MEMORANDUM

TO: Council and AP Members

FROM: Chris Oliver
Executive Director

ESTIMATED TIME
4 HOURS

DATE: September 29, 2003

SUBJECT: Community Development Quota (CDQ) Program

ACTION REQUIRED:
(a) Review proposed appeals process
(b) Review discussion paper on eligible CDQ communities

Background

(a) Review proposed appeals process

In June 2002, the Council approved Amendment 71 to the Fishery Management Plan for the Groundfish Fishery of the BSAI, to address policy and administrative issues in the CDQ Program. Among the many recommendations within Amendment 71, the Council elected to define the allocation process in regulation, including an expanded State hearing and comment process, but without an appeals process. NMFS has advised the Council that Federal regulations must be revised to provide an opportunity for the CDQ groups to appeal NMFS's determination to approve or disapprove the State's CDQ allocation recommendations, in order to comply with the Administrative Procedure Act.

NMFS has prepared a discussion paper to provide additional information to the Council about a proposed administrative appeals process, which NMFS believes must be included in revisions to the CDQ allocation process. This paper presents the timeline and milestones associated with a revised allocation process and indicates that the appeals process will lengthen NMFS's part of the CDQ allocation process by up to six months. The discussion paper will be provided at the meeting.

NMFS will request that the Council include the administrative appeals process in its recommendation for the regulatory amendments associated with Amendment 71. If the Council does not agree to add the administrative appeals process to Amendment 71, it is likely that the Alaska Regional Office would have to recommend disapproval of the Council's recommendations on Issue 1 of Amendment 71, and preparation of a separate rulemaking by NMFS to revise regulations at 50 CFR part 679 to include an administrative appeals process for CDQ allocations.

NMFS also will ask the Council if it wants to continue to require the State to consult with the Council about its CDQ allocation recommendations. Council consultation currently is required by NMFS regulations, but is not necessary to comply with the Administrative Procedure Act. Removing this requirement would save time in the allocation process. In lieu of the consultation, the Council could request status reports on CDQ allocations from the State and NMFS at any Council meeting.

(b) Review discussion paper on eligible CDQ communities

In October 2000, NMFS received a letter from one of the CDQ groups challenging the 2001 - 2002 CDQ allocations recommended by the State of Alaska. This letter posed questions about the specific regulatory language pertaining to CDQ eligibility and, more generally, about the eligibility status of some of the communities currently participating in the program. Currently, community eligibility criteria for participating in the CDQ Program is included in the Magnuson-Stevens Act (added in 1996 under the Sustainable Fisheries Act amendments), the BSAI FMP, and in Federal regulations, but the exact wording of the criteria differs among the three documents.

Given the rules of statutory construction, the eligibility criteria in the Magnuson-Stevens Act take precedence over the eligibility criteria set forth in Federal regulations (50 CFR 679.2), to the extent there is any conflict between the statutory and regulatory language. The letter challenging the CDQ allocations prompted NMFS to examine this issue, and to initiate the effort, a legal opinion was requested from NOAA GC on whether and where inconsistencies exist between the criteria listed in Federal regulations and that listed in the Magnuson-Stevens Act, as well as how to interpret and apply the statutory criteria for community eligibility.

Based on the conclusions of that opinion, the Federal regulations (and BSAI Groundfish FMP) must be revised to be consistent with the eligibility criteria in the Magnuson-Stevens Act, and only communities that meet that criteria can be listed as eligible communities in regulation and participate in the CDQ Program. The legal opinion further concludes that NMFS must review the eligibility status of each of the 65 communities that have previously been determined eligible by NMFS, either through rulemaking or administrative determination, relative to the eligibility criteria in the statute. The legal opinion was issued August 15, 2003, and was sent to the Council on August 21.

Both an FMP and regulatory amendment are necessary to effect the proposed changes. Staff has prepared a discussion paper at the request of NMFS to discuss various issues related to community eligibility in the CDQ Program and to propose an analytical approach that will address the existing inconsistency between Federal regulations, the BSAI FMP, and the Magnuson-Stevens Act. This paper represents a preliminary analysis of CDQ eligibility issues that will be subsequently developed into a formal RIR/IRFA analysis for Council review. The two primary alternatives proposed for analysis are attached as **Item C-2(a)**. The entire discussion paper, with several attachments, was distributed to you on September 16.

Given the eligibility concerns raised and the conclusions of the legal opinion, the agency must remedy the regulatory and statutory inconsistencies and ensure that all participating communities meet the eligibility criteria in the Magnuson-Stevens Act prior to the next allocation cycle. **NMFS is requesting that the Council initiate the FMP and regulatory analysis necessary for these amendments. NMFS estimates that initial review of a draft analysis would need to occur at the February Council meeting, with final action in April 2004, in order for a rule to be effective by January 2005.** The schedule for the final rule is driven by the upcoming allocation cycle (2006-2008); the CDQ groups will start developing Community Development Plans to support their allocation requests for that cycle sometime in late 2004.

Some of the CDQ groups are asking Congress to clarify its intent that all 65 communities currently participating in the program meet the eligibility requirements of the Magnuson-Stevens Act. While Congressional action is not guaranteed, should Congress take action to deem all 65 communities eligible to participate, the FMP and regulatory amendments proposed would be simplified, but not unnecessary. The Council and NMFS would still need to revise the FMP and Federal regulations to make the eligibility criteria consistent with that in the MSA, and staff would recommend the same timeline for making these changes. The primary difference that would likely result from Congressional action is that a re-evaluation of each of the 65 participating communities would no longer be necessary.

DRAFT alternatives for CDQ eligibility analysis

The following represent two primary alternatives proposed for analysis.

Alternative 1: No action. Do not make any revisions to the BSAI FMP or Federal regulations (50 CFR 679.2 or 50 CFR 679.30).

Alternative 1 would not revise the eligibility criteria in the BSAI FMP and Federal regulations to be consistent with the eligibility criteria in the Magnuson-Stevens Act (MSA). Alternative 1 would also not effect a re-evaluation of the eligibility status of the 65 communities currently participating in the CDQ Program and would not make revisions to Table 7 in 50 CFR 679. Due to eligibility concerns raised, and the conclusions stated in the NOAA legal opinion of August 15, 2003, selection of this alternative by the Council may result in a Secretarial amendment to revise the BSAI FMP and Federal regulations to be consistent with the MSA.

Alternative 2: Amend the BSAI FMP and revise Federal regulations (50 CFR 679.2 and 50 CFR 679.30) to make the eligibility criteria consistent with that provided in the MSA.

There are several elements to Alternative 2 as follows:

- Revise the BSAI FMP so that the eligibility criteria is the same as the criteria listed in the MSA.
- Revise NMFS regulations (50 CFR 679) so that the eligibility criteria is the same as the criteria listed in the MSA.
- Revise Table 7 to 50 CFR 679 to list all communities that are eligible for participation in the CDQ Program under the criteria in the MSA. This necessitates re-evaluating all 65 currently participating communities to determine eligibility status under MSA criteria. During each CDQ application and allocation cycle, NMFS will determine whether each community that is part of a CDP is listed on Table 7.
- Establish process in Federal regulations by which communities not listed on Table 7 can apply and be evaluated for eligibility in the CDQ Program.
- Clarify that rulemaking is necessary to amend Table 7 in the future. Table 7 would only be amended if the eligibility status of a community changed relative to the criteria listed in the MSA.

Agenda C-2(a)
October, 2003

Western Alaska Community Development Quota (CDQ) Program
Proposed CDQ Allocation Process (Including an Administrative Appeals Process)

Issues for Council to Consider

1. Determine whether a CDQ allocation process that includes an administrative appeals process is consistent with the North Pacific Fishery Management Council's (Council's) recommendations to the National Marine Fisheries Service (NMFS) for Amendment 71 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area. Council action on this issue is needed.

2. Determine whether a requirement to extend current CDQ allocations if new allocations cannot be approved by the end of the allocation cycle is consistent with the Council's recommendations on Amendment 71. NOAA General Counsel advises that this requirements is necessary under the Administrative Procedure Act. Council action on this issue is needed.

3. Provide a recommendation on the appeals process described under Option 1 or Option 2. Council action on this issue is desired by NMFS, but not absolutely necessary. With no recommendation from the Council, NMFS probably would develop the proposed rule based on Option 2, which is a longer process, but provides the State of Alaska (State) more opportunities to support its recommendations.

4. Consider whether the Council wants to continue to require the State to consult with Council about its recommended percentage allocations among the CDQ groups before it submits these recommendations to NMFS. Council action on this issue is not needed if the Council wants to continue this requirement.

Background

This discussion paper was prepared by the National Marine Fisheries Service to provide additional information to the Council about revisions to the CDQ allocation process that NMFS believes must be implemented for the Community Development Quota Program. This proposed process includes an administrative appeals process and a requirement to extend existing allocations if new allocations are not approved by the end of the allocation cycle.

The Council recommended Amendment 71 to BSAI FMP and regulatory amendments to accompany Amendment 71 at its June 2002 meeting (Attachment 1 is the Council's motion).

The Council organized its recommendations into eight issues. Issue 1 was the CDQ allocation process. The following three alternatives were considered:

1. No action. Continue the current administrative process for making CDQ allocations.
2. Improved administrative process for making CDQ allocations.
3. Make CDQ allocations through rulemaking rather than an administrative process.

The Council's recommendation on Issue 1 was: "The Council adopts Alternative 2 (amended), to define the process in regulation, include an expanded State hearing and comment process, but no formal appeals process." The Council's primary concerns with the administrative appeals process were (1) having an appeals process would encourage any CDQ group unhappy with the State's recommended allocations to appeal to NMFS and try to hold up approval of new allocations, (2) the potential for "endless appeals" if NMFS were to approve allocations different than the State's recommendations and then set in motion another round of appeals, (3) the potential for NMFS to disapprove the State's allocation recommendations late in the year and not have any allocations approved to start the next fishing year, and (4) the amount of additional time added to the allocation process and the need to start preparing Community Development Plans even earlier.

Adding an administrative appeals process: NMFS advised the Council at the June 2002 meeting and the June 2003 meeting that NMFS regulations must be revised to include an opportunity for the CDQ groups to appeal NMFS's determination to approve or disapprove the State's CDQ allocation recommendations. NOAA General Counsel provided the following advice to the Council at its June 2003 meeting:

> The language of the Council's motion on (Amendment) 71, and particularly Issue 1, stated that the process by which CDQ allocations are made will be defined in regulation and will include an expanded State hearing and comment process but no formal appeals process in Federal regulations for CDQ allocation decisions. There is a Constitutional requirement contained in the 5th and 14th Amendments to the Constitution that procedural due process be afforded in all agency adjudications, even in informal agency adjudications. Procedural due process requires that notice of the agency's determination be provided and that an opportunity for hearing appropriate to the nature of the case be provided before the agency makes a final determination on the adjudication. CDQ allocations are informal agency adjudications, so therefore there is no ability for the Council or the agency to waive the procedural due process requirement. As such, the regulations that will be submitted to NOAA Fisheries to implement Amendment 71 and also the regulatory provisions that you approved at that time must include a process that comports with the requirements of procedural due process.

Requiring the CDQ groups to comment to the State about its allocation recommendations and requiring the State to respond to those comments provides an important function in the allocation process, but it does not substitute for the legal requirement that NMFS provide an opportunity for

the CDQ groups to appeal NMFS's decision about CDQ allocations. Therefore, the Council's June 2002 motion on Issue 1 appears to be inconsistent with what NMFS believes is legally required for the CDQ allocation process.

NMFS requests the Council to review the proposed CDQ allocation process described in this discussion paper, including the administrative appeals process, and clarify it's intent with regard to its recommendations on Amendment 71, Issue 1. Can the CDQ allocation process proposed by NMFS be considered consistent with the Council's intent and incorporated into the proposed rule for Amendment 71? If the Council does not agree to have this administrative appeals process incorporated into Amendment 71, the Alaska Regional Office probably would have to recommend disapproval of the Council's recommendations on Issue 1 of Amendment 71, and prepare separate rulemaking by NMFS to revise regulations at 50 CFR part 679 to include an administrative appeals process for CDQ allocations.

Continuing CDQ allocations: One of the Council's concerns was whether the addition of the administrative appeals process would increase the possibility that NMFS could not approve CDQ allocations by the end of the CDP cycle and that no CDQ allocations would be in effect for the start of the next fishing year. In a legal opinion dated September 3, 2003, NOAA General Counsel advised NMFS that it could not allow CDQ allocations to expire and not have any allocations in place for the CDQ fisheries. A copy of this legal opinion is in Attachment 2 to this discussion paper. Specifically, the opinion states that the "Administrative Procedure Act (APA) expressly addresses this situation by providing as a matter of law that existing allocations remain in place until such final agency action, notwithstanding their 3 year term." Therefore, NMFS proposes to revise its regulations to specify that, if for any reason, the administrative process for approving the State's CDQ allocation recommendations cannot be concluded by the date the current allocations expire, that these allocations would continue until such time that new CDQ allocations were approved by NMFS. Therefore, NMFS requests the Council to review the attached legal opinion and recommend that NMFS incorporate this requirement into the proposed rule for Amendment 71.

Current CDQ Allocation Process

A portion of approximately 45 groundfish, halibut, crab, and prohibited species quota categories are allocated to the CDQ Program. The total amounts allocated annually to the CDQ Program are called "CDQ reserves." Each CDQ reserve is further allocated among the six CDQ groups through percentage allocations that are developed by the State of Alaska and considered by the Council about every three years. The percentage allocations of qutoas to the CDQ reserves are fixed in the Magnuson-Stevens Act (MSA) or in NMFS regulations. The percentage of each CDQ reserve allocated annually among the CDQ groups is determined periodically through a competitive allocation process. The MSA makes the Secretary of Commerce responsible for the final decision about how to allocate the CDQ reserves among the CDQ groups.

The CDQ allocation process (both current and proposed) includes three major steps: (1) preparation of the Community Development Plan (CDPs) by the CDQ groups, (2) development of the State's CDQ allocation recommendations, and (3) NMFS's review of and determinations about the State's allocation recommendations.

Before the CDQ allocations are approved, a proposed CDP is an application for CDQ allocations. After the allocations are approved the CDPs are working business plans for the groups. The proposed CDPs must be prepared prior to the State's deadline for submission of the CDPs. In order to develop CDPs, the CDQ groups need to know the information requirements for the CDPs, the evaluation criteria that will be used for allocations, and the administrative process that will be followed by the State and NMFS to make CDQ allocations. Therefore, any revisions to regulations governing the CDQ allocation process must be effective in time for the groups to prepare their CDPs.

Table 1 shows the major milestones that occurred in the most recent CDQ allocation process in 2002. The list of milestones is divided between the State's part of the allocation process and NMFS's part of the allocation process.

The process that the State goes through to develop CDQ allocation recommendations involves (1) announcing an application period with a deadline, (2) accepting proposed CDPs as applications for CDQ allocations, (2) reviewing the proposed CDPs for compliance with State and NMFS information requirements, (3) working with the CDQ groups to get all required information into the CDPs, (4) holding a public hearing about CDQ allocations, (5) developing CDQ allocation recommendations based on State and NMFS regulations, (6) releasing to the public the State's initial CDQ allocation recommendations, (7) accepting written comments from the groups and responding to these comments in writing, (8) consulting with the Council about its CDQ allocation recommendations, and (9) submitting its final, written recommendations to NMFS about CDQ allocations.

Table 1 shows that during the last allocation cycle, development of the State's allocation recommendations took about 6 ½ months. The application period started on April 1, 2002; CDPs were due on July 1, 2002; the public hearing was held on August 20, 2002; the State issued initial recommendations on September 9, 2002; it consulted with the Council at the October meeting; and it submitted recommendations to NMFS on October 15, 2002.

The State determines the time necessary for its administrative process and the appropriate deadlines necessary to meet NMFS's requirements for a Council consultation and submission of final recommendations. The only deadline for the State that currently is in NMFS regulations is the October 15 deadline for submission of final CDQ allocation recommendations to NMFS.

Table 1. Milestones, dates, and duration of the most recently completed CDQ allocation process in 2002 (for the 2003-2005 allocations).

Milestone	Dates	Duration
Total time for CDQ allocation process	Apr 1, 2002- Jan 17, 2003	9 1/2 months
State develops its recommendations		6 ½ months
State's application period begins	April 1	
CDQ groups submit proposed CDPs to the State	July 1	
State holds public hearing	Aug 20	
State issues initial CDQ allocation recommendations	Sept. 9	
State accepts comments from groups	Sept	
State consults with Council	Oct. mtg	
State submits allocation recommendations to NMFS	Oct. 15	
NMFS reviews State's recommendations		3 months
NMFS accepts comments from CDQ groups	Oct. 31	
NMFS issues final decision on CDQ allocations (target is 45-day review or December 1)	actual Jan 17, 2003	

Proposed CDQ Allocation Process

The legal advice to include an administrative appeals process means that, rather than having a "comment period" after NMFS receives the State's recommendations, but before NMFS issues its final decision on CDQ allocations, NMFS must provide the CDQ groups with (1) notice of its decision on CDQ allocations, and (2) an opportunity to appeal that decision before NMFS takes final agency action on CDQ allocations. Therefore, NMFS believes that the following changes must be made to the CDQ allocation process:

1. Remove the comment period during NMFS's review of the State's CDQ allocation recommendations. At this time, NMFS believes that the comment period provided during development of the State's recommendations provides an adequate opportunity for the CDQ groups to comment on the recommendations that NMFS will review. The comments and the State's written responses will be part of the record that NMFS considers in reviewing the State's allocation recommendations.

2. Add issuance of an initial administrative determination. The Sustainable Fisheries (SF) Division of NMFS's Alaska Regional Office would issue an initial administrative determination (IAD) providing a written explanation of NMFS's initial decision about whether to approve or disapprove the State's allocation recommendations.

3. Add an administrative appeals process. The CDQ groups would be provided the opportunity to appeal the IAD before NMFS makes a final decision about whether to approve or disapprove the State's allocation recommendations.

Figure 1 provides an illustration of the steps in the CDQ allocation process that NMFS is proposing. This process is described in more detail in the remainder of this discussion paper.

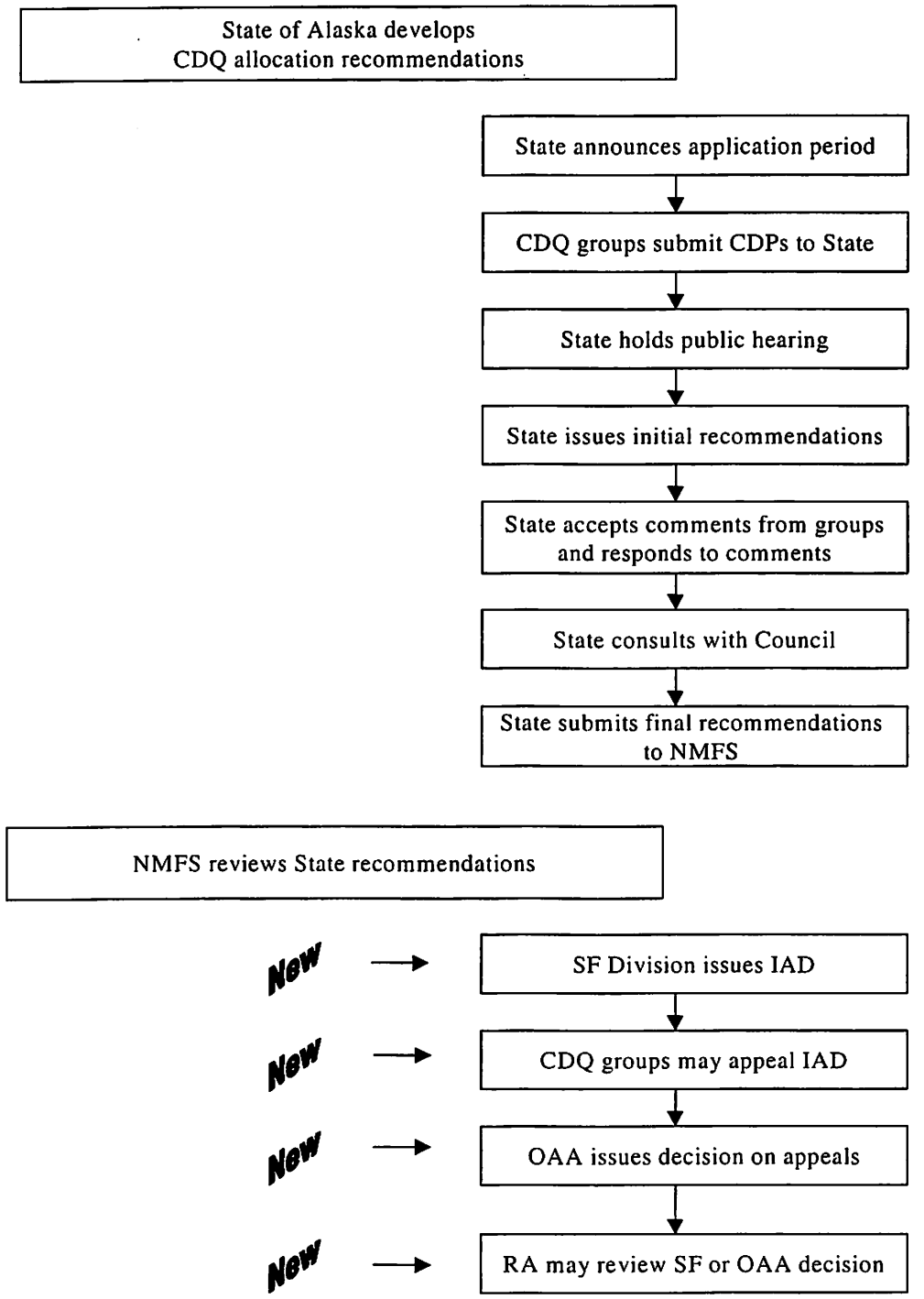

Figure 1. Primary milestones in the proposed CDQ allocation process.

Table 2 provides a comparison of the schedule of events in (1) the 2002 CDQ allocation cycle, (2) Option 1 that would have a 4-month appeals process, and (3) Option 2 that would have a 6-month appeals process. The main differences between the two options are (1) what happens if the NMFS's Office of Administrative Appeals (OAA) does not agree with the SF Division's IAD approving the State's allocation recommendations (e.g. it overturns or reverses the IAD), and (2) the time required for the appeals process. The two month time difference occurs if the appeals officer finds a problem with the IAD that requires it to reverse the IAD. Under Option 1, the appeals officer would issue a final decision disapproving the State's recommendations with no opportunity that year for the State to try to remedy problems. Under Option 2, the State would have the opportunity and the time to try to respond to problems the appeals officer identified before a final decision on the appeals was issued. The two options for the administrative appeals process are discussed in more detail later in this paper.

The deadlines and dates for milestones in the State's part of the allocation process are uncertain at this time, because they are decided by the State. The State may continue to select the dates for these milestones as long as it completes all of the required steps in the process before submitting its allocation recommendations to NMFS. For the next allocation cycle (2006-2008), NMFS estimates that, under Option 1, the State's allocation process would start around January 1, 2005 and under Option 2 it would start around October 1, 2004.

Under Amendment 71, NMFS proposes no changes to the requirements that the State hold an application period and accept applications (proposed CDPs) from the CDQ group. The State would continue to be required to hold a public hearing after it accepts proposed CDPs and before it finalizes its CDQ allocation recommendations. No revisions are proposed to the current regulations describing the public hearing. The State would continue to select the date of its public hearing.

The State also would continue to be responsible for reviewing the CDPs to verify that they contain all of the information required by NMFS regulations. NMFS proposes to require that the State submit with its allocation recommendations an information checklist following a format developed by NMFS that would show where each of the NMFS information requirements is provided in the CDPs. The State currently submits a checklist that provides information about the location of information required by both NMFS and the State in the CDPs. The State requires all of the information required by NMFS and a significant amount of additional information required only by the State.

NMFS proposes to add to Federal regulations two additional elements to the State's part of the allocation process. The State voluntarily added these elements in the most recent allocation cycle. The State would be required to (1) issue initial CDQ allocation recommendations, and (2) accept and respond to comments from the CDQ groups about these initial recommendations. Again, no dates would be specified in NMFS regulations for when these events had to occur. The State would determine the dates that would provide adequate time to complete the element

Table 2. Compare milestones in the most recent CDQ allocation process (2002) with the proposed process (revised 10/2/03).

Milestone	Current (2002)	Option 1 (4-mo appeals)	Option 2 (6-mo appeals)
State's application period begins	April 1, 2002	Jan. 1, 2005?	Oct. 1, 2004?
CDQ groups submit proposed CDPs to the State	July 1	The time required for these elements and the deadlines are determined by the State and are not included in NMFS regulations (process took 6 ½ months in 2002)	
State holds public hearing	Aug 20		
State issues initial CDQ allocation recommendations	Sept. 9		
State accepts comments from groups	Sept		
State consults with Council	Oct. mtg	June 2005 mtg?	April 2005 mtg?
State submits allocation recommendations to NMFS	Oct. 15	July 1	May 1
NMFS accepts comments from CDQ groups	Oct. 31	n/a	n/a
NMFS SF Division issues IAD	n/a	September 1	July 1
Administrative Appeals Process Deadline for CDQ group to file an appeal	n/a	September 15	July 15
Deadline for response by State or other CDQ groups	n/a	October 1	August 1
Initial Decision on appeals			October 1
If initial decision is to disapprove State's recommendations OAA provides State with opportunity to address problems CDQ groups have opportunity to respond to State's new information	n/a	n/a	Oct. 1 - Dec. 1
Final decision on appeals	n/a	December 1	December 1
RA may review appeals decision	n/a	Dec 1-31	Dec. 1-31
Final agency action on CDQ allocations	Jan. 17, 2003	Jan 1, 2006	Jan 1, 2006

of the process in time to meet NMFS's deadline for submission of the final recommendations. The comments submitted by the CDQ groups and the State's responses would be required to be submitted to NMFS as part of the record supporting the State's final CDQ allocation recommendations.

The State's initial allocation recommendations would be required to include the percentage allocation recommendations for all CDQ species among the CDQ groups and the State's written rationale explaining the reasons why it is recommending these percentage allocations. In addition, NMFS regulations would be revised to require the State to submit important facts that it uses as a basis for its allocation recommendations. For example, in recent CDQ allocation cycles, the relative royalty rates obtained by the CDQ groups for CDQ species was an important factor in the State's CDQ allocation recommendations. The State generally recommended higher percentage allocations for groups that obtained higher royalty rates. In the future, NMFS would require that these royalty rates and an explanation of how they were calculated be included in the State's allocation recommendations to NMFS. Other facts that may be important to the State's rationale, such as population, measures of economic need, and past financial performance, also would be required to be included in both the State's initial CDQ allocation recommendations and the final recommendations submitted to NMFS.

The State's recommendations also would have to be formatted in a way that separates confidential and non-confidential information. The State would be required to prepare a general explanation of its allocation recommendations that could be released to the public, other CDQ groups, and the Council. It would have to separate the confidential financial information in a way that it could be provided to each CDQ group in both the initial and final CDQ allocation recommendations. The CDQ groups would need to have the confidential information on which its allocation recommendations were based to comment on the State's initial allocation recommendations and to appeal NMFS's IAD.

At the time it issues its initial CDQ allocation recommendations, the State would notify the CDQ groups that they could submit written comments to the State and the deadline for those comments. The State would be required to respond to comments submitted by the CDQ groups in writing and to include these comments and responses in the information submitted to NMFS with the State's final recommendations. The purpose of requiring the State to issue initial recommendations and to respond to comments about these recommendations is to identify factual disputes and disagreements about the State's recommendations when the State can still consider these issues in making its final recommendations. A CDQ group could identify a legitimate factual error or deficiency in the State's rationale. If this does occur, it would be better to have these issues resolved before the State submits its final recommendations to NMFS rather than wait to consider the issues during NMFS's administrative appeals process when the options for remedies would be so much more limited. Even if the State disagrees with all of the points raised by a CDQ group, just having these issues aired would strengthen the administrative record for the State's recommendations because it would demonstrate that the State was aware of and considered certain issues raised by the CDQ groups. It also would limit the ability of a CDQ

group to claim later in the process that the State had failed to recognize or consider an important legal, factual, or procedural issue.

NMFS proposes to require that the CDQ groups raise all factual errors they believe exist in the State's recommendations to the State during this comment period and limit the CDQ groups from providing new information or raising new factual disputes during NMFS's appeals process. This limitation is necessary because NMFS is reviewing the State's allocation recommendations, which are based on the information available to the State at the time it develops and submits its allocation recommendations.

Council consultation: NMFS regulations currently require the State to consult with the Council before its submits its final CDQ allocation recommendations to NMFS. Consultation with the Council is included in NMFS regulations by design of the Council in its recommendations for the original regulations implemented in 1992. The Council did not recommend any changes to this requirement under Amendment 71.

Council consultation provides the opportunity for the State to inform the Council of its CDQ allocation recommendations, for the CDQ groups to testify to the Council, and for the Council to provide input to the State about its recommendations. However,Council consultation is not essential to provide due process to the CDQ groups and it cannot substitute for the right to administratively appeal NMFS's decision to approve or disapprove the State's CDQ allocation recommendations. To date, the Council has supported the State's recommendations and has not requested the State to consider additional issues or factors in making its recommendations.

In 2002, the State issued its initial allocation recommendations on September 9, 2002, received and responded to comments from the CDQ groups during September and consulted with the Council at the October meeting. In the future, the Council consultation also would have to occur between the times that the State issues its initial CDQ allocation recommendations and before it submits those recommendations to NMFS. Under either Option 1 or Option 2, the State could arrange its schedule to accommodate Council consultation. However, this step takes the time to prepare and attend the Council meeting for the State, NMFS, and the CDQ groups at a time when the groups are preparing comments to the State, the State is responding to these comments and preparing its final recommendations to NMFS, and NMFS is preparing to review the State's recommendations. It also requires providing some time after the Council meeting and before the State must submit its recommendations to NMFS for the State to address any issues the Council requests the State to consider. Attendance at the June Council meeting, which would be required under Option 2, involves the additional travel to Kodiak, Dutch Harbor, or Portland for State and NMFS staff and representatives of the CDQ groups. NMFS estimates that consultation with the Council could require up to three weeks of the allocation process.

In previous discussions, the Council expressed concern about how long the CDQ allocation process would take in the future. NMFS raises the option of removing the Council consultation because it would remove one requirement for the State in its process and would, therefore,

streamline the CDQ allocation process. In lieu of a consultation during the allocation process, the Council could request status reports about CDQ allocations at any Council meeting.

NMFS's review of the State's allocation recommendations

NMFS regulations would clarify that NMFS is reviewing the State's allocation recommendations based on the record submitted by the State. NMFS would not be making an independent decision about CDQ allocations. The decision before NMFS would be whether the State followed NMFS regulations and other federal law in developing its CDQ allocation recommendations and provided a rationale that adequately explained its allocation recommendations.

NMFS's initial review of the State's CDQ allocation recommendations would be done by staff of the SF Division. The SF Division would review the proposed CDPs to determine if they contained all of the information required by NMFS regulations and would review the State's written recommendations and rationale to determine if the process described in NMFS regulations was followed by the State. For example, did the State have an application period, accept applications (proposed CDPs) from the CDQ groups, hold a public hearing, issue initial CDQ allocation recommendations, accept written comments from the CDQ groups, respond to those comments in writing, consult with the Council, and submit written recommendations to NMFS? In addition, the SF Division would review the State's rationale to determine if the State considered all of the evaluation criteria in NMFS regulations, considered relevant and accurate facts about the CDQ groups, provided an explanation of the facts used, applied the criteria consistently among the CDQ groups, and adequately explained the reasons for its CDQ allocations recommendations.

When reviewing the State's CDQ allocation recommendations, the SF Division may request additional information or explanation from the State if it finds reasons that it may not be able to approve the State's recommendations. Some of the reasons that more information might be requested from the State are unresolved factual disputes (a CDQ group disputed facts or information used by the State and the State did not resolve the question or issue in the recommendations submitted to NMFS), failure to consider all evaluation criteria in NMFS regulations, considering evaluation criteria not included in NMFS regulations, inconsistent reasoning (e.g. applying different standards to different CDQ groups or to seemingly similar circumstances without adequate explanation of the reasons), failure to follow the process in NMFS regulations, or any seeming inconsistency with NMFS regulations or any other federal law or regulation. Although NMFS proposes to limit the issues a CDQ group could raise in appeal, if NMFS obtained any additional information from the State during NMFS's review of the allocation recommendations, then the CDQ groups could raise issues with this new information during the appeals process because they would not have had an opportunity to respond to it earlier in the process.

After reviewing the State's recommendations and providing the State an opportunity to address any deficiencies found, the SF Division would issue an initial administrative determination that would either approve or disapprove the State's CDQ allocation recommendations. NOAA

General Counsel would be consulted in developing this IAD. However, neither the Regional Administrator (RA) or the Deputy Regional Administrator would be consulted or involved with the determinations made in the IAD. This requirement allows the Regional Administrator and the Deputy Regional Administrator to conduct an independent review of any decisions issued by the Office of Administrative Appeals later in the administrative process and allows the Regional Administrator to make the final decision on behalf of the Secretary of Commerce about CDQ allocations.

The proposed schedule in Table 2 provides the SF Division 60 days to review the State's recommendations, identify any questions or deficiencies and work with the State to obtain any necessary additional information. Under Option 1 this review period would occur between July 1 and September 1 and under Option 2 it would occur between May 1 and July 1. The SF Division would be allowed only two choices in the IAD - to approve or disapprove the State's allocation recommendations. If the IAD approves the State's CDQ allocation recommendations, it would provide a written explanation about why the SF Division determined that these recommendations complied with NMFS regulations and all other applicable federal law.

The SF Division would be required to disapprove the State's CDQ allocation recommendations if it found that the State did not follow the process required in NMFS regulations or that the State's rationale was not adequate for reasons such as those described above. The SF Division would be required to notify the State in writing of any potential deficiencies that it had found before it issues an IAD to disapprove the State's allocation recommendations, and to provide the State an opportunity to address these deficiencies. However, if after providing the State an opportunity to address deficiencies, the State could not remedy the problems, the SF Division would have to issue an IAD disapproving the State's CDQ allocation recommendations. As discussed below, the CDQ groups would have an opportunity to appeal an IAD by the SF Division to either approve or disapprove the State's allocation recommendations and the State would have an opportunity to respond to any appeals.

Administrative Appeals Process: NMFS is proposing two options for the administrative appeals process to try to respond to some of the Council's concerns about length of time required for the process and limits on the ability of the CDQ groups to continue to appeal. Option 1 is called the "4-month appeals process" and Option 2 is called the "6-month appeals process." Both of these options fulfill the requirement for an administrative appeals process. The two month time difference between Option 1 and Option 2 occurs between the initial and final decision on appeals and depends on whether the appeal decision is made with no further input from the State (Option 1) or whether the State and CDQ groups would be provided an opportunity to respond to problems identified in the appeal (Option 2).

Under both Option 1 and Option 2, the IAD issued by SF would provide information to the CDQ groups about the administrative appeals process and notify them that they had 15 days from the date the IAD was issued to file an appeal with NMFS's Office of Administrative Appeals. NMFS believes that the State should not be allowed to be an appellant in the CDQ allocation

process because the opportunity to administratively appeal an agency action is generally provided only to parties who are directly and adversely affected by the action.

Figure 2 provides an illustration of the most likely scenario that the SF Division issues an IAD that approves the State's allocation recommendations. If the IAD approved the State's CDQ allocation recommendations and no appeals were submitted, the CDQ allocations approved in the IAD would be final agency action on CDQ allocations for the next year. If an appeal is filed by one or more CDQ groups, the OAA would provide a second 15-day period during which other CDQ groups and the State could respond in writing to the appeal. This provides a total of 30 days for the OAA to get all initial information related to the appeals. All appeals would be joined and considered together by the appeals officer. All CDQ groups would be bound by the decision of the appeals officer whether they submitted an appeal or a response or not. The appeals officer would review the IAD and the written record on which it was based. He or she would determine whether any issues raised in the appeal were legitimate legal issues. The appeals officer would not delve into issues that were not specifically identified in an appeal.

Figure 3 provides information about the differences between Option 1 and Option 2.

Under Option 1 the appeals officer would review the written record supporting SF Division's IAD only and would not gather more information from the State or CDQ groups. Neither the SF Division or the State would be provided an opportunity to submit additional information to the OAA to respond to any issues raised in appeal or to clarify or supplement its record. The appeals officer would issue a final decision within 60 days. The decision of the appeals officer would be either to uphold the SF Division's IAD to approve (or disapprove) the State's CDQ allocation recommendations or to overturn the IAD. The Regional Administrator would have 30 days to review the OAA decision. If the OAA upheld the IAD and the Regional Administrator did not intervene, then the State's recommended CDQ allocations would be approved for the next three years. If the OAA reversed the IAD, then the OAA recommendation would be to disapprove the State's CDQ allocation recommendations. Without further intervention from the RA, the current CDQ allocations would be continued through the end of the next year and would be effective until replaced by new CDQ allocations through a subsequent final agency action by NMFS. The State would be allowed to resubmit CDQ allocation recommendations the next year following the regular CDQ allocation process. The Regional Administrator could overturn the OAA decision to disapprove the State's CDQ allocation recommendations only if he was able to identify a legal reason to do so.

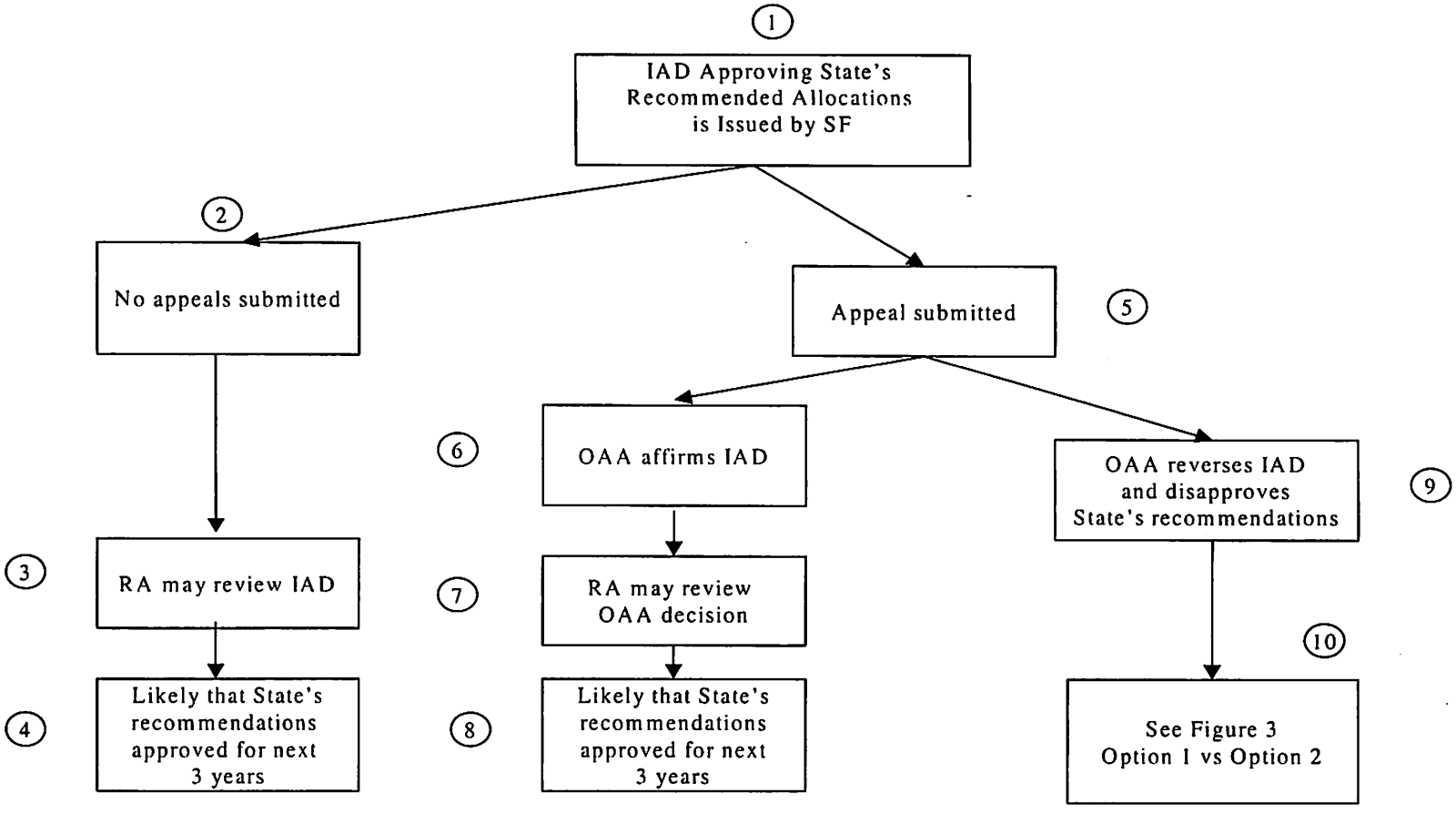

Figure 2. Possible outcomes if the SF Division issued an IAD approving the State's recommended CDQ allocations.

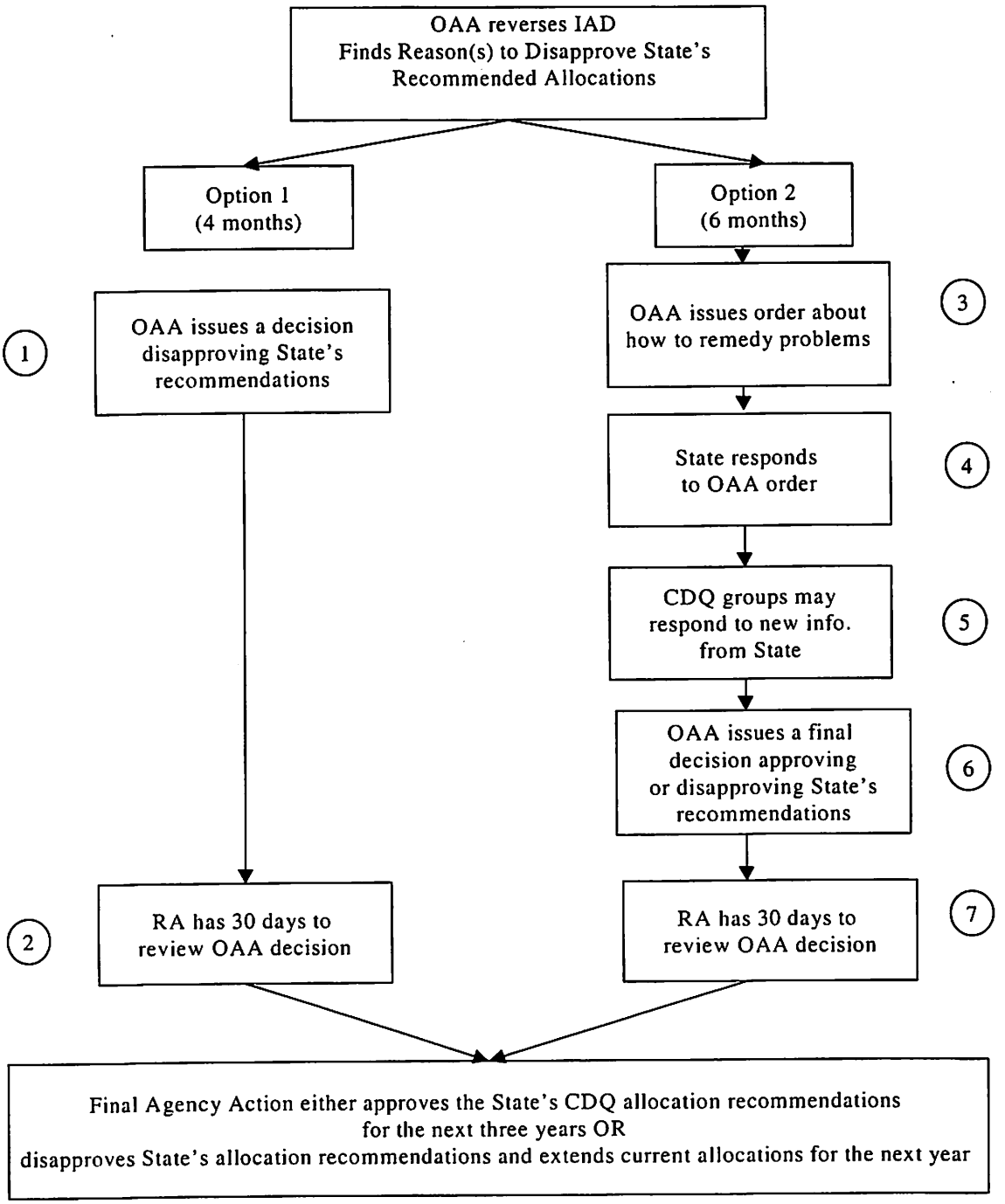

Figure 3. Comparison of the administrative appeals process under Option 1 and Option 2.

Option 2 would provide an administrative appeals process that would take six months. If the OAA found reasons related to an issue raised in an appeal that NMFS could not approve the State's recommended CDQ allocations, it would issue an order describing those problems and the reasons it intended to overturn the IAD. The order also would identify any ways in which the State could remedy these problems. The State would be provided an opportunity to respond to the OAA order and submit additional information. The CDQ groups would be provided an opportunity to submit responses to the State's additional information to the OAA. Upon review of this additional information, the OAA would issue a final decision either approving or disapproving the State's allocation recommendations. The Regional Administrator would have 30 days to review the OAA decision.

If NMFS's final agency action disapproved the State's allocation recommendations: Under either Option 1 or Option 2 it is possible, although unlikely, that NMFS would disapprove the State's CDQ allocation recommendations. This would occur only after the State had several opportunities to remedy problems that NMFS had identified (more opportunities under Option 2 than under Option 1). If NMFS disapproved the State's recommendations, the existing CDQ allocations would be continued through the end of the next year and until new CDQ allocations were approved by NMFS. The State would be allowed to resubmit new CDQ allocation recommendations the next year following the regular schedule for allocations.

If an appeal could not be resolved by the end of the year in which the CDQ allocations expire, NMFS would continue the current allocations through the end of the next year, as recommended by NOAA General Counsel. Although a decision on the appeal could come at any time during that next year, NMFS would not revise percentage allocations mid-way through the year. Specific allocations of amounts of groundfish, crab, halibut, and prohibited species are made in January of each year. Once these specific quota accounts are established for a CDQ group, NMFS could not revise the allocations during the fishing year because it would cause financial uncertainty for the CDQ groups, difficulty in establishing contracts with fishing partners, and fisheries management difficulties for NMFS. If a CDQ allocation was reduced mid-year, but that CDQ group had already fully harvested its initial allocation, it would be impossible to reallocate that quota to another group without exceeding the amount of quota allocated to the CDQ Program that year. Enforcement of quota overages also would be complicated by the possibility of reallocating quota mid-year.

If the IAD disapproved the State's allocation recommendations: It is possible, although unlikely, that the SF Division would disapprove the State's CDQ allocation recommendations in the IAD. This would occur only if the SF Division had identified a significant problem with the State's recommendations and the State had been unable or unwilling to address the problem. An IAD disapproving the State's CDQ allocation recommendations would provide the reasons for that initial determination and notification that the CDQ groups had 15 days in which to submit an appeal of this IAD to the Office of Administrative Appeals. The State would not be allowed to appeal this IAD. However, if a CDQ group appealed, the State would be allowed to submit a response to the appeal in the subsequent 15-day response period. If no CDQ group appealed, the State still could submit information to the Regional Administrator for him or her to consider

during the 30 day period in with the Regional Administrator reviews all CDQ allocation decisions by the SF Division or the Office of Administrative Appeals.

Three year allocation cycle: NMFS's final agency action to approve the State's CDQ allocation recommendations would be effective for three years regardless of whether this action occurred at the end of a three year allocation cycle or occurred after having to extend current allocations one more year.

Attachment 1

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

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

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

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

Issue 2: Periodic or long-term CDQ allocations

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

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

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

Issue 3: Role of government oversight

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

Alternative 2: Amend the BSAI FMP to specifically identify elements of the government's responsibility for administration and oversight of the economic development elements of the CDQ Program.

Government oversight of the CDQ Program and CDQ groups is limited by the following purposes:

1. Ensure community involvement in decision-making;
2. Detect and prevent misuse of assets through fraud, dishonesty, or conflict of interest;
3. Ensure that internal investment criteria and policies are established and followed;
4. Ensure that significant investments are the result of reasonable business decisions, i.e., made after due diligence and with sufficient information to make an informed investment decision;
5. Ensure that training, employment, and education benefits are being provided to the communities and residents; and

6. Ensure that the CDQ Program is providing benefits to each CDQ community and meeting the goals and purpose of the program.

Issue 4: CDQ allocation process: Types of quotas

The Council adopts Alternative 1 - no action.

Issue 5: CDQ allocation process - The evaluation criteria

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

1. Number of participating communities, population, and economic condition.
2. A Community Development Plan that contains programs, projects, and milestones which show a well-thought out plan for investments, service programs, infrastructure, and regional or community economic development.
3. Past performance of the CDQ group in complying with program requirements and in carrying out its current plan for investments, service programs, infrastructure, and regional or community economic development.
4. Past performance of CDQ group governance, including: board training and participation; financial management; and community outreach.
5. A reasonable likelihood exists that a for-profit CDQ project will earn a financial return to the CDQ group.
6. Training, employment, and education benefits are being provided to residents of the eligible communities.
7. In areas of fisheries harvesting and processing, past performance of the CDQ group and proposed fishing plans in promoting conservation based fisheries by taking action that will minimize bycatch, provide for full retention and increased utilization of the fishery resource, and minimize impact to the essential fish habitats.
8. Proximity to the resource.
9. The extent to which the CDP will develop a sustainable fisheries-based economy.
10. For species identified as "incidental catch species" or "prohibited species," CDQ allocations may be related to the recommended target species allocations.

Issue 6: Extent of government oversight

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

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

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

Alternative 3: Revise NMFS regulations to allow investments in non-fisheries related projects. The following option represents the annual maximum amount of investment in non-fisheries related projects. Each CDQ group may decide the appropriate mix of investments up to the maximum and any group may choose to invest less than the maximum.

Option 2 (amended): Allow each CDQ group to invest up to 20% of its previous year's pollock CDQ royalties.

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

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

Issue 8: Other CDQ Administrative Issues

The Council adopted Alternative 2, all three options.

Option 1: Allow CDQ groups to transfer quota by submitting a transfer request directly to NMFS.

Option 2: Allow NMFS to approve PSQ transfers directly, allow the transfer to PSQ during any month of the year, and allow PSQ transfer without an associated transfer of CDQ.

Option 3: CDQ groups would submit alternative fishing plans directly to NMFS.

Attachment 2

Agenda C-2(a) Oct 03

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

DATE: September 03, 2003

FOR: Chris Oliver, Executive Director
North Pacific Fishery Management Council

THROUGH: Lisa Lindeman, Regional Attorney
NOAA General Counsel, Alaska Region

FROM: Robert Babson, Attorney
NOAA General Counsel, Alaska Region

SUBJECT: Renewal of Community Development Quota Allocations under the Administrative Procedure Act.

The North Pacific Fishery Management Council (NPFMC) is developing amendments to the regulations applicable to the Community Development Quota (CDQ) program. We have identified an issue regarding the term of existing CDQ allocations should the agency fail to approve new allocations prior to expiration of the 3 year allocation period. The Administrative Procedure Act (APA) expressly addresses this situation by providing as a matter of law that existing allocations remain in place until such final agency action, notwithstanding their 3 year term.

Discussion

The APA defines "license" as including

> ...the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission...

5 U.S.C. 551 (8). The APA also defines "licensing" as including

> ...agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license...

5 U.S.C. 551 (9). Under these definitions, it is clear the agency's approval of the State of Alaska's CDQ allocation recommendations pursuant to 50 CFR 679.30(d) constitutes "licensing" under the APA, and that

an allocation resulting from this process authorizing a CDQ group to harvest CDQ species constitutes a "license."

Section 9(b) of the APA, 5 U.S.C. 558 (c), delineates applicable procedures to be followed by Federal agencies engaged in licensing. The subsection contains three sentences, each applicable to a different aspect of the licensing process. The third sentence of the subsection applies to the renewal of licenses, and provides:

> When a licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

Id. In explaining the rationale for this provision, the following statement appears in *The Attorney General's Manual on the APA:*

> This sentence states the best existing law and practice. [Citation omitted.] It is only fair where a licensee has filed his application for a renewal or a new license in ample time prior to the expiration of his license, and where the application itself is sufficient, that his license should not expire until his application shall have been determined by the agency. In such a case the licensee has done everything that is within his power to do and he should not suffer if the agency has failed, for one reason or another, to consider his application prior to the lapse of this license. Agencies, or course, may make reasonable rules requiring sufficient advance application.

Id., at 91-92, *reprinted in Federal Administrative Procedure Sourcebook,* at 157-58 (*2d Ed. 1992).* Thus, pursuant to this provision of the APA, CDQ allocations will continue in full force and effect as a matter of law until final agency action changing them, regardless of the expiration of the allocation period, assuming that the CDQ applicants have made sufficient and timely application for new allocations. *See Pan-Atlantic Steamship Corp. v. ATL Coast Line,* 353 U.S. 436 (1957). Final agency action, in the context of CDQ allocations, does not occur until the agency has issued a final decision subsequent to an opportunity to appeal the initial administrative decision.

cc: Jane Chalmers
James Balsiger
Lauren Smoker

Greg Kashim
Staff Report
by State of AK
C-2

Agenda Item C-2
Proposed CDQ Program Appeals Process

The State supports the six-month appeals process option proposed by NMFS for the CDQ allocation process section of Amendment 71. Under this option, the State would submit findings to NMFS on May 1st which would allow for a six month appeals process. This option would allow a three month appeals process for groups disagreeing with the allocation decision by NMFS. In the event NMFS disapproved the State's allocation recommendations, this option would also allow for a three month remand period which would give the State an opportunity to address any deficiencies found in the record by NMFS to support the State's allocation recommendations. The groups would have an opportunity to respond to any new information introduced by the State. It is the intent of the State to have an expedited process which would allow the entire allocation process to be completed prior to the beginning of the new allocation cycle. The State's proposed draft timeline is as follows:

2006-2008 CDP Allocation Cycle	
Dates	**Milestone**
October 1, 2004	Application Period Begins
November 30, 2004	CDP Applications Due
January 31, 2005	Public/Private Hearings
February 7, 2005	State Issues Initial Allocation Recommendations
February 7th thru March 7, 2005	CDQ Groups Allowed 30 days For Reconsideration
March 7 thru April 7, 2005	State Allowed 30 days to Respond to Request for Reconsideration
April 8, 2005	Council Consultation
May 1, 2005	State Submits Allocation Recommendation Findings to NMFS
July 1, 2005	NMFS SF Issues IAD
July 15, 2005	Deadline for CDQ group(s) to File Appeal
August 1, 2005	Deadline for Response From State and CDQ Groups
October 1, 2005	NMFS OAA Decision on Appeal
October 1 thru December 15, 2005	If State's Allocation Recommendations Are Disapproved by NMFS, Remand Process Begins
December 15th thru December 31, 2005	RA May Review Appeals Decision
January 1, 2006	NMFS Issues Final Decision on CDQ Allocations

Western Alaska Community Development Quota Program
Eligible Communities and CDQ Groups

Map Prepared for:
National Marine Fisheries Service
Sustainable Fisheries Division
Juneau, Alaska (907) 586-7228

Original Map Prepared by:
Resource Data, Inc. May 18, 2000

Revised Map Prepared by:
NMFS, Analytical Team
Juneau, Alaska September 2003

- CDQ Communities
- Mean Lower-Low Water
- Baseline for Territorial Sea
- 50nm CDQ MLLW Buffer
- CDQ Group Regions
- Maritime Boundary Line

This map illustrates the location of the baseline of the territorial sea, the location of the communities, and a line 50nm inland from the baseline of the territorial sea. Actual determination of eligibility for the CDQ Program based on distance from the Bering Sea Coast was made by NOAA using nautical charts and community location information supplied by the State of Alaska. Do not rely upon this map as a legal determination of CDQ Program eligibility. Contact the Sustainable Fisheries Division for more information.

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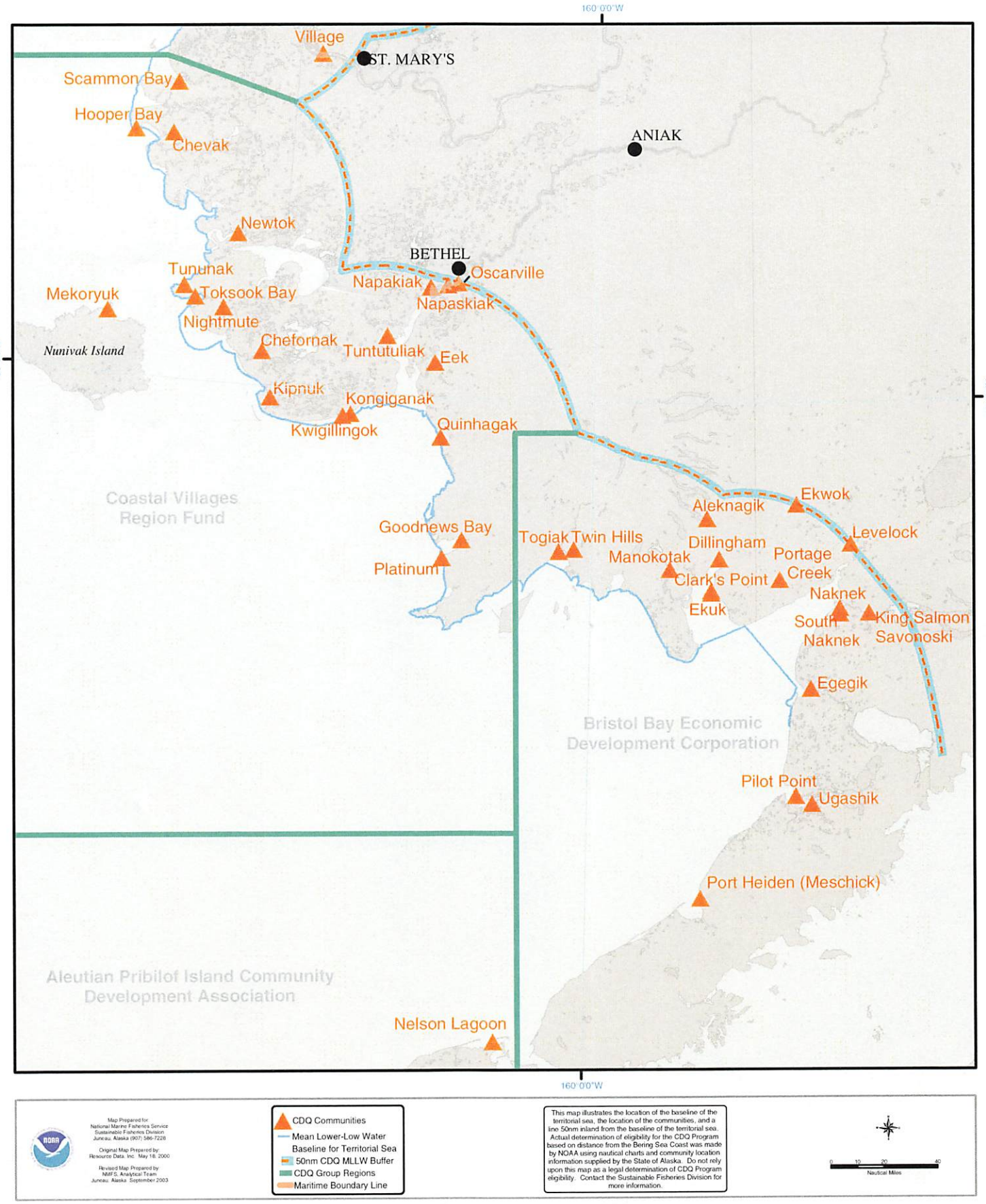
Nautical Miles



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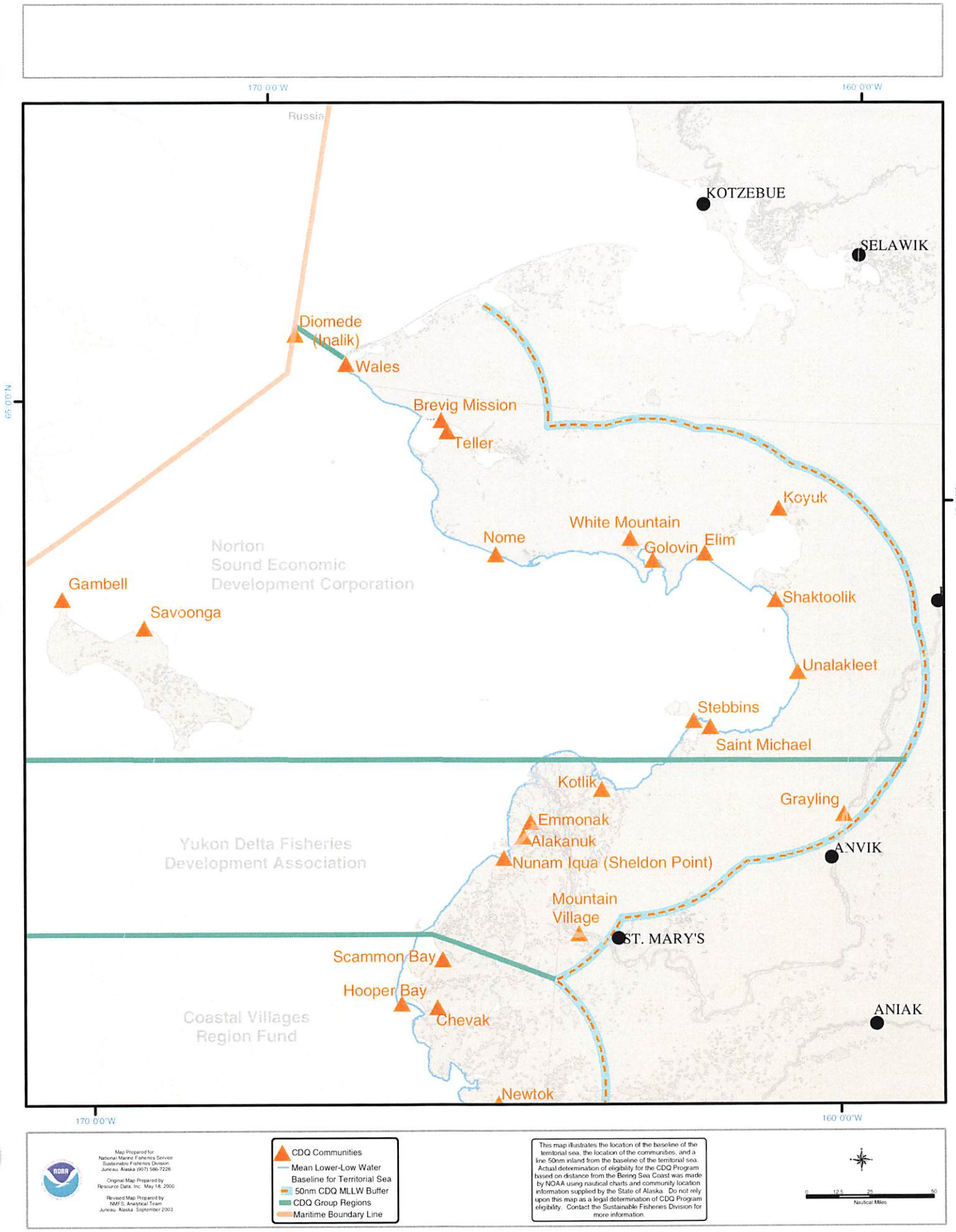
170°0'0"W
160°0'0"W
65°0'0"N
Russia
KOTZEBUE
SELAWIK
Diomede (Inalik)
Wales
Brevig Mission
Teller
Koyuk
White Mountain
Nome
Golovin
Elim
Norton Sound Economic Development Corporation
Gambell
Savoonga
Shaktoolik
Unalakleet
Stebbins
Saint Michael
Kotlik
Grayling
Emmonak
Alakanuk
Nunam Iqua (Sheldon Point)
ANVIK
Yukon Delta Fisheries Development Association
Mountain Village
ST. MARY'S
Scammon Bay
Hooper Bay
Chevak
ANIAK
Coastal Villages Region Fund
Newtok
170°0'0"W
160°0'0"W
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Nautical Miles

Discussion Paper
on
Western Alaska Community Development Quota (CDQ) Program: Community Eligibility

NPFMC
September 15, 2003

I. Introduction

The following discussion paper was prepared at the request of the National Marine Fisheries Service (NMFS) to discuss various issues related to community eligibility in the Western Alaska Community Development Quota (CDQ) Program and to facilitate an analysis that will address the existing inconsistencies between Federal regulations, the Fishery Management Plan for the Groundfish Fishery in the Bering Sea and Aleutian Islands Area (FMP) and the Magnuson-Stevens Act (MSA).

In October 2000, NMFS received a letter challenging the 2001 - 2002 CDQ allocations recommended by the State of Alaska (State). This letter posed questions about the specific regulatory language pertaining to CDQ eligibility and, more generally, about the eligibility status of the some of the communities currently participating in the program. Currently, community eligibility criteria for participating in the CDQ Program is included in the MSA, the Bering Sea and Aleutian Islands Area (BSAI) FMP, and in Federal regulations.[1] The exact wording of the criteria differs among the three documents, which creates difficulty in interpreting the standards for an eligible community. The letter prompted NMFS to examine the consistency of Federal regulations at 50 CFR 679 relative to the CDQ Program eligibility criteria with the criteria established in the MSA. This effort included requesting a legal opinion from NOAA General Counsel (GC) to both identify existing inconsistencies and establish how to interpret and apply the criteria for community eligibility in the MSA. Based on that opinion, further efforts will include revising the Federal regulations to be consistent with the eligibility criteria in the MSA and re-evaluating the application of the eligibility criteria to ensure that all participating communities are eligible under the criteria listed in the MSA.

This paper represents a preliminary analysis of CDQ eligibility issues that will be subsequently developed into a formal Regulatory Impact Review/Initial Regulatory Flexibility Analysis (RIR/IRFA) for Council review.

---

[1]Community eligibility regulations are found at 50 CFR 679.2, and a list of eligible communities is found in Table 7 to Part 679.

II. Background and Legal Opinion

Upon identification of issues associated with community eligibility, NMFS staff requested a legal opinion (see Attachment 1) from NOAA GC on how to interpret and apply the criteria for community eligibility in the MSA. This legal opinion was issued August 15, 2003, and was sent to the Council on August 21. The document provides legal guidance for interpreting the MSA criteria and the analytical approach recommended to mitigate any inconsistencies between these criteria and those in 50 CFR 679. The legal opinion also provides a comprehensive statutory and regulatory history of the development of the community eligibility criteria for the CDQ Program. Because the legal opinion is provided as an attachment to this paper, only a brief history is included here.

On November 23, 1992, NMFS published the final rule to implement the CDQ Program (57 CFR 54936). The final rule included a list of eligibility criteria, as well as a list of eligible communities that appeared to meet the criteria. The accompanying language required that the Secretary of Commerce (Secretary) review the State's findings to determine that each community either met the eligibility criteria *or* was listed on the table of eligible communities. This language is significant in that it did not require that the State and NMFS substantively determine a community's eligibility status using the criteria every allocation cycle. The language of the final rule implied that if a community was listed on the table (Table 7 in current regulations) it was automatically considered an eligible community for purposes of the CDQ Program and CDQ allocations (NMFS 2003, p.4). No further evaluation of the community's eligibility status would be necessary in the future.

In June 1996, NMFS issued a final rule that consolidated CDQ program regulations found in two separate regulations into Part 679. This action combined the pollock and the halibut/sablefish CDQ Program into one subpart, Subpart C, which contained a section with the criteria for community eligibility[2] (NMFS 2003, p. 5-6). The new language included the four eligibility criteria used in the original CDQ Program with regard to pollock allocations. Later that year, NMFS published a final rule adding Akutan to Table 7 as an eligible community, based on the Council's recommendation that the community did not have previously developed harvesting or processing capability sufficient to support substantial BSAI groundfish fisheries participation.[3] Table 7 (and the eligibility criteria) was amended to incorporate these changes, and the resulting table reflected the 57 communities that were eligible to participate in the CDQ Program at that time.[4]

In October 1996, the Sustainable Fisheries Act (SFA) amended the MSA, adding statutory language that establishes the Western Alaska CDQ Program (Section 305(I)). The Senate report accompanying the bill noted that the SFA "would establish community eligibility criteria that are based upon those previously

---

[2]50 CFR 679.30(d)(2)).

[3]Akutan was originally excluded because a large groundfish processing plant is located within the community. Akutan was eventually included when evidence was provided to indicate that the city of Akutan received little benefit from the plant.

[4]The 57 eligible communities listed as of 8/12/96 were: Atka, False Pass, Nelson Lagoon, Nikolski, St. George, St. Paul, Brevig Mission, Diomede/Inalik, Elim, Gambell, Golovin, Koyuk, Nome, Savoonga, Shaktoolik, St. Michael, Stebbins, Teller, Unalakleet, Wales, White Mountain, Alegnagik, Clark's Point, Dillingham, Egegik, Ekuk, Manokotak, Naknek, Pilot Point, Ugashik, Port Heiden/Meschick, South Naknek, Savonoski/King Salmon, Togiak, Twin Hills, Alakanuk, Chefornak, Chevak, Eek, Emmonak, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kotlik, Kwigillingok, Mekoryuk, Newtok, Nightmute, Platinum, Quinhagak, Scammon Bay, Sheldon's Point, Toksook Bay, Tununak, Tuntutuliak, Akutan.
There are three instances where communities are listed with two names separated by a slash. NMFS has treated these entries to be one community with alternate names.

developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ Programs" (S. REP. No. 104-276, at 26 (1996)). The statute language includes a list of eligibility criteria, which differs slightly from that published in Federal regulations, and does not include a list of eligible communities. The community eligibility criteria in the MSA is provided in Attachment 2.

Subsequently, with the expansion of the CDQ Program to include a portion of all BSAI groundfish TACs, NMFS published two final rules implementing the multi-species CDQ amendment in 1998.[5] At that time, no substantive changes were made to the wording of the eligibility criteria and no changes were made to Table 7. Thus, the current definition of eligible community is that which was included in the final rule for the multispecies CDQ Program. **The current regulatory text at 50 CFR 679.2 is as follows:**

> *Eligible community means a community that is listed in Table 7 to this part or that meets all of the following requirements:*
>
> *(1) The community is located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nautical miles of the baseline of the Bering Sea.*
>
> *(2) That is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.*
>
> *(3) Whose residents conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI.*
>
> *(4) That has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The community of Unalaska is excluded under this provision.*

Finally, in April 1999, NMFS made a determination that an additional eight communities[6] were eligible for the CDQ Program, based on a recommendation and supporting documentation from the State.[7] This determination was made through a letter to the State (April 19, 1999), and these eight communities have been considered eligible for the program since that time. As noted previously, NMFS did not formalize this decision through rulemaking, nor did it amend Table 7, due to emerging questions of community eligibility. Thus, Table 7 still includes only the 57 communities previously determined eligible through rulemaking in 1992 and 1996. However, the complete list of 65 communities that NMFS considers eligible through rulemaking and the 1999 administrative determination is provided in Attachment 3.

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[5]Two final rules were published: 63 FR 8356, 2/19/98 and 63 FR 30381, 6/4/98.

[6]These communities are Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.

[7]These eight communities were added when a NMFS review found that the original survey to draw the 50 mile limit was completed using statute, rather than nautical, miles. This extension of the geographic threshold to 50 nautical miles resulted in qualifying eight additional communities. These communities were required to meet all of the eligibility criteria in regulation.

Legal Opinion on Consistency between MSA and Federal Regulations

The legal opinion issued by NMFS gives a complete background on the history of the regulatory and Congressional language establishing eligibility criteria in Federal regulations and the MSA. It also provides an opinion on whether and where consistencies exist between the criteria listed in Federal regulations and those listed in the MSA. The opinion confirms that under the rules of statutory construction, "the language of the statute is controlling and takes precedence over the language of an existing regulation if the regulation is not consistent with the statutory language." (NMFS 2003, p. 9). In addition, while an administrative agency has authority to interpret a statute, the deference afforded to an agency's interpretation does not apply when the agency's interpretation is in conflict with a legislative mandate. Thus, the opinion states the following:

> *"In October 1996, when the MSA was amended, Congress spoke to the issue of community eligibility and provided definable boundaries for community participation in the CDQ Program. And although Congress stated in the legislative history that the SFA would establish community eligibility criteria that are based upon those previously developed by the Council and NMFS, Congress did not use language that is identical to the regulatory eligibility criteria. Based on the rules of statutory construction outlined above, the eligibility criteria set forth in the MSA control and take precedence over the regulatory criteria set forth in 50 CFR §679.2 to the extent there is any conflict between the statutory and regulatory language. Additionally, because Congress has now specifically addressed the issue of community eligibility for the CDQ Program, NMFS's previous interpretation of the MSA as providing the Council and agency the ability to implement eligibility criteria consistent with the general provisions of the MSA cannot be maintained to the extent that the regulatory criteria are in conflict with the statutory language of the MSA." (p. 10).*

NOAA GC then provides a legal interpretation of the MSA eligibility criteria as well as a comparison of the statutory and regulatory language to determine whether inconsistencies or conflicts exist. This side-by-side comparison is presented in the legal opinion (Attachment 1) on pages 11-12. NOAA GC finds that some of the criteria in the MSA are considered substantively identical to the regulatory language. There is one criterion in regulation that requires amending for consistency purposes: the requirement that a community's residents conduct more than half of their commercial or subsistence fishing effort in the BSAI. In addition, there are two criteria that require points of interpretation. The interpretations of each of the criteria, and the approach that will be used to evaluate communities against these criteria, will be discussed later in this paper.

The most significant difference noted between the MSA statutory text and the Federal regulatory text is that there is no reference to Table 7 (i.e., a list of eligible communities) in the MSA. The language in the MSA clearly indicates that a community must satisfy all of the criteria listed in order to be eligible – there is no language that conveys discretion to the agency to modify, replace, or allow communities to participate that do not meet all of the criteria in the MSA. Thus, the current Federal regulations that allow a community to either meet the eligibility criteria *or* be listed on Table 7, are not consistent with the MSA. This discrepancy would not necessitate a change to the regulations per se, as long as all of the communities listed on Table 7 meet the statutory criteria.

In sum, the legal opinion finds inconsistencies within the eligibility criteria and language in Federal regulations at 50 CFR 679 when compared to the criteria and language in the MSA. It concludes that the agency must revise the regulations to be consistent with the MSA, as there are substantive differences

between the two texts. As a subsequent step to this approach, the agency must also re-evaluate the eligibility status of all 65 currently participating communities that were determined to be eligible both prior to and following the MSA amendment. The remainder of this paper discusses the approach being considered by NMFS to revise the regulations so they are consistent with the MSA, as well as the approach for re-examining all currently participating CDQ communities.

III. Problem statement

Given that there are differences in the specific language in Federal regulations and the MSA relevant to community eligibility in the CDQ Program, NMFS has determined that the regulatory criteria must be changed to be consistent with the MSA criteria. However, because the regulatory language directly affects the application of the criteria, it may also affect the resulting eligibility status of some of the currently participating CDQ communities. Thus, Table 7 also must be reviewed and perhaps modified to list only those communities that meet the eligibility criteria in the statute. Recognizing this potential effect, the primary problem to be addressed remains as follows:

> The BSAI FMP and NMFS regulations must be revised to be consistent with the MSA. The BSAI FMP (Section 13.4.7.2) and Federal regulations (50 CFR 679.2) contain community eligibility criteria for the CDQ Program. However the language is not exactly the same between these documents, nor do they match the community eligibility requirements that were added to the MSA in 1996 through the Sustainable Fisheries Act.
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> In addition, there are currently 65 communities that NMFS has determined are eligible to participate in the CDQ Program. Table 7 to 50 CFR 679 includes only 57 total communities: 56 that were determined eligible when the program was originally implemented in 1992 and 1 community (Akutan) that was added in 1996 through rulemaking. Eight additional communities were determined eligible in 1999 through an agency administrative determination that was not formalized through rulemaking, due to emerging questions of community eligibility. If Table 7 is to be used in Federal regulations to reflect eligible communities, it must contain a complete list of communities eligible for the CDQ Program under the criteria established in the MSA. It is uncertain whether all 65 currently participating communities meet these criteria.

Given the identified need to revise the community eligibility criteria in the FMP and regulations, the Council may want to further guide the analysis by approving a problem statement to that effect.

IV. Schedule & Product

The product planned for this action is an RIR/IRFA to support a BSAI FMP amendment and accompanying regulatory amendment.[8] Because the CDQ community eligibility criteria are listed in both the BSAI FMP and Federal regulations, they should be revised in both documents to be consistent with the MSA. The regulatory amendment that would revise the eligibility criteria, and potentially, the list of eligible communities, would have to be effective by January 1, 2005, in order to be in place when the next CDQ allocation cycle begins. The CDQ groups, the State, and NMFS will need to know which communities are eligible prior to the development and evaluation of the groups' Community Development Plans (CDPs). The

[8] A categorical exclusion under the National Environmental Policy Act is being sought for this action.

CDQ groups will start preparing their CDPs for the 2006 - 2008 allocation cycle in late 2004, and the entire allocation process is anticipated to take about twelve months.[9] Thus, in order to have a rule effective by January 2005, NMFS estimates that initial review of a draft analysis will need to occur at the February 2004 Council meeting, with final action in April 2004.

There is also an effort, external to the Council process, in which interested stakeholders are actively working to amend the MSA to clarify the question of which communities are eligible for the CDQ Program. While Congressional action is not guaranteed, Congress may act to clarify its intent on community eligibility. Should Congress take action on this issue, the FMP and regulatory amendments proposed to remedy the identified problem would be simplified, but not unnecessary. Under the proposed statutory changes discussed thus far, NMFS would still need to revise the FMP and Federal regulations to make the eligibility criteria consistent with that in the MSA. This is necessary not only for general consistency purposes, but also to clarify the criteria that would apply to any community applying for program eligibility in the future. The primary difference that may result from Congressional action is that a re-evaluation of each participating community may no longer be necessary. In that case, because the action would be much simplified, the schedule for final action may be more flexible.

NMFS has initiated this effort and raised the issue to the Council, despite the potential for Congressional action, in case no legislative solution occurs by the end of 2003. Given the concerns raised and the conclusions of the legal opinion, the agency must remedy the regulatory and statutory inconsistencies and ensure that all participating communities meet the eligibility criteria in the MSA prior to the next allocation cycle. The schedule for this potential action is thus driven by the upcoming allocation cycle and the need for a final rule effective by January 2005.

The remainder of this paper outlines the analytical approach *should no Congressional action be taken*, in essence, a plan to: (1) revise the eligibility criteria listed in the FMP and Federal regulations to be consistent with the MSA, and (2) undertake a review of each of the 65 currently participating communities' eligibility status to revise Table 7. This approach and the proposed alternatives for analysis could be revised, and the re-evaluation of eligible communities eliminated, should Congressional action occur.

V. Description of Alternatives

The following are two primary alternatives that would be considered in an analysis to resolve the identified problem.

Alternative 1: No action. Do not make any revisions to the BSAI FMP or Federal regulations (50 CFR 679).

Alternative 1 would not revise the eligibility criteria in the BSAI FMP and Federal regulations to be consistent with the eligibility criteria in the MSA. Alternative 1 also would not initiate a re-evaluation of the eligibility status of the 65 communities currently participating in the CDQ Program and would not make revisions to Table 7 in 50 CFR 679. Due to the concerns noted above, and the conclusions of NOAA GC stated in the legal opinion of August 15, 2003, selection of this alternative by the Council may result in a

[9]The schedule of events that has occurred in past CDQ allocation cycles has generally taken nine months to complete, but inclusion of a formal appeals process in the next and future cycles may extend that timeframe by approximately three months.

Secretarial amendment to revise the BSAI FMP and Federal regulations to be consistent with the MSA. Thus, while it is necessary to include a no action alternative for analysis, it is uncertain whether this represents a viable alternative for selection by the Council.

Alternative 2: Amend the BSAI FMP and revise Federal regulations (50 CFR 679) to make the eligibility criteria consistent with that provided in the MSA.

There are five elements to Alternative 2, as follows:

- Revise the BSAI FMP so the eligibility criteria are the same as those listed in the MSA.
- Revise NMFS regulations (50 CFR 679) so the eligibility criteria are the same as the criteria listed in the MSA.
- Revise Table 7 to 50 CFR 679 to list all communities that are eligible for participation in the CDQ Program under the criteria in the MSA. This necessitates re-evaluating all 65 currently participating communities to determine each community's eligibility status under MSA criteria. During each CDQ application and allocation cycle, NMFS will determine whether each community that is part of a CDP is listed on Table 7.
- Establish the process in Federal regulations by which communities not listed on Table 7 can apply and be evaluated for eligibility in the CDQ Program.
- Clarify that rulemaking is necessary to amend Table 7 in the future. Table 7 would only be amended if the eligibility status of a community changed relative to the criteria listed in the MSA, or if a new community were found eligible.

VI. Approach to Alternative 2

This section describes each of the provisions proposed as part of Alternative 2 (bulleted items above), and the preliminary approach that would be taken in the analysis.

Revisions to the BSAI FMP and Federal regulations

Given that there are differences in the specific language in Federal regulations and the MSA relevant to community eligibility in the CDQ Program, NMFS has determined that the regulatory criteria must be changed to be consistent with the MSA criteria. The NOAA GC legal opinion concludes that not all of the criteria in regulation differ substantively from that in the MSA, thus not all of the criteria need to be modified. **However, in order to provide clarity for current and future use of the criteria, staff recommends making the current eligibility criteria in the BSAI FMP and Federal regulations identical to those listed in the MSA.**

Even if there are no significant differences in the interpretation of the wording of the various criteria, having the same exact criteria in each document will provide clarity and consistency in both understanding and applying those criteria for participation in the CDQ Program. Attachment 4 provides the proposed changes to the BSAI FMP text that would be necessary to ensure consistency with the MSA eligibility criteria, as well as some modifications that would clean up the FMP language without making substantive changes.

In addition, the following represents draft regulatory language which would (1) revise the current definition of eligible community at 50 CFR 679.2, and (2) modify the eligibility criteria as appropriate and include it at 50 CR 679.30. These changes would result in the exact same wording of the community eligibility criteria in the MSA, Federal regulations, and the BSAI FMP. (For comparison, the current regulatory language establishing the eligibility criteria is located at 50 CFR 679.2 and provided on page 3 of this paper.)

§ 679.2 Definitions.

Eligible community means:

(1) For purposes of the CDQ Program, a community that is listed in Table 7 to this part. A community will be listed in Table 7 if it has met all of the criteria specified in § 679.30(X).

§ 679.30 General CDQ regulations.

(X) Eligible Communities.

The communities that NMFS has determined meet the following eligibility requirements are listed in Table 7 to this part. Any community that meets the following eligibility criteria, but is not listed in Table 7, may apply to NMFS to request a determination about its eligibility for the CDQ Program. NMFS will consult with the State of Alaska and the Council in making its determinations about eligibility. A community is not eligible to participate in the CDQ Program unless it is listed in Table 7. To be eligible to participate in the CDQ Program, a community shall:

(1) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;

(2) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

(3) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;[10]

(4) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;

(5) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands; and

(6) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.

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[10]This criterion is included so that eligibility criteria in Federal regulations exactly match those in the MSA. It is somewhat redundant with the proposed introductory text to 50 CFR 679.30(X) and may not be included in the actual action to amend Federal regulations. Should further interpretation of this criterion find that it requires a community to meet eligibility requirements other than those specifically listed in the MSA, NMFS will clarify the meaning of this criterion in the analysis and rulemaking associated with this action.

Re-evaluating community eligibility status

NOAA GC also concludes that some of the MSA criteria for community eligibility are substantively different from the regulatory criteria contained within the definition of eligible community at 50 CFR 679.2. Therefore, all 65 communities that NMFS has determined to be eligible for the CDQ Program must be re-evaluated using the MSA criteria. Following this evaluation, Table 7 must be revised to contain only those communities that are eligible under those criteria. This section will describe each of the eligibility criteria listed in the MSA, which would replace the current criteria in Federal regulations under Alternative 2.

The approach used in this section is to: (1) identify each specific MSA criterion; (2) state whether the legal opinion concluded that there was a substantive difference between the regulations and the MSA with regard to each criterion; and 3) describe the legal interpretation of each criterion and how it will be applied to the 65 communities. In cases in which the criterion is fairly straightforward (e.g., geographic and the Alaska Native Claims Settlement Act (ANCSA) related criteria), some preliminary information has been provided regarding the eligibility status of the 65 currently participating communities. However, much of the re-evaluation of communities will be deferred to the initial draft analysis, and all of the following information will be developed in further detail.

The following MSA community eligibility criteria for the CDQ Program (listed in italics) is from the statutory text at 16 U.S.C. 1855 (i)(1)(B).

Geographic criteria

(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;

(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

NOAA GC conclusion: current regulations are substantively identical to MSA criteria
Preliminary evaluation of current communities: no indication at this time that eligibility status will change

The two criteria above are listed separately in the MSA but are grouped together for discussion purposes because together they make up the geographic criteria relevant to community eligibility. NOAA GC has concluded that the statutory language is substantively identical to the regulatory language. Thus, under Alternative 2, while the wording would be changed in regulations to exactly match the wording provided above, there would be no effect on the interpretation of either criterion as previously applied. As stated in the legal opinion, the language is clear and unambiguous and there is no need for further interpretation.

Concerning the eligibility status of the current communities participating in the CDQ Program, all 65 communities are eligible under the geographic criteria above. NMFS made this determination for 56 communities in 1992, for Akutan in 1996, and for the eight additional communities included in 1999. A NOAA geographer concluded this determination for the eight additional communities in 1998 using location data provided by the State (Romesburg letter, 1998). This effort included a review of 44 additional communities that were within 100 nm of the Bering Sea coast. In 1999, NMFS determined that eight of these

communities met the geographic (within 50 nm) and all other criteria.[11] The remaining communities were either unpopulated, did not meet the 50 nm criterion, north of the Bering Strait, or located on the Gulf of Alaska.

Consistency with regulatory provisions criterion

(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;

NOAA GC conclusion: not included in current regulations, but regulations are not inconsistent with MSA
Preliminary evaluation of current communities: no indication at this time that eligibility status will change

This criterion is included in the statutory eligibility criteria but is not in current Federal regulations. It appears to require that communities meet the regulatory criteria that is developed by the State and NMFS in order to be eligible, which may be redundant with the introductory text that states that to be eligible, a community must meet all of the criteria listed. This criterion may also allow for additional eligibility criteria to be established for the CDQ Program. While the overall intent of Alternative 2 is to revise the eligibility criteria in the FMP and Federal regulations to match that in the MSA, further interpretation of this criterion is necessary to understand its application. Due to the existing uncertainty surrounding the interpretation of this criterion, staff has requested further advice from NOAA GC.

ANSCA status criterion

(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native Village;

NOAA GC conclusion: current regulations are substantively identical to MSA criterion
Preliminary evaluation of current communities: at least one community does not appear to meet this criterion

This criterion addresses whether a potential community has been determined and certified to be a Native village under ANCSA. NOAA GC found that the statutory language requiring ANCSA certification is also clear and unambiguous and there is no need for further interpretation. Thus, based on the previous conclusion that all communities must meet the plain language of the statute to be eligible, each community must be reviewed to ensure that all eligible communities are certified as Native villages under ANCSA.

With regard to the ANCSA status of the 65 currently participating CDQ communities, only King Salmon/Savonoski does not appear to be certified as a Native village under ANCSA. "Native village" has a specific definition in ANCSA under 43 U.S.C. 1602(c):

"'Native village' means any tribe, band, clan, group, village, community, or association in Alaska listed in sections 1610 and 1615 of this title, or which meets the requirements of this chapter, and which the Secretary determines was, on the 1970 census enumeration date (as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance), composed of twenty-five or more Natives; (Emphasis added)"

[11]Several other communities were determined to be located within the 50 nm criterion but were apparently unpopulated in 1999. These communities were: Bill Moore's Slough, Chuloonawick, Council, Hamilton, King Island, Mary's Igloo, Paimiut, Solomon, and Umkumiute.

The statute provides a list of communities (sections 1610 and 1615) that may be determined to be Native villages for the purposes of receiving land entitlements under ANCSA, with the condition that the Secretary of the Interior make a determination that each of the communities listed actually meet the criteria. This is clear from the language that states that the community must be listed and be determined by the Secretary of the Interior to be composed of 25 or more Native peoples in 1970.

In addition, the statutory language provides for other communities, not listed in Sections 1610 or 1615, to be certified as Native villages, should they meet the requirements of the chapter and be determined by the Secretary of the Interior to be composed of 25 or more Native peoples in 1970. Thus, the list of Native villages provided in the statute was not intended to be static and final; the Secretary of the Interior must make a determination about each community on the list as to whether it meets the definition of Native village, as well as review evidence provided from communities not on the list regarding their status as a Native village. The Federal regulations governing the eligibility requirements under ANCSA and implementing the process for reviewing Native villages is found at 43 CFR 2651.2.[12]

Since ANCSA was established, the list of certified Native villages pursuant to the ANCSA criteria has changed according to the process described above. Several communities listed in the Act were found by the Secretary of the Interior not to meet the definition of a Native village established in the Act, and several communities not listed in the Act received certification as Native villages after providing sufficient evidence to that fact. The Department of Interior confirmed in writing, and again recently through personal communication, the list of ANCSA certified Native villages to-date.[13]

As noted in the legal opinion, King Salmon was not an ANCSA certified Native village at the time of the CDQ final rulemaking, yet King Salmon/Savonoski has been included on Table 7 as an eligible CDQ community since 1992. During Council deliberations at that time, King Salmon was noted as pursuing, but had not yet received, certification as a Native village with the Department of the Interior. While the intent described during the Council discussion was that King Salmon would be added to the list of eligible communities should it receive certification, the final Council motion did not reflect that condition. In the final motion, King Salmon was paired with Savonoski and added to the table of eligible communities.[14] The Council deliberations also mention that Savonoski is an ANCSA-certified Native village (Transcript of Council deliberations, 4/23/92, p.1-2).

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[12]Federal (Bureau of Land Management) regulations further define the eligibility criteria for villages to receive benefits under ANCSA at 43 CFR 2651.2. In the case of villages not specifically listed in ANCSA, not only must there be 25 or more Native residents of the village, but there must be a Native majority in order to be eligible.

[13]Letter to Sally Bibb, NMFS, from Joe LaBay, U.S. Dept. of the Interior, Bureau of Land Management, June 8, 1999; email to Sally Bibb from Joe LaBay, dated July 22, 2003; and personal communication with Nicole Kimball, August 6 and August 7, 2003.

[14] Some of the factors that may have led to King Salmon being added to Savonoski were it's proximity to, and shared cultural history with, Savonoski, as well as the belief that Savonoski was ANCSA certified. King Salmon and Savonoski are two separate communities in the Katmai region of southwestern Alaska, several miles apart. "Old Savonoski" was located near the east end of the Iliuk Arm of Naknek Lake until 1912, when Mt. Katmai erupted and forced the residents of Savonoski to abandon their village site. Finding their former site uninhabitable, former Savonoski villagers eventually established "New Savonoski," located along the south bank of the Naknek River and about five miles east of Naknek (Historic Resource Study of Katmai National Park and Preserve, 1999). Over the years, residents of New Savonoski were forced to abandon the new site due to erosion of the riverbank, and the villagers further dispersed across the region.

According to the legal opinion, NMFS must determine whether the communities represented by the CDQ groups meet the eligibility requirements listed in the MSA, and can no longer deem a community eligible by virtue of the fact that it is listed on Table 7. The Department of Interior has recently confirmed that King Salmon has not received ANCSA certification as a Native village, thus, it does not meet all of the statutory criteria.[15]

In addition, Savonoski is also not certified under ANCSA as a Native village. While Savonoski was originally listed in Section 1610 as a (potential) Native village to receive benefits under ANCSA, the Department of Interior determined that it was not a Native village by virtue of the fact that it did not meet the population criteria specified in the Act (25 or more Native peoples according to the 1970 U.S. Census or other satisfactory evidence). Not only did Savonoski not qualify for status as a "Native village" under ANCSA, the Department of Interior determined on June 20, 1983, that it did not qualify as a "Native group" (IBLA decision memo 83-951, 4/30/84). ANCSA authorized smaller land conveyances to qualified "Native groups," which were defined as "any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who compromise a majority of the residents of the locality (Emphasis added)" (43 U.S.C. 1602(d)).[16] Thus, the population threshold to be certified as a Native group under ANCSA is lower than that required for certification as a Native village. According to the Department of the Interior, Savonoski did not meet either of these thresholds.

Savonoski, Inc., appealed to the Interior Board of Land Appeals (IBLA) regarding the original determination to issue a certificate of ineligibility for status as a Native group by the Bureau of Indian Affairs, and the IBLA upheld the ineligibility determination on April 30, 1984 (IBLA decision memo 83-951, 4/30/84). The Department of the Interior has recently confirmed that Savonoski has not received ANCSA certification as a Native village (or Native group) since that time, thus, it does not appear to meet all of the statutory criteria (D. Hopewell, pers. comm.).

King Salmon/Savonoski has been treated as one community in the CDQ Program to-date, which is why at least "one" community would likely be deemed ineligible under this criterion as a result of the pending RIR/IRFA on eligible communities. The research completed thus far indicates that the remaining 64 participating communities are certified Native villages under ANCSA.[17]

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[15]Although King Salmon did not receive certification as a Native village under ANCSA, the King Salmon Tribe became a Federally-recognized entity as of December 29, 2000. This means that the community met a list of criteria for Federal recognition of status as an Indian tribe and, by virtue of that status, can receive services from the U.S. Bureau of Indian Affairs (67 FR 46327, July 12, 2002). (K. Feldman, pers. comm.)

[16]The implementing BLM regulations further define a Native group under 43 CFR 2653.0-5©) and 43 CFR 2653.6 (5). The definition under 43 CFR 2653.0-5(c) is: "Native group means any tribe, band, clan, village, community or village association of Natives composed of less than 25, but more than 3 Natives, who comprise a majority of the residents of a locality and who have incorporated under the laws of the State of Alaska." 43 CFR 2653.6(5) expands on this definition, requiring, among other things, that the community must be composed of more than a single family or household.

[17]Note that the CDQ communities of Savoonga, Gambell, and Elim opted to acquire title to reserve lands under Section 19(b) of ANCSA, acquisition of which precludes receiving any other benefits under the statute. However, only "Village Corporations" located within a reserve defined in the statute were eligible to take advantage of this option. Village Corporations, by definition in the statute (43 U.S.C 1602(j)), must be representative of a "Native Village." Thus, Savoonga, Gambell and Elim, while selecting reserve lands, are certified as Native villages under the statute.

Current fishing effort criterion

(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian islands;

NOAA GC conclusion: inconsistency exists between MSA and current regulations; interpretation necessary to define "current"
Preliminary evaluation of current communities: incomplete at this time

NOAA GC recommends modifying the regulatory language to be consistent with the MSA language regarding this criterion. Among the issues is the fact that the regulatory language references fishing effort "in the waters of the BSAI," as opposed to the MSA language which states "in the waters of the Bering Sea or waters surrounding the Aleutian islands." NOAA GC notes that the "BSAI" has a specific definition in regulation, referring only to waters in the Exclusive Economic Zone (EEZ)(3-200 miles), which excludes State waters (0-3 miles). By contrast, the legal interpretation of subsistence fishing is that it cannot come from the EEZ (NMFS 2003, p. 15). NOAA GC concludes Congress intended both commercial harvests and subsistence harvests should be used to satisfy this criterion. Therefore, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must include harvests from both State and Federal waters. Due to the potentially substantive discrepancy between the regulatory and statutory language, in which the regulations might be interpreted to exclude State waters, Federal regulations must be revised to be consistent with the MSA. However, although this inconsistency exists, in practice, NMFS may have applied this criterion as mandated by the MSA language in the past. See the legal opinion for more detail on this issue.

The second point of interpretation from NOAA GC is in regard to the application of the word "current" when referring to fishing effort. NMFS has interpreted and applied the word "current" to mean the level of a community's commercial or subsistence harvests at the time of initial evaluation for eligibility. If the community's harvests satisfied the criterion at the time they were initially evaluated for eligibility, then the community was determined to have satisfied the criterion in perpetuity and no further consideration was required by NMFS (NMFS 2003, p. 17). NOAA GC concludes that because the statutory language is ambiguous on this point, NMFS was permitted to develop a reasonable interpretation of the term, and did so. Thus, with the deference afforded to the agency to interpret the term, and the way the agency has applied the criterion in the past, it follows that NMFS will continue to interpret the term as meaning fishing effort during the time the community was or is initially considered for eligibility. Once determined to have met the criterion, it would satisfy the criterion thereafter. This means that a community that may apply for eligibility in the future would be evaluated on the basis of its fishing effort at the time of its evaluation, and not as of the date the MSA criteria were published or any other point in time.

The two interpretations discussed above will guide the re-evaluation of all 65 CDQ communities. The re-evaluation of communities' eligibility status under this criterion has not yet been undertaken, but must be part of the draft analysis to support an FMP and regulatory amendment. Each community will be evaluated based on the approach outlined above (i.e., communities that applied prior to 1992 will be evaluated based on fishing effort in the Bering Sea and waters surrounding the Aleutian Islands at that time, communities that applied in 1998-1999 will be evaluated based on fishing effort at that time). It is anticipated that this will be a significant portion of the overall effort to review the communities' eligibility status.

Previously developed harvesting or processing capability criterion

(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.

NOAA GC conclusion: current regulations are substantively identical to MSA criterion
Preliminary evaluation of current communities: incomplete at this time

NOAA GC concludes that the statutory language is relatively clear and unambiguous, and is not substantively different from the regulatory text. While the statute references the Bering Sea, the regulations reference participation in the BSAI; however, this is not deemed an inconsistency because it does not result in a substantive difference. The legal opinion states: "...the statutory term "Bering Sea" includes waters directly north of the Aleutian Islands. Due to the FMP management area divisions between the Bering Sea and Aleutian Islands, the regulatory text must reference both areas in order to encompass the same area." (p. 19, NMFS memo). The regulatory text also specifically mentions the exclusion of Unalaska, while the statute does not. This is not deemed inconsistent with the statute, however, as it is not necessary to state explicitly in order to uphold this community's ineligibility status.

The re-evaluation of the CDQ communities will be guided by the same interpretation of this criterion as has been used in the past. The review under this criterion has also not yet been completed, but will be part of the draft analysis.

Process for future amendments to Table 7

Review of eligible communities on Table 7
Lastly, the mechanism for and timing of evaluating community eligibility and amending Table 7 in the future needs to be clarified. Under current regulations, NMFS is responsible for determining whether the communities represented in the CDPs are eligible, either by meeting the eligibility criteria in section 50 CFR 679.2 or by being listed on Table 7. As discussed previously, Alternative 2 would modify the regulations to eliminate the "either/or" situation, and require that all communities listed on Table 7 meet the eligibility criteria as currently listed in the statute. The question that remains is whether communities are listed on Table 7 indefinitely, or whether they must be reviewed to meet the eligibility criteria at the beginning of each new CDP cycle.

There are five basic criteria to consider, but only one that is truly relevant to this question. A community's eligibility status with respect to the geographic, 50 nm , or ANCSA-related criteria (criteria (i), (ii), (iv)) is unlikely to change over time, so a community will likely need to meet these thresholds only once.[18] Criterion (v), which addresses whether a community has previously developed harvesting or processing capability, is relative to a point in time previous to the community's inclusion in the CDQ Program. Thus, it is not logical to require a community to meet this criterion at any time other than the initial application and evaluation period.

[18]Note that criterion (iii) requires that the community meet the criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal register. Thus, this criterion is not relevant to the question at hand.

The timing question is most relevant to criterion (iv), which addresses current fisheries participation. As discussed previously, NOAA GC determined that NMFS's past interpretation with regard to the current harvests criterion was reasonable, in that a community is evaluated on the basis of its harvests at the time of initial evaluation for eligibility. Should the community meet this criterion at that time, it does not need to be subsequently reviewed on this basis. Given this rationale, the intent of Alternative 2 is that if a community met all of the MSA criteria and was listed on Table 7, NMFS would not need to periodically re-evaluate a community's eligibility status in the future with regard to the MSA criteria. **During each CDQ application and allocation cycle, NMFS would only determine whether each community that is part of a CDP is listed on Table 7.**

Should NMFS need to add or remove a community from Table 7, however, rulemaking would be necessary to effect this change. Part of the regulatory revision explicit in Alternative 2 is to clarify that rulemaking is necessary to amend Table 7 in the future, and **Table 7 would only be amended if the status of a community changed relevant to the eligibility criteria listed in the MSA or a new community was added.** Despite meeting all of the criteria, a community could not participate in the program unless it was listed on Table 7, and a community would need to apply to NMFS for a determination of eligibility. The likelihood of a community's status relative to the MSA criteria changing *after* initial evaluation is relatively low. However, should there be a change in the future, rulemaking would be necessary to remove that community from Table 7.

Unpopulated communities on Table 7

While the criteria discussed above are the only explicit criteria established in the MSA, there is also an implicit recognition that a community must be populated in order to meet the criteria initially to be determined eligible and to meet the requirements in the CDP during each new allocation cycle. While the term "community" is not defined in the statute or accompanying Federal regulations, the statutory eligibility criteria requires that a community must be inhabited, through the condition that a community must *"consist of residents"* who conduct the majority of their fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands (criterion (v)). Thus, while it is not a separate, explicit criterion, the fact that a community must have a population is encompassed in criterion (v) and is a rational expectation in the context of the program. In order for a community to meet all of the MSA eligibility criteria to participate in the CDQ Program initially, it must have residents whose actions and operations attempt to meet the criteria.

In addition, specific requirements for approval of a CDP necessitate that: (1) the community's governing body provide a letter of support for the CDQ group,[19] and (2) one member from each represented community be included on the Board of Directors for the CDQ group.[20] In order to fulfill those requirements, it is implicit that the community be inhabited. Because future CDQ allocations are not guaranteed upon expiration of a CDP, the regulations state that a CDQ group must re-apply for subsequent allocations on a competitive basis.[21] Thus, the provisions above are required to be fulfilled in each new CDP that is submitted for a specific allocation cycle.

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[19] 50 CFR 679.30(a)(1)(v)

[20] 50 CFR 679.30(a)(2)(iv)

[21] 50 CFR 679.30(a)

Given that a community must be populated in order to meet the eligibility criteria to be listed on Table 7, the issue remains as to the process undertaken if a community on Table 7 becomes uninhabited.[22] As stated previously, Table 7 would only be amended if the status of a community changed relative to the eligibility criteria listed in the MSA. Thus, should an eligible community become uninhabited, staff proposes that it would not be removed from Table 7.

A community must have been populated in order to be able to meet the criteria at the time of initial evaluation, but there is no statutory requirement that the community must maintain a population to continue to meet the MSA criteria. However, because it would be relatively difficult, if not impossible, for a CDQ group representing an unpopulated community to meet all of the requirements of the general CDQ application procedures, an uninhabited community would not be able to participate in the next CDQ application and allocation cycle. Because the community would remain on Table 7, however, it would be eligible to participate in the program via inclusion in a CDP should the community become re-inhabited at some point in the future.

Adding new communities to Table 7

Another potential scenario is that a new community may apply to NMFS for eligibility to participate in the CDQ Program. It would then be evaluated for eligibility by the State and NMFS, in consultation with the Council. The legal opinion concludes that the plain language of the MSA at section 305(i)(1)(B) states that any community that meets the eligibility criteria in (i) through (vi) is an eligible community for purposes of the CDQ Program. There is no language that constrains the program to only a subgroup of communities that meet the criteria or the existing 65 participating communities. Thus, new communities are not prevented by the statute from applying for inclusion in the program. Consistent with the conclusions throughout this paper regarding the application of the criteria, a new community applying for eligibility would be evaluated based on the information provided at the time of its initial evaluation. If it were found to meet the eligibility criteria set forth in the MSA, it would be added to Table 7 through rulemaking. This concept is included in the proposed regulatory language under Alternative 2.

NMFS reviewed all communities that met the ANCSA status as a Native village (criterion iv) that were within the 50 nm boundary from the Bering Sea coast and not located on the Gulf of Alaska coast (criteria i and ii). Two communities were identified for which the 2000 U.S. Census has reported populations, but have not applied for inclusion in the program: Paimiut (pop. 2) and Solomon (pop. 4). While these communities did not report populations in years past, and it is unknown whether they would meet the remaining eligibility criteria, they provide an example of the type of situation in which a new (previously uninhabited) community may apply for inclusion in the program.

VII. Summary

This paper was prepared as a preliminary analysis of community eligibility issues in the CDQ Program to facilitate development of a formal RIR/IRFA to support an FMP and regulatory amendment. NOAA GC has issued a legal opinion which identifies inconsistencies between the CDQ community eligibility criteria established in Federal regulations, the BSAI FMP, and the MSA. This opinion also provides guidance regarding the interpretation and application of the criteria for community eligibility in the MSA.

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[22]Currently, there are two CDQ communities with relatively low populations according to the 2000 U.S. Census: Ekuk (pop. 2) and Ugashik (pop. 11). See Attachment 3 for the population data for all CDQ communities.

Based on the legal analysis provided by NOAA GC, NMFS must identify an approach to rectify the existing inconsistencies between the Federal regulations implementing the CDQ Program and the MSA. This paper proposes two primary alternatives to be analyzed in an RIR/IRFA for Council review. The action alternative (Alternative 2) in this amendment package would:

- revise the BSAI FMP and Federal regulations at 50 CFR 679 to match the eligibility criteria in the MSA;
- revise Table 7 to 50 CFR 679 to list all communities that meet the eligibility criteria in the MSA;
- require that only communities listed on Table 7 would be eligible to participate in the CDQ program;
- establish a process by which new communities could apply for eligibility; and
- clarify that rulemaking is necessary to amend Table 7 in the future.

As part of the regulatory changes necessary to be consistent with the MSA under Alternative 2, NMFS will need to re-evaluate all 65 currently eligible CDQ communities and amend Table 7 to list only communities that meet all of the statutory criteria. This paper evaluates the communities' status against the geographic and ANCSA-related criteria, and concludes that King Salmon/Savonoski does not meet the requirement that a community must be a certified Native village under ANCSA. The remaining criteria (current harvests and previously developed harvesting or processing capability) will be evaluated for the initial review draft of the analysis. While only two primary alternatives are proposed, the Council may determine that additional alternatives are necessary or desirable for analysis.

The CDQ groups will start developing new CDPs in late 2004, in preparation for the upcoming CDQ allocation cycle (2006-2008). In order to plan and develop a CDP to support their CDQ allocation requests, the CDQ groups must know which communities are eligible. In order to have a final rule by January 2005, NMFS estimates that initial review of a draft analysis will need to occur at the February 2004 Council meeting, with final action in April 2004. Should Congress take action to make the 65 currently participating communities permanently eligible for the CDQ Program, FMP and regulatory amendments would still be necessary to make the eligibility criteria consistent with those in the MSA. However, depending upon the direction of Congressional action, the re-evaluation of eligible communities may become unnecessary.

Attachments:

1. NOAA GC legal opinion dated August 15, 2003
2. Magnuson-Stevens Act, Section 305
3. List of 65 eligible communities and population
4. Draft BSAI FMP revisions

References

Alaska Native Claims Settlement Act. 43 U.S.C. 1601 (1971)

Alaska Native Selections, 43 CFR 2653.0-5(c); 43 CFR 2653.6(5)

Bureau of Land Management, ANCSA Regulations, Eligibility Requirements, 43 CFR 2651.2

Clemens, J., and F. Norris, "Building in an Ashen Land: Historic Resource Study of Katmai National Parks and Preserve," National Park Service, 1999. (http://www.nps.gov/katm/hrs/hrs.htm)

Dennis Hopewell, Office of the Solicitor, Alaska Region, U.S. Department of the Interior. Personal communication, August 11, 2003.

Federal Fishing Regulations, 50 CFR 679.2; 50 CFR 679.30

Feldman, Kerry. Associate Dean, College of Arts & Sciences, University of Alaska Anchorage. Personal communication, September 15, 2003.

LaBay, Joe. Bureau of Land Management, U.S. Dept. of the Interior. Personal communication, August 6-7, 2003.

Letter from Jim W. Balsiger, Administrator, AK Region, NMFS, to Jeffrey W. Bush, Deputy Commissioner, Alaska Department of Community and Economic Development, dated January 17, 2003.

Letter from Joe J. Labay, Bureau of Land Management, U.S. Dept. of the Interior, to Sally Bibb, AK Region, NMFS, dated June 8, 1999.

Letter from Dennis J. Romesburg, Chief Geographer, NOAA to Steven Pennoyer, Administrator, AK Region, NMFS, received October 7, 1998.

Magnuson-Stevens Fishery Conservation and Management Act. P.L. 94-265 as amended through October 11, 1996.

Mishler, C.W., and C.F. Holmes, "Cultural Resources Survey: North Naknek Airport" Public Data File 84-28, Alaska Division of Geological and Geophysical Surveys, October 1982.

Moores, John, Engineering Geologist & Land Manager, Bristol Bay Native Corporation, Anchorage, AK. Personal communication, September 4, 2003.

National Oceanic and Atmospheric Administration, Office of General Counsel, memorandum: *Interpretation of Magnuson-Stevens Fishery Conservation and Management Act (MSA) language concerning community eligibility in the Western Alaska Community Development Quota (CDQ) Program*, August 15, 2003.

Norris, Frank, "Alaska Subsistence: A National Park Service Management History," Ch. 3, Subsistence in Alaska's Parks, 1910-1971. (http://www.cr.nps.gov/history/online_books/norris1/chap3a.htm)

Pratt, Ken. ANCSA office, Bureau of Indian Affairs, U.S. Dept. of the Interior. Personal communication, August 11, 2003.

Savonoski, Inc., U.S. Dept. of the Interior, IBLA decision memo 83-951, April 30, 1984.

Senate Report, No. 104-276, (May 23, 1996).

Sustainable Fisheries Act. P.L. 104-297 (1996).

Transcript of Council deliberations on April 23, 1992; North Pacific Fishery Management Council minutes for the 101st Plenary Session, April 22-26, 1992, p.1-2.

U.S. Census Bureau, "Geographic Areas Reference Manual," November 1994.

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Office of General Counsel
P.O. Box 21109
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August 15, 2003

MEMORANDUM FOR: Dr. James W. Balsiger
Administrator, Alaska Region

THROUGH: Lisa L. Lindeman
Alaska Regional Attorney

FROM: Lauren M. Smoker
Attorney, Alaska Region

SUBJECT: Interpretation of Magnuson-Stevens Fishery Conservation and Management Act (MSA) language concerning community eligibility in the Western Alaska Community Development Quota (CDQ) Program

By memorandum dated June 13, 2003, you requested "written legal advice about how to interpret and apply the criteria for community eligibility in the MSA." *See* Attachment 1. The following memorandum provides our legal opinion on the various questions you posed as well as an opinion on your preferred interpretation.

This memorandum initially presents a review of the regulatory and statutory development of the eligibility criteria used in the CDQ program. It then presents a brief summary of the applicable legal standards to be applied when interpreting statutory and regulatory language. These standards are then applied on a paragraph-by-paragraph basis to the statutory language and a legal interpretation of the statutory eligibility criteria is presented, followed by a comparison of the statutory language to the regulatory language to determine whether there are inconsistencies between the two such that some action on the part of NMFS is necessary to correct an identified inconsistency. A final section summarizing the findings of this legal analysis is provided at the end of this memorandum.

Statutory and Regulatory History of the Community Eligibility Criteria for the CDQ Program

In March 1992, the Secretary of Commerce approved Amendment 18 to the Bering Sea and Aleutian Islands Area (BSAI) Fishery Management Plan (FMP) that, among other things, allocated one half of the BSAI pollock reserve, or 7.5% of the total allowable catch (TAC) of pollock, to eligible communities in western Alaska.[1] NMFS proposed regulations to implement the western Alaska CDQ program in October 1992 (57 *Fed. Reg.* 46139; October 7, 1992). The proposed rule stated the following concerning eligible communities:

> The CDQ program was proposed to help develop commercial fisheries in western Alaska communities. These communities are isolated and have few natural resources with which to develop their economies. Unemployment rates are high, resulting in substantial social problems. However, these communities are geographically located near the fisheries resources of the Bering Sea, and have the possibility of developing a commercial fishing industry. Although fisheries resources exist adjacent to these communities, the ability to participate in these fisheries is difficult without start-up support. This CDQ program is intended to provide the means to start regional commercial fishing projects that could develop into ongoing commercial fishing industries.

Id., at 46139. In order to identify eligible communities, four eligibility criteria were proposed which had been developed by the Governor of the State of Alaska (Governor), in consultation with the North Pacific Fishery Management Council (Council):[2]

> Prior to approval of a [Community Development Plan] recommended by the Governor, the Secretary will review the Governor's findings as to how each community(ies) meet [sic] the following criteria for an eligible community:
> (i) For a community to be eligible, it must be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the Gulf of Alaska coast of the North Pacific Ocean even if it is within 50 nautical miles of the baseline of the Bering Sea.
> (ii) The community must be certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
> (iii) The residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea.
> (iv) The community must not have previously developed harvesting or processing capability sufficient to support substantial fisheries participation in the BSAI, except if

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[1] *See generally,* Final Rule implementing Amendment 18 to the BSAI FMP, 57 *Fed. Reg.* 23321, June 3, 1992. Amendment 18 was effective through December 31, 1995.

[2] 57 *Fed. Reg.* 46139, 46140, Oct. 7, 1992.

the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision.

Id., at 46144 (proposed section 675.27(d)(2)). Under the proposed rule, prior to approval of the Governor's recommendations for approval of Community Development Plans (CDPs) and CDQ allocations of pollock, the Secretary was required to review the Governor's findings to determine if the eligibility criteria had been met by the communities submitting CDPs. *Id.* The proposed rule also included a table that listed the communities that were determined by the Secretary to have met the proposed criteria.[3] *Id.*, at 46145. Finally, the preamble of the proposed rule made it clear that the communities eligible to apply for CDQ allocations of pollock were not limited to those communities listed in the table. *Id.*, at 46140.

A final rule implementing the CDQ Program was published on November 23, 1992.[4] (57 *Fed. Reg.* 54936) Based on public comment, four changes were made to the proposed eligibility criteria in the final rule, two of which are important for this analysis.[5] First, the proposed regulation at 675.27(d)(2) and the heading for Table 1 were changed to require the Governor and Secretary to make findings on the eligibility of a community only if it is not listed on Table 1 (emphasis added). *Id.*, at 54938. The preamble states that this change was made because the State submitted an evaluation of the list of communities in Table 1 against the community eligibility criteria at 675.27(d)(2) that concluded that the communities listed in Table 1 met the

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[3]The following 56 communities were listed in proposed Table 1:
Atka, False Pass, Nelson Lagoon, Nikolski, St. George, St. Paul, Brevig Mission, Diomede/Inalik, Elim, Gambell, Golovin, Koyuk, Nome, Savoonga, Shaktoolik, St. Michael, Stebbins, Teller, Unalakleet, Wales, White Mountain, Alegnagik, Clark's Point, Dillingham, Egegik, Ekuk, Manokotak, Naknek, Pilot Point/Ugashik, Port Heiden/Meschick, South Naknek, Sovonoski/King Salmon, Togiak, Twin Hills, Alakanuk, Chefornak, Chevak, Eek, Emmonak, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kotlik, Kwigillingok, Mekoryuk, Newtok, Nightmute, Platinum, Quinhagak, Scammon Bay, Sheldon's Point, Toksook Bay, Tununak, Tuntutuliak.
There are four instances where communities are listed with two names separated by a slash. In one instance, the entry represents two separate communities (Pilot Point and Ugashik are separate, ANCSA-certified native villages). For Diomede/Inalik and Port Heiden/Meschick, NMFS has treated these entries to be one community with alternate names. The status of the Savonoski/King Salmon entry is discussed in detail within this memorandum.

[4]This final rule implemented the CDQ program for 1992 and 1993. A subsequent regulatory amendment implemented the CDQ program for 1994 and 1995 (58 *Fed. Reg.* 32874, June 14, 1993). The subsequent regulatory amendment made no changes to the criteria for community eligibility.

[5]The following two changes are somewhat less relevant for the purposes of this analysis: (1) language in proposed section 675.27(d)(2)(iv) was changed from "substantial fisheries participation" to "substantial groundfish fisheries participation" to precisely reflect the intent of the Council (*see* Comment 4 and Response, 57 *Fed. Reg.* 54936, 54938), and (2) in response to a comment requesting inclusion of Akutan, King Cove, and Sand Point as eligible communities, NMFS responded that the Council intended the benefits of the CDQ program to be limited to communities within a specific geographical area of western Alaska and that do not have substantial groundfish harvesting or processing capability – because Akutan has a large groundfish processing plant, and King Cove and Sand Point are located on the Gulf of Alaska, these communities were not included as eligible communities (*see* Comment 12 and Response, *Id.*, at 54939).

criteria. *Id.*

This change has great importance for this analysis for two reasons. First, it removed the requirement that the State and NMFS substantively determine a community's eligibility status using the four eligibility criteria every CDQ allocation cycle. Under the final regulation, if a community was listed on Table 1, it was automatically considered an eligible community for purposes of the CDQ program and CDQ allocations. Second, this change made King Salmon an eligible community even though King Salmon was not a community that was certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. 1601 et seq.) to be a native village.[6] During Council deliberations on the CDQ program, the ANCSA certification status of King Salmon was discussed. The Council recognized that King Salmon was not an ANCSA-certified village, but that King Salmon was pursuing certification as a native village with the Department of the Interior. The Council meeting transcript reflects that on April 22, 1992, the Council decided that when it received notification of King Salmon's certification, Table 1 would be amended to include King Salmon. However, the following day, that condition for the village's participation in the program was not reflected in the final motion passed by the Council, which simply read "...that King Salmon be added to Savonoski." Transcript of Council deