

C4 - AP motion Cost Recovery

The AP recommends the Council adopt the following purpose and need statement and list of alternatives for analysis.

Purpose and Need

Sections 303A(e) and 304(d)(2)(A) of the Magnuson Stevens Fishery Conservation and Management Act (MSA) authorize the collection of fees to recover the actual costs directly related to the management, data collection, and enforcement of any Limited Access Privilege Program (LAPP) and Community Development Program (CDQ). The MSA is clear that cost recovery narrowly applies only to actual costs incurred for specific provisions directly related to a LAPP or the CDQ Program – not all aspects of vessel or processor operations. Longstanding NOAA policy has determined that “actual costs directly related to” is applied as the “but/for” principle of incremental cost, (i.e. only incremental costs- those that would not have been incurred but/for the existence of a LAPP or CDQ program- are eligible for cost recovery).

Although many NMFS offices in the Alaska Region appear to adhere to the MSA statutory requirements and NOAA policy, there is clear evidence that NOAA management offices, specifically the NOAA Office of Law Enforcement, has not clearly established the statutorily required link between the fees being levied on LAPP and CDQ Program participants and the actual incremental cost directly related to those programs. The Council, under its authority under Sections 303A(e) and 303A(i) and consistent with Section 304(d)(2)(A) of the MSA, intends to unambiguously define the actual costs that are directly related to and recoverable from each LAPP and the CDQ program. This action is necessary to bring accountability and transparency to the Cost Recovery Program, as required by the MSA, NOAA policy, and Federal accounting requirements. Ensuring appropriate and transparent cost recovery is strongly supported by Executive Order 14276 Restoring American Seafood Competitiveness.

Alternatives

Alternative 1: No action/status quo.

Alternative 2 and 3 are not mutually exclusive.

Alternative 2: Revise Cost Recovery regulations for each Limited Access Privilege Program (LAPP) and Community Development Program (CDQ) to define “actual costs directly related” to each program. Actual costs are those that are listed in the Subpart of 50 CFR 679 and 50 CFR Part 680 implementing each program, to include any Amendments that are directly related to the program, noting:

- Compliance assistance has been a longstanding feature of NOAA OLE activities and is not cost recoverable.
- Enforcement of regulations that are not directly related to and implemented under a LAPP or the CDQ Program are not cost recoverable. Enforcement activities are not cost recoverable until a specific regulation defined as incremental is identified.

- Rent and utilities and general personnel benefits that are provided to all employees of a cost recovery organization (i.e., medical, vacation, sick leave) are not cost recoverable.
- Assigning pre-determined fixed percentages of personnel, travel, contracting or other costs to specific LAPPs or the CDQ Program is not cost recoverable.

Option 1: Include Pacific Cod Trawl Cooperative Program (PCTC), Crab Rationalization Program (CR), American Fisheries Act (AFA), Amendment 80 Program (A80), Aleutian Islands Pollock (AIP), Community Development Quota Program (CDQ), Halibut and Sablefish Individual Fishing Quota (IFQ) Program, Central Gulf of Alaska Rockfish Program (GOA RP).

Alternative 3: Define how “actual costs directly related” to each LAPP/CDQ program shall be collected. No fee shall be paid until each entity collecting costs has demonstrated to the regulated public clear evidence that the costs are directly related to the program as follows:

Personnel/Contract Costs: number of personnel, hours worked in 15 minute increments, and descriptions of program specific tasks completed as an incremental cost.

Specific to NOAA OLE, provide the following information for each investigation billed to cost recovery: citation(s) of the regulation investigated/violation, number of officers assigned to the case, hours billed by each officer assigned to the case in 15 minute increments, total amount billed in the investigation.

The AP recommends that the Council ensure that the analysis clearly and accurately outlines the “actual costs directly related” associated with each LAPP and the CDQ Program with careful consideration of the MSA and NOAA policy on cost recovery. The AP recommends that the Council ensure that the directly regulated public be provided the opportunity to clearly describe costs that are, and are not, associated with each LAPP and the CDQ Program.

Motion passes 16-0

Rationale in Support of Motion

- The MSA authorizes NOAA fisheries to recover only the actual costs directly related to the management, data collection, and enforcement of Limited Access Privilege Programs (LAPP) and Community Development (CDQ) Programs. NOAA represents in rulemaking and policy that recoverable costs should be limited to “incremental” costs- meaning costs that would not exist “but/for” the LAPP or CDQ program itself.
- The 2025 Cost Recovery Report attached to this agenda item strongly reaffirms this principle in multiple sections. Section 2 of the report states that recoverable costs must satisfy three criteria: 1. The cost must be directly associated with the LAPP or CDQ program; 2. The cost must go beyond general fisheries management; 3. The cost must exist because the program exists. It’s clear what the test is for a cost to be “recoverable.”
- Most NOAA divisions and partner agencies have embraced this policy guidance. However, NOAA OLE’s statements within the 2025 Cost Recovery Report indicate that they have adopted a much broader interpretation of recoverable costs than was originally contemplated under MSA, implementing regulations, and NOAA Policy Guidance. From page 5 of the Report, “NOAA OLE considers the majority of the work performed by Enforcement Officers and Agents in investigating

