligible to harvest groundfish CDQ on their behalf,
- remove a prohibition in § 679.7 against harvesting groundfish CDQ unless a vessel is listed as eligible by a CDQ group,
- prohibit the discard of Pacific cod and rockfish taken when halibut or sablefish CDQ are onboard a vessel,
- revise CDQ catch monitoring requirements in § 679.32 to incorporate applicable changes to the basis for CDQ catch accounting for the halibut, sablefish, and pollock CDQ fisheries,
- eliminate the requirement that groundfish bycatch be retained by catcher vessels targeting halibut, sablefish, or pollock CDQ, and
- revise regulations in § 679.50 to align coverage observer coverage requirements for the sablefish CDQ, halibut CDQ, and pollock CDQ fisheries with comparable non-CDQ fisheries.

Alternative 3. Revise regulations associated with the halibut, sablefish, and pollock CDQ fisheries so that they are not more restrictive than regulations governing IFQ fisheries or fisheries managed with cooperatives. Additionally, incorporate the management of the sablefish CDQ fishery into the sablefish IFQ Program.

Alternative 3 would amend the same regulations in 50 CFR part 679 that are described under Alternative 2. In addition, the management of the fixed gear sablefish CDQ fisheries would be integrated into the regulations governing the IFQ fisheries. The management functions associated with the sablefish CDQ fishery would shift from the Alaska Region’s Sustainable Fisheries Division to the Restricted Access Management (RAM) Program. This would align both the regulatory requirements and the management functions associated with the regulation of harvest of the fixed gear sablefish CDQ with those established for the IFQ fisheries. In addition to the general changes proposed for Alternative 2, Alternative 3 would:

- add a requirement for sablefish CDQ permits to § 679.4,
- revise regulations in § 679.5 to incorporate sablefish CDQ into IFQ recordkeeping and reporting requirements,
- revise § 679.7 to incorporate sablefish CDQ into the prohibitions that apply to the sablefish IFQ fishery, and amend §§ 679.41 and 679.42 to incorporate sablefish CDQ into regulations governing the sablefish IFQ fishery, and
- incorporate management of the sablefish CDQ fishery into the RAM Program.

NMFS recommends Alternative 2 as its preliminary preferred alternative for this action. This is based on an assessment of the effects of each alternative. In summary, the selection of Alternative 2 primarily is based on an evaluation the potential changes that each alternative would bring to the sablefish CDQ fishery. NMFS believes that Alternative 2 would result in the least disruptive change to the CDQ groups and CDQ fisheries, while meeting the regulation of harvest requirements in the Magnuson-Stevens Act. Alternative 2 would amend regulations for the CDQ fisheries affected by this action so that they match those regulations in place for comparable fisheries, but would not make as many changes to the program as Alternative 3. Alternative 2 would not integrate the sablefish CDQ fishery into the sablefish IFQ Program. CDQ groups would not be subject to sablefish CDQ permits and additional IFQ-related reporting requirements, nor would NMFS have to implement such requirements. Furthermore, retaining fixed gear sablefish under the comprehensive groundfish CDQ accounting and management system would make it easier for NMFS to monitor the catch and transfer of the multiple categories of sablefish CDQ allocated to the CDQ Program and CDQ groups.

Potential Effects of this Action

The Environmental Assessment prepared for this action examines potential effects on resource components of the BSAI, per the requirements of the National Environmental Policy Act. The primary effect of Alternatives 2 and 3 would be a decrease in fisheries observer coverage, with a corresponding decrease in observer data and its use for CDQ catch accounting. This principally affects the groundfish and prohibited species resource components. Selection of either Alternative 2 or Alternative 3 would require NMFS to modify its CDQ catch accounting procedures to match those in place for comparable IFQ fisheries or fisheries managed with cooperatives. NMFS would still have the information it needs to manage the CDQ fisheries. Existing catch monitoring and accounting procedures support NMFS's objective of monitoring the catch of various BSAI resource components across various industry sectors as well as controlling the overall catch to annual BSAI TAC limits. No adverse effects on BSAI resource components were identified.

A Regulatory Impact Review was conducted to comply with Executive Order (E.O.) 12866. Alternatives 2 and 3 were evaluated with respect to the economic effects each could have on the entities affected by this action. This review concluded that the CDQ groups could, in general, benefit from the changes proposed by this action. Both Alternative 2 and Alternative 3 would amend regulatory restrictions that have historically been identified by CDQ groups and their harvesting partners as expensive and burdensome, particularly observer requirements and bycatch retention requirements. Implementation of the alternatives considered under this action may have a positive economic impact on the halibut, fixed gear sablefish, and pollock CDQ fisheries by decreasing or modifying certain management restrictions. Correspondingly, these fisheries could enjoy increased operational flexibility. NMFS would be subject to short term costs associated with implementing the changes proposed under each of the action alternatives. This does not appear to be a "significant regulatory action" based on the E.O. 12866 criteria used to assess the potential effects of a given action.

The Initial Regulatory Flexibility Analysis prepared for this action examines potential impacts on regulated small entities, per Regulatory Flexibility Act requirements. For this action, those entities are the six CDQ groups that represent 65 western Alaska communities. Each of the proposed alternatives is intended to modify, by some degree, the regulation of harvest of the halibut, sablefish, and pollock CDQ fisheries. The proposed alternatives are intended to provide

some degree of benefit to CDQ groups; none of the alternatives appear to have any negative economic impacts on these small entities.



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

June 1, 2007

MEMORANDUM FOR:

Robert D. Mecum
Acting Administrator, Alaska Region
National Marine Fisheries Service

Chris Oliver
Executive Director
North Pacific Fishery Management Council

FROM:

Lisa L. Lindeman
Alaska Regional Counsel

SUBJECT:

Authority of Community Development Quota Program
Panel under Section 305(i)(1)(G) of the Magnuson-Stevens
Fishery Conservation and Management Act (NOAA Legal
Memorandum No. GCAK-2007-01)

STATEMENT OF ISSUE

The Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act)¹ extensively amended section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and fundamentally changed many features of the Western Alaska Community Development Quota (CDQ) program as developed by the North Pacific Fishery Management Council (Council) and NOAA's National Marine Fisheries Service (NMFS). Among other things, section 305(i)(1) establishes a CDQ program Panel (Panel) and identifies the Panel as the entity responsible for administering those aspects of the program not otherwise addressed in section 305(i)(1).

The Council and NMFS have requested our legal views on a number of questions regarding the legal implications of the new language at section 305(i)(1). At this time, the factual basis necessary to form a legal opinion for most of these questions is not yet sufficiently developed. However, the following question posed by both the Council and NMFS can be addressed at this time: whether the Panel's authority includes the development of unspecified regulatory details necessary to effectively implement those aspects of the CDQ program that are addressed in section 305(i)(1) but are not delegated to the Panel.

¹ Pub. L. No. 109-241, § 416, 120 Stat. 516, 540-45 (2006).



SHORT ANSWER

The Panel is the entity responsible for administering those aspects of the CDQ program that are not otherwise addressed in section 305(i)(1). However, the Panel's authority does not include the administration of CDQ program aspects that are addressed in section 305(i)(1). Entities other than the Panel, such as NMFS, that are responsible for administering an aspect of the CDQ program that is addressed in section 305(i)(1) also have the authority to develop regulatory details not specified in the statutory language but that are associated with effective implementation of the statutory language. Only those unspecified details associated with effective implementation of the statutory language may be implemented by the responsible entity.

BACKGROUND

When the CDQ program was initially implemented in 1992 in accordance with general provisions of the MSA,² the MSA did not include any provisions that specifically addressed the CDQ program. In 1996, the MSA was amended to include several provisions at section 305(i)(1) that governed certain aspects of the CDQ program.³ Recently, the Coast Guard Act extensively amended section 305(i)(1) and fundamentally changed many features of the CDQ program as developed by the Council and NMFS.⁴ Among other things, section 305(i)(1) establishes a CDQ program Panel⁵ and sets forth new roles and responsibilities for the Panel, the Council, NMFS, and the State of Alaska (State) in the administration of the CDQ program.⁶

Section 305(i)(1) specifically identifies the Panel as the entity responsible for:

- (1) coordinating and facilitating activities of the CDQ entities under the program;⁷

² Final Rule to Implement the Western Alaska CDQ Program, 57 *Fed. Reg.* 54,936 (November 23, 1992). Under the MSA, the Council has the general authority to make policy recommendations to the Secretary for the conservation and management of fisheries in the Exclusive Economic Zone of the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. 16 U.S.C. § 1852(a)(1)(G).

³ The Sustainable Fisheries Act, Pub. L. No. 104-297, § 111, 110 Stat. 3559, 3592-93 (1996), added provisions to the MSA at section 305(i)(1) (16 U.S.C. § 1855(i)(1)) that addressed the percentage of crab to be allocated to the CDQ program, the eligibility criteria for communities, and certain restrictions on changes to the CDQ program during a legislated moratorium.

⁴ The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 (MSRA), Pub. L. No. 109-479, § 116, 120 Stat. 3575, 3606 (2006) made several substantive changes to section 305(i)(1) but did not amend the sections addressing the Panel's authority to administer certain aspects of the CDQ program.

⁵ See section 305(i)(1)(G)(i) and (ii) (16 U.S.C. §§ 1855(i)(1)(G)(i) and (ii)) (establishing the Panel and requiring that the Panel "consist of 6 members" and that each CDQ entity participating in the program "select one member of the panel"). The Panel has been established as the Western Alaska Community Development Association and has submitted two letters to NOAA Fisheries in which the Panel explains its interpretation of section 305(i)(1) (Attachments A and B to this memorandum).

⁶ Section 305(i)(1), as amended by the Coast Guard Act and the MS Reauthorization Act, is provided in Attachment C to this memorandum.

⁷ Section 305(i)(1)(G)(iii)(II) (16 U.S.C. § 1855(i)(1)(G)(iii)(II)).

- (2) establishing a system to be applied in the decennial review and adjustment of entity allocations that allows each entity participating in the program to assign relative values to statutorily-specified criteria to reflect the particular needs of its villages;⁸
- (3) allocating "seven-tenths of one percent of . . . the amount allocated to the program by subclause (I) or (II) of subparagraph (B)(ii) . . . among the eligible entities;"⁹ and
- (4) administering 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.¹⁰

To perform these responsibilities, the MSA requires that the Panel act by unanimous vote of all six members and prohibits action by the Panel if there is a vacancy in the Panel's membership.¹¹

The Council and NMFS have asked whether the Panel's authority to administer aspects of the CDQ program not addressed in section 305(i)(1) includes the development of unspecified regulatory details associated with effective implementation of those aspects of the CDQ program that are addressed in section 305(i)(1) but are not delegated to the Panel. The Panel has expressed its opinion regarding the authority delegated to it by section 305(i)(1).¹² In summary, the Panel interprets the MSA as conferring "considerable discretion and authority"¹³ on the Panel "to administer every aspect of the CDQ program that the rest of the CDQ provisions do not address."¹⁴ The Panel identified six aspects of the CDQ program that it has determined are "addressed" within section 305(i)(1) and therefore not left to the Panel's administration.¹⁵ However, the Panel

⁸ Section 305(i)(1)(H)(ii) (16 U.S.C. § 1855(i)(1)(H)(ii)).

⁹ Section 305(i)(1)(C) (16 U.S.C. § 1855(i)(1)(C)).

¹⁰ Section 305(i)(1)(G)(iii)(I) (16 U.S.C. § 1855(i)(1)(G)(iii)(I)). Because the section is 305, the subsection is (i), and the paragraph is (1), the phrase "this paragraph" refers to aspects of the program addressed within section 305(i)(1). For clarity, the remainder of this memorandum will reference section 305(i)(1) instead of "this paragraph." Additionally, this memorandum does not provide any legal opinion regarding the State of Alaska, its role in the CDQ program, or its legal relationship with the Panel.

¹¹ Section 305(i)(1)(G)(iv) (16 U.S.C. § 1855(i)(1)(G)(iv)).

¹² See Attachments A and B to this memorandum.

¹³ See Attachment A at 1.

¹⁴ See Attachment A at 4. In its letters to NMFS, the Panel notes that while the statutory language provides the Panel with a choice in exercising its authority, either through private contractual arrangement or recommendation to the appropriate governmental entity, it concludes "that Congress intended it to administer all aspect [sic] of the CDQ program through private contractual arrangements, including the administration of Panel operations, except for the . . . six elements of the program that are "addressed" within the meaning of the Act." For those aspects of the CDQ program that are addressed in section 305(i)(1), the Panel states that it "will limit its role to the advisory capacity when necessary." The Panel expresses an opinion as to whether certain aspects of the program that are addressed in section 305(i)(1) should be contained within an FMP and asks that NMFS consult the Panel when undertaking rulemaking related to the six areas it believes are within the agency's authority to administer.

¹⁵ Both letters generally identify the same six aspects, although the Panel's January 16, 2007, letter (Attachment B) provides additional detail: (1) CDQ program purposes and the regulation of fish harvesting and processing, establishment of fish harvesting and processing rights, and program allocations; (2)

contends that unspecified details associated with those addressed aspects are within the Panel's authority to administer.¹⁶

ANALYSIS

Unless specifically identified in the statutory language as the responsible entity, the Panel does not have authority to administer those aspects of the CDQ program that are addressed in section 305(i)(1). Section 305(i)(1) explicitly or implicitly identifies entities other than the Panel as responsible for administering several statutorily addressed aspects of the CDQ program.¹⁷ Because these aspects of the CDQ program are "otherwise addressed" in section 305(i)(1) and the statutory language does not identify the Panel as the entity responsible for administering them, these aspects are outside the Panel's administrative authority.

While section 305(i)(1) specifically addresses several aspects of the CDQ program, it does not specify every detail necessary to implement those aspects. This raises the question whether the development of regulatory details associated with effective implementation of the addressed aspects of the CDQ program is within the Panel's authority. In our opinion, although these details are not specifically addressed in the statutory language, they are not within the Panel's authority to administer. The Supreme Court has recognized the general rule that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."¹⁸ Under this rule, the entity responsible for implementing an aspect of the CDQ program addressed in section 305(i)(1) not only has the authority to implement the specific statutory language but also has the authority to develop unspecified details associated with effective implementation of the statutory language. Additionally, nothing in the statutory language in section 305(i)(1) contradicts the application of this general rule. Congress, by specifically delegating to the Panel those aspects of the CDQ program not addressed in section 305(i)(1), withheld the implementation of aspects addressed in that section from Panel authority. The Panel has the authority to administer, or implement, those aspects of the CDQ program not otherwise addressed but does not have the authority to administer, or implement, those aspects of the program that are addressed.

identification of eligible participating communities; (3) CDQ group eligibility standards, including governance, investment types, and annual statements of compliance; (4) excessive share ownership harvesting and processing limitations on CDQ entities and requirements for and limits to oversight of CDQ groups; (5) the State's decennial review of each groups' performance; and (6) the definition of a community development plan.

¹⁶ See Attachment B at 3 (stating that because some details associated with certain addressed aspects "are not addressed in the legislation," the Panel will develop these details by contractual arrangement).

¹⁷ Examples of these aspects include allocations to the program, the regulation of harvest, and eligibility requirements for participating CDQ groups.

¹⁸ *Loving v. United States*, 517 U.S. 748, 768, 116 S. Ct. 1737, 1748 (1996), quoting *Lichter v. United States*, 334 U.S. 742, 778, 68 S. Ct. 1294 (1948). See also *Yakus v. United States*, 321 U.S. 414, 425-26, 64 S. Ct. 660, 668 (1944) (stating that "Congress is not confined to that method of executing policy which involves the least possible delegation of discretion to administrative officers.")

Furthermore, to conclude that the Panel has the authority to develop unspecified details necessary to implement an addressed aspect delegated to another entity could lead to absurd results. If the responsible entity did not have authority to develop administrative details not specified in the statutory language but necessary to implement a statutory provision within 305(i)(1), it is possible that the responsible entity would never be able to carry out its responsibility for implementing those sections if no action from the Panel on the details were forthcoming. Such a situation would be clearly contrary to the statutory language of the MSA that identifies entities other than the Panel as responsible for implementing the aspects of the CDQ program that are addressed in section 305(i)(1).¹⁹ Therefore, the entity responsible for administering an addressed aspect of the CDQ program also has the authority to develop details necessary to effectively implement the statutory language. However, because Congress has so precisely articulated its intent concerning many of the statutorily addressed aspects of the CDQ program, the entity responsible for an addressed aspect must take care to implement only those details associated with effective implementation of the statutory language and not step beyond the authority delegated by Congress.

CONCLUSION

The Panel is the entity responsible for administering those aspects of the CDQ program that are not otherwise addressed in section 305(i)(1). However, the Panel's authority does not include the administration of CDQ program aspects that are addressed in section 305(i)(1), including the development of unspecified details associated with effective implementation of those aspects. The entity responsible for administering an addressed aspect must take care to implement only those unspecified administrative details that are associated with effective implementation of the statutory language and not step beyond the authority delegated by Congress.

Approved:


Deputy General Counsel

Date: 6-1-07

Attachments

¹⁹ Nothing in the MSA prevents the Panel from providing the entity responsible for administering an addressed aspect with comments on how to administer that aspect.

CDQ Panel



Alaska
Arctic
Petersen
Moose Lagoon
Nikolai
St. George

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

November 28, 2006

Via Facsimile: 907-586-7249

Attachment
A



Alaska
Chena Point
Dillingham
Eggen
Ekwok
Etah
King Island
Laredo
Lisianski
Metchik
Pilot Point
Pope John
Powers Creek
South Nakat
Togiak
Twin Falls
Upukil

Douglas Mecum
Deputy Administrator, Alaska Region
National Marine Fisheries Service

Re: Panel Authority and Implementation of Amended Section 305(i)(1) of the Magnuson-Stevens Fishery Conservation and Management Act

Dear Doug:

As Chair of the Community Development Quota Program Panel, and on behalf of its six member groups, I write to address some of the legal issues raised by the recent amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA).



St. Paul

Panel's authority. When Congress adopted the Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act), it established the Community Development Quota Program Panel (the Panel) each of whose six members represents one of the CDQ groups.



Chena
Chukchi
Sik
Cordova Bay
Hanger Bay
Kipuk
Koyukuk
Kurtchuck
Metchik
Nepuk
Nepuk
Noyah
Noyah
Oumalik
Pilot Point
Qulunguk
Seward Bay
Tulokuk Bay
Tulokuk
Tulokuk

As they constitute the Panel and begin carrying out its work as directed by Congress, the six CDQ groups find that there may be some question about the extent of the Panel's authority. The issue first arose at the October 2006 meeting of the North Pacific Fishery Management Council (Council), when the National Marine Fisheries Service (NMFS) distributed a "Staff discussion paper" setting out NMFS' plans for adopting regulations to put the Coast Guard Act into effect. That 34-page paper, which "is intended to provide an overview of the effects of the Coast Guard Act and a proposed plan for implementation of these amendments," mentions the Panel only very incidentally, and does not discuss its authority or responsibility at all. The CDQ groups hope that this omission does not imply a reading of the Coast Guard Act that would accord the Panel little authority or significance. As you might imagine, Panel members believe that the Coast Guard Act confers on the Panel considerable discretion and authority.



St. Michael
St. Michael
Lisianski
Lisianski
Koyuk
Etah
Oumalik
White Mountain
Yukon
Pilot
Seward Bay
White
Oumalik
Oumalik
Seward

Coast Guard Act. The Coast Guard Act section on the CDQ program (Section 416) includes numerous references to the Panel. At the core is subparagraph (a)(1)(G), which establishes the Panel and sets its membership and functions:

(G) ADMINISTRATIVE PANEL.—



Alaska
Koyukuk
Cape
Koyuk
Koyuk Village
Noyah Bay

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 2 of 6

(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.

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 3 of 6

(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.

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 4 of 6

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. Bridgport Financial, Inc.*, 420 F.3d 1078 (9th Cir. 2005), quoting *Lanier 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:

- Allotments, 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 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 context, none of which detracts from the Panel's mandate to administer all but the definition of CDQs: (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)(v)(V)).

Mr. Douglas Mecum
Deputy Administrator, Alaska Region
November 28, 2006
Page 5 of 6

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
 Page 6 of 6

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.

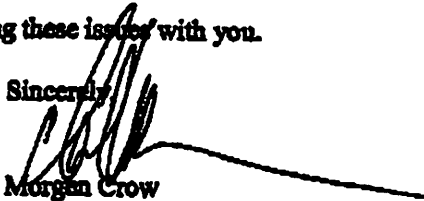
The "aspects of the program not otherwise addressed in this paragraph" include matters, e.g., the incidental catch of cod by vessels fishing in the CDQ program, that lie within the Council's authority to recommend to the Secretary amendments to FMPs. Recommendations directly to the Secretary will concern 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

The Conference substitute establishes a community development quota program panel. The CDQ Panel will consist 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 (c) 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 (d) 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 (c) 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 aspects 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.

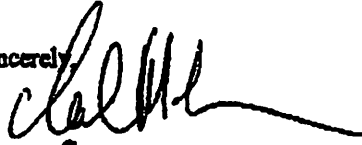
In addition to the notice procedure, over the next 90 days the Panel will develop draft regulations, which it will petition NMFS to adopt. We look forward to working with NMFS in that petition process.

22-01-2007 14:58 From

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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

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 restrictively 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 Chefnak, 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.

AGENDA C-6
Supplemental
JUNE 2007

May 29, 2007

RECEIVED

MAY 29 2007

N.P.F.M.C

North Pacific Fishery Management Council
605 W. Fourth Avenue, Suite 306
Anchorage, AK 99502-2252

Dear Council member,

Thank you for your willingness to accept public comments on the CDQ program and MSA amendments. My name is Laurie McNicholas, I have resided in Nome for 12 years, and occasionally I have worked as a freelance reporter for *The Nome Nugget* Newspaper for about 10 years. I produced news and feature stories about Norton Sound Economic Development Corporation for several years until mid-2004. Last month I resumed coverage of NSEDC for *The Nome Nugget* based primarily on minutes of board meetings held from July 2006 through April 2007 and answers to questions by members of the NSEDC board about actions they took at meetings during that period.

I am concerned that while the CDQ amendments to the MSA in the Coast Guard Act of 2006 have greatly reduced Federal and State oversight of CDQ groups and shifted to their member communities a major responsibility for holding CDQs accountable, the amendments include no provisions to ensure community involvement in decision-making by the CDQ groups. This seems unreasonable. For reporting to their member communities, the CDQ amendments to the MSA mandate only that CDQs comply with State law requiring annual reports to their member villages summarizing financial operations for the previous calendar year, etc. An annual report seems inadequate as the sole reporting requirement for CDQs to their member communities.

Subparagraph G of Sec. 416 of the 2006 Coast Guard Act provides for establishment of a CDQ panel composed of six members, states that each CDQ group will select one member of the panel, and says the panel may act only by unanimous vote. A House of Representatives conference report on the purpose of the CDQ panel states: "The CDQ Panel removes the need for governmental oversight of the CDQ program and encourages the CDQ groups to work together." How can a six-member panel of representatives of each CDQ group remove the need for governmental oversight that mandated community involvement in decision-making? This seems illogical. I've been informed that the CDQ Panel began to hold meetings in August 2006, elected officers, established an office in Anchorage, hired an executive director in February 2007 and is awaiting regulations for the CDQ MSA amendments. Have they made any other organization progress? Is there yet any indication whether the mandate for unanimous consent facilitates—or impedes—their decision-making?

Actions taken in the past eight months by NSEDC's board of directors to radically restructure the corporation underscore concerns regarding the lack of provision in CDQ amendments for public participation in decision-making. Here is an example: At their

Page 2-McNicholas letter to NPFMC

quarterly meeting July 27-28, 2006 in Nome (less than three weeks after the 2006 Coast Guard Act became law), the NSEDC board decided to dismantle the corporation's investment subsidiary, Norton Sound Investment Corporation, and transfer its assets to the parent corporation, where the assets remained invested but lacked designated management for six months. NSIC had held NSEDC's investments in Glacier Fish Company, Norton Sound Ventures, other holdings and various investment accounts for several years, during which time NSIC was managed by Steve Rieger under contract with NSEDC. At its July 2006 meeting, the NSEDC board decided not to renew Rieger's contract. The board created the position of Norton Sound Investment Manager to replace Rieger, but the position has yet to be filled. Minutes of the meeting indicate no discussion of dissolving NSIC took place during open, public sessions, but several board members have said they discussed NSIC in a closed executive session immediately before voting to dissolve the subsidiary. In January 2007 the NSEDC board selected two firms to manage \$28 million each of NSEDC's investments.

In the context of new CDQ amendments to the MSA, including the provision for making up to 20 percent of investments in projects within they region and the great reduction in Federal and State oversight, the NSEDC board's decision to radically change the corporation's internal investment management structure and eliminate internal intermediary processes in investment decision-making is worrisome, especially because the Board decided to do so behind closed doors and provided no reasons to the public for doing so. NSEDC is not covered by the Alaska Open Meeting Law, but is there any legal reason why a public body supplying a valuable public resource such as a quota of the TAC for various Bering Sea-Aleutian Islands fisheries cannot require a recipient to open its meetings and records as a condition of accepting the public resource? Is it possible for NPFMC or the National Marine Fisheries Service to require boards of directors of CDQs to run their meetings in an open manner modeled on high standards such as those of the Alaska Open Meetings Act?

Federal and State oversight of CDQ groups formerly included the capability to ensure that internal investment criteria and policies are established and followed, that significant investments are the result of reasonable business decisions and to detect and prevent misuse of assets through fraud, dishonesty or conflict of interest. The new CDQ amendments do not seem to provide much meaningful oversight in those areas, but I hope Federal regulations pertaining to the amendments will assert as much oversight as the law will allow. Thank you for considering my comments.

Sincerely yours,



Laurie McNicholas
P.O. Box 565
Nome, AK 99762
Phone/FAX: (907)-443-3910



BBEDC



WESTERN ALASKA COMMUNITY DEVELOPMENT ASSOCIATION



May 24, 2007

RECEIVED
MAY 29 2007
N.P.F.M.C.

Ms. Stephanie Madsen, Chair
NORTH PACIFIC FISHERY MANAGEMENT COUNCIL
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

Dear Ms. Madsen:

The Western Alaska Community Development Association (WACDA) Board of Directors has reviewed the draft of the EA/RIR/IRFA regarding amendments to revise the regulation of harvest for halibut, sablefish and pollock CDQ fisheries. Based on that review and subsequent discussion with NMFS Staff, the CDQ Panel endorses the NMFS recommendation of alternative two as the preferred alternative.

Alternative two offers a common sense approach to amending CDQ fishery regulations to conform to those regulations governing other fisheries. This achieves the parity called for in last year's amendments to the Magnuson-Stevens Fishery Conservation and Management Act.

Retaining the fixed gear sablefish CDQ under the NMFS Sustainable Fisheries Division accounting and management system offers benefits to both the CDQ entities and NMFS by minimizing possible disruptions, eliminating additional permitting requirements and maintaining reasonable reporting and monitoring requirements.

We urge the Council's favorable consideration of alternative two and look forward to working with NMFS to ensure its full implementation.

Sincerely,

Western Alaska Community Development Association

C. Morgen Crow
C. Morgen Crow, Chairman
WACDA Board of Directors

- | | | | | | | | | | | |
|----------------|--------------|------------|---------------|-------------|------------------|------------|---------------|-----------------|-------------|----------------|
| AKUTAH | CHEVAK | EKUK | GOLOVIN | KOMGIGAHAK | MEKORYUK | HEWTOR | PILOT POINT | SCAMMON BAY | STEBBIS | TMPHILLS |
| ALAKAHIK | CLARKS POINT | EKIVOK | GOODHEVIS BAY | KOTUK | MOUNTAIN VILLAGE | NIGHTMUTE | PLATINUM | SHAKTOOK | TELLER | UTASHIK |
| ALEKIAGIK | DILLINGHAM | ELIM | GRAYLING | KOYUK | THAKHEK | NIKOLSKI | PORT HEIDEN | SOUTH HARKER | TOGIAK | UHALAKLEET |
| ATKA | DIOMEDE | ENAYONAK | HOOPER BAY | KWISLIPUSOK | THAPAKAN | NOVIE | PORTAGE CREEK | ST. GEORGE | TOKSOOK BAY | WALEY |
| BREVIG MISSION | EK | FALSE PASS | KIING SALMON | LEVELOCK | THAPASKAK | TUNAMIQUA | QUIRHAGAK | ST. MICHAEL | TUNTUTULAK | WHITE MOUNTAIN |
| CHEFORNAK | ECEGIK | GAMBELL | KIRIUK | MANIKOTAK | NELSON LAGOON | OSCARVILLE | SAYOCHGA | ST. PAUL ISLAND | TURUNAK | |

Implementation Status of CDQ Program Related Requirements in Section 305(i)(1) of the Magnuson-Stevens Act

Magnuson-Stevens Act Requirement	Implementation Status
<p>(A) IN GENERAL.—There is established the western Alaska community development quota program in order—</p> <ul style="list-style-type: none"> (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>Both the BSAI FMP and regulations at 50 CFR part 679 need to be revised to remove the current description of the purpose of the CDQ Program, which is not consistent with the MSA. The new language of the MSA may or may not need to be added to the FMP(s) or regulations. As the statement of purpose of the CDQ Program is in the MSA, it is not absolutely necessary to reproduce this statement of purpose in either the FMPs or federal regulations.</p>
<p>(B) PROGRAM ALLOCATION.—</p> <p>(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>Subparagraph (B) addresses allocations of groundfish, halibut, and crab to the CDQ Program.</p> <p>In combination with (B)(ii), this subparagraph maintains the current allocations to the CDQ Program for pollock (10% of the TACs as a directed fishing allowance), sablefish (20% of fixed gear allocation of the TAC and 7.5% of trawl allocation), halibut (various %), and crab (10% of TACs, except 7.5% of Norton Sound red king crab GHL).</p> <p>Allocations of groundfish species with a directed fishery in the BSAI were made to the CDQ Program for 2007 and 2008 through the 2007-2008 groundfish specifications final rule (72 FR 9451; March 2, 2007).</p> <p>The groundfish species now allocated to the CDQ Program are those with a directed fishery in the BSAI: BS and AI pollock, Pacific cod, sablefish, Atka mackerel, yellowfin sole, rock sole, BS Greenland turbot, arrowtooth flounder, flathead sole, and AI Pacific ocean perch.</p> <p>The following species or species groups with TACs were determined to not meet the definition of the term “directed fishery of the BSAI” for purposes of this section of the MSA and were not allocated to the CDQ Program: Bogoslof pollock, AI Greenland turbot, other flatfish, Alaska plaice, northern rockfish, shortraker rockfish, rougheye rockfish, other rockfish, squid, and other species. Catch of these species by the CDQ groups accrues against the TAC for these species and is managed under the regulations that apply to all other vessels in the non-CDQ fisheries.</p>

<p>(B) PROGRAM ALLOCATION.—(ii) EXCEPTIONS.—Notwithstanding clause (i)—</p> <p>(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</p> <p>(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.</p> <p>The total allocation (directed and nontarget combined) for a fishery to which subclause (I) or (II) applies may not be exceeded.</p>	<p>The allocation of Pacific cod to the CDQ Program was increased to 10.7% under Amendment 85.</p> <p>Revisions to the list of species allocated to the CDQ Program and increases in the allocations of all remaining groundfish species (except pollock, sablefish, and Pacific cod) to 10.7% are included in the proposed rule for BSAI Amendment 80 (72 FR 30052; May 30, 2007). Related amendments to the BSAI groundfish FMP are proposed through Amendment 80</p> <p>No FMP or regulatory amendments are needed unless a new BSAI directed fishery is established in the future.</p> <p>Initial assessment has not identified any FMP or regulatory amendments that would be needed to implement this requirement. 50 CFR part 679 already requires this strict quota accountability for species allocated among the CDQ groups.</p>
<p>(B) PROGRAM ALLOCATION.— (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 to implement this requirement, because, as described in the legislative intent, this subparagraph reflects current practices under the FMPs and federal regulations.</p>
<p>(B) PROGRAM ALLOCATION.— (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 restrictively than for other participants in the applicable sector, including with respect to the harvest of nontarget species.</p>	<p>Analysis of alternatives to implement the regulatory amendments required by this subsection for pollock, halibut, and sablefish is being considered by the Council at this June 2007 meeting. Reductions in observer coverage and retention requirements have already been implemented under the authority of the statute. No FMP amendments appear to be needed for this subparagraph.</p> <p>Amendment 80 would create additional fisheries managed under cooperatives. Therefore, in the proposed rule for Amendment 80, NMFS proposes to require the non-AFA trawl catcher/processors to follow the Amendment 80 catch accounting and observer coverage requirements while CDQ fishing. The proposed Amd 80 requirements are very close to existing CDQ requirements.</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.

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.

This subparagraph addresses allocations of the CDQ reserves among the CDQ groups. A list of the percentage allocations for groundfish, halibut, and crab that were in effect on March 1, 2006, was published in the *Federal Register* on August 31, 2006 (71 FR 51804). 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.

Under the requirements at the end of this subsection, the percentage allocations in effect on March 1, 2006, apply only to the portion of the CDQ reserve created by the allocation of 10% of the TAC for all groundfish, except pollock and sablefish. The additional 0.7% of each TAC will be allocated among the CDQ groups by the CDQ administrative panel. The percentages in effect on March 1, 2006, apply to the full allocations of pollock, sablefish, halibut, and crab.

This requirement describes the basis of the current CDQ allocations. Therefore, no FMP or regulatory amendments appear to be needed.

NMFS currently is allowing transfers of groundfish CDQ quota after an overage under the authority of the statute. NMFS is preparing a proposed rule to revise federal regulations to allow transfers after overages. NMFS will propose to allow transfers until January 15 of the next year and will enforce the prohibition on exceeding a quota at that time.

A letter dated March 13, 2007, notified the State of Alaska that regulations governing the crab CDQ fisheries must be evaluated by the State to ensure that they are consistent with the MSA requirement authorizing transfers after overages.

This provision allows the CDQ administrative panel to allocate 0.7% of the groundfish TACs allocated to the CDQ Program, except pollock and sablefish. NMFS has requested that the CDQ Panel submit its allocations by November 1 to provide time to establish quota balances for the next year. NMFS does not have to review or approve allocations made by the CDQ Panel.

If the CDQ Panel is not able to reach a unanimous decision about allocation of the 0.7% of the TACs, then NMFS must allocate this portion of the CDQ reserves through proposed and final rulemaking, based on the nontarget needs of the CDQ groups.

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

[Followed by a list of communities and associated CDQ entities.]

(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).

The BSAI groundfish FMP must be revised to remove the outdated community eligibility requirements. Table 7 to 50 CFR part 679 must be updated to reflect this list of CDQ groups and associated communities. These revisions could be included in any future CDQ-related FMP amendment and regulatory amendments.

These requirements are in effect now under the authority of the MSA, however, no regulations related to these requirements have been implemented.

An assessment must be done to determine what federal regulations, if any, are needed to implement this subparagraph.

(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).

The provision requires that the amount of QS, PQS, IFQ, IPQ, annual harvest of pollock, or annual processing of pollock that is attributed to a CDQ group for purposes of applying ownership, harvesting, or processing limitations must be based on the CDQ group's percentage of direct or indirect ownership. In some cases, regulations implemented prior to the Coast Guard act for crab and pollock applied the AFA 10% rule to the CDQ groups. The BSAI crab FMP and regulations at 50 CFR part 679 (AFA) and 680 (crab) must be revised to be consistent with the MSA. In the meantime, requirements of the statute are being applied by NMFS.

Initial assessment has not identified any FMP or regulatory amendments that would be needed for these subparagraphs (F)(ii) through (iv).

These requirements would be implemented, monitored, and enforced by the State of Alaska.

(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.

The Western Alaska Community Development Association (WACDA) has formed and each CDQ group has elected a member to this CDQ administrative panel.

NOAA GC's June 1, 2007, legal opinion addresses NMFS's question about the CDQ Panel's authority to develop regulations necessary to implement the requirements or "addressed aspects" of the MSA that were not specifically delegated to the CDQ 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).

Requires the State of Alaska to evaluate the performance of each CDQ group.

Authorizes the CDQ Panel (WACDA) to determine how each of the four evaluation criteria would be weighted for each CDQ group in the evaluation and allocation adjustment process.

These are the four criteria that the State would consider in its evaluation of the performance of each CDQ group.

In a letter dated January 19, 2007, the State of Alaska notified NMFS that it does not have the legal authority to adjust CDQ allocations under this subparagraph. Therefore, the Secretary of Commerce must make any allocation adjustments that result from this process.

Federal regulations will be needed to govern NMFS' role in the allocation adjustment process. Current regulations and the BSAI groundfish FMP also must be revised to remove outdated text describing the allocation process.

<p><i>(I) SECRETARIAL APPROVAL NOT REQUIRED.—</i> 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>On August 30, 2006, NMFS issued an interpretation and interim policy suspending enforcement of Federal requirements to submit Community Development Plans (CDPs), amendments to CDPs, the annual budget report, and the annual budget reconciliation report.</p> <p>Federal regulations and the BSAI FMP need to be revised to remove existing text that is inconsistent with the MSA.</p>
<p><i>(J) COMMUNITY DEVELOPMENT PLAN DEFINED.—</i>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—</p> <p>(i) to harvest its share of fishery resources allocated to the program, or</p> <p>(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>Subparagraph (H)(ii)(IV) requires that one of criteria that the State must consider in evaluating the CDQ groups in the decennial review is “Achieving the goals of the entity’s community development plan.” Any regulations referring to the community development plan must be consistent with the definition of a community development plan in the MSA.</p> <p>The definition of a community development plan in federal regulations must be removed entirely or revised to be consistent with the MSA.</p>

Waynetta Ayers
Eugene Asichsich
Phillip Lesterhof
Madam Chair and members of the Council:

We are testifying on behalf of the Western Alaska Community Development Association, WACDA, which also serves as the CDQ Panel required by the Coast Guard bill. WACDA was formed in September of 2006. Waynetta Ayers is our Executive Director. All six CDQ groups participate. All of our decisions require a unanimous vote. Despite that requirement, we have been able to make a great deal of progress in addressing issues of concern to all six groups. Many of those decisions directly relate to the requirements on and the responsibilities of the CDQ groups.

The following is a brief review of some of the issues WACDA is actively addressing:

- 1.) We have completed a CDQ Umbrella Agreement which describes the process through which the six groups may legally bind (and unbind) ourselves contractually with respect to various activities and requirements. This document has been forward to each of the groups for approval.
- 2.) The Coast Guard bill requires that each CDQ group provide an "annual report" to all of its constituents. The bill requires each group to adhere to the disclosure requirements contained in state of Alaska law. There is, however, no such state of Alaska law. Therefore, the CDQ Panel has developed annual reporting requirements that, when formally adopted by the six groups, will identify the minimum amount of information each group must include in its annual report. These requirements mirror, to a large extent, the reporting requirements for Alaska Native corporations. They do include disclosure of top five annual incomes, and financial statements.
- 3.) The Coast Guard bill allows for a certain percentage of CDQ investments to be spent on non-fishery related activities. The bill does not define what constitutes an "investment." The CDQ Panel has nearly completed a policy that defines "investment" and describes how the definition is applied for the purpose of determining each group's compliance with the non-fishery related investment rule.

In addition to the above, there are other similar issues the CDQ Panel is actively engaged in addressing. As these policies are approved by the Panel they will be incorporated into the CDQ Umbrella Agreement.

As noted above, the Coast Guard bill confers various responsibilities to NMFS, to the state of Alaska, and to the CDQ Panel. In certain instances, the language in the bill lacks clarity. In that regard you have received a legal opinion from NOAA GC which addresses some of the ambiguities. We met Friday afternoon with staff from NOAA GC, NMFS Sustainable Fisheries, and the Council to discuss the legal opinion and other aspects of the Coast Guard bill. We were generally pleased with those discussions.

We believe the Congress clearly intended that oversight and the accompanying administrative regulatory burdens upon the CDQ groups be minimized. We also believe that is good public policy. We recognize that NMFS has certain legal responsibilities

with regard to the CDQ program and that some level of regulations will be necessary to effectuate those responsibilities. During the next few months we look forward to working with NMFS and NOAA GC to creatively develop a regulatory construct that both accomplishes their legal responsibility and minimizes the regulatory burden on our groups.

In that regard, we are requesting that the Council assist this process by adopting a policy that requires Council participation in CDQ matters only when the issues are related to fishery management and conservation. In all other areas relating to CDQ issues, the Council would serve in an advisory capacity similar to receiving B Agenda reports – comments are appropriate, but formal approval action would not be required. Action in these instances would be done by NMFS directly. Examples of these types of issues include items number 2 and 3 above. This policy, if approved by the Council, would preserve the Council's participation in all aspects of the CDQ program, yet streamline and smooth the process. Our proposed language is attached.

On a different subject, Regulation Amendment Item C-6, the CDQ Panel supports Alternative 2.

Thank you.