violations, potential and confirmed, within LAPPs to be recoverable.” Rather than distinguishing between general fisheries enforcement and uniquely incremental LAPP enforcement as is required, it seems NOAA OLE now presumes that enforcement activity occurring within a LAPP fishery is recoverable simply because it occurs on a vessel in a LAPP program. This does not meaningfully apply the concepts of “but/for” and “incremental costs.”

- In the 2025 Report, NOAA OLE relies on their own interpretation that LAPP fisheries are more “complex” which they argue justifies a broader application of cost recovery. The AP heard from another entity collecting costs (the FMA observer program), that although calculating incremental cost for vessels that had observer coverage before the implementation of a LAPP program is complex for them, they can do it and they are doing it. Complexity alone is not a valid justification.
- To bring accountability and transparency to the Cost Recovery Program for all entities collecting costs, this motion defines the “costs that are directly related to” in regulation for each program and also lays out what clear evidence shall be provided to the regulated public in order to collect those costs.
- The AP has heard iterative Cost Recovery reports which provide enough information to move directly to an initial analysis.
- Alternative 2 defines the term “actual costs directly related to” as those listed in the Subpart of CFR 679 or 680 implementing each program. Costs to manage, collect data, or enforce those regulations contained in those Subparts are recoverable. Everything else falls in general fisheries management and is not cost recoverable for all entities collecting costs.
- There may be other regulations outside of those distinct subparts that should also be cost recoverable. The intent of the motion is that those regulations would also be included under Alternative 2. An analysis will identify these additional regulations on a program-by-program basis and stakeholder participation in fleshing this out is important.
- The bullets underneath Alternative 2 are meant to clarify several unresolved issues.
 - First, compliance assistance is not cost recoverable.
 - Second, in April 2025, OLE staff presented to the AP and publicly described a process of assessing fees that is inconsistent with statutory and regulatory provisions. OLE staff stated that when they start investigations they will charge the investigation to a cost recovery program even if they have not determined it is yet a recoverable cost. This bullet makes it clear that practice should cease.
 - Third, removing rent and utilities from cost recovery is consistent with previous Council recommendations.
 - Last, recoverable costs charged to the regulated public should be actual costs. Fixed agency overhead like general personnel benefits or pre-determined fixed percentages of costs ie. “apportioning formulas” as used by NOAA OLE may be the most administratively efficient methodology, but do not meet the test of “actual cost directly related” and are not recoverable.

- Option 1 is meant to be fully inclusive and lists all 8 fisheries that are currently subject to cost recovery in the AK Region. The intent of the motion is that it will apply to any future LAPP programs created in addition to the current LAPP programs listed.
- Alternative 3 goes directly to transparency and accountability. As the 2025 Cost Recovery Report notes, the largest incremental cost category is personnel, which is why this is the focus. Under Alternative 3, NOAA divisions and partner agencies need to provide “backup” or clear evidence to the regulated public that a “but/for” or “incremental” cost analysis was done and the billed time is eligible for cost recovery. This level of backup is not onerous and is standard when invoicing businesses for expenses.
- On the piece specific to NOAA OLE, the Council requested similar information as part of the 2025 Cost Recovery Report. NOAA OLE responded that they do not track enforcement activities at an individual case level using 15 minute increments, as all other partner agencies do, and instead use broad allocation methodologies based on case load, patrol hours, boardings, and pulse operations. This suggests that NOAA OLE is not identifying whether specific enforcement work is incremental to the LAPP itself, and is billing cost recovery fees not on actual costs, but on generalized workload assumptions. Alternative 3 allows for cost recovery only by NOAA divisions and partner agencies that can clearly provide documentation of the statutorily required link between the fees being levied and the incremental costs of those programs.
- The last section provides some AP recommendations to the Council on what should be included in the analysis to make it clear and as robust as possible.
- The second recommendation is that the directly regulated public be provided the opportunity to engage and describe which costs are directly related to each program. Public testimony noted that in the West Coast Region a working group was convened for this purpose and the AP noted this could be a good option here. LAPP and CDQ program participants have deep knowledge of their fisheries and their knowledge can be utilized to streamline this analysis.
- In support of initiating this analysis, AP members also noted that cost recovery costs are not the only management costs incurred by participants in LAPP and CDQ programs. Industry is also responsible for full coverage observer fees, cooperative or quota manager costs, and data management costs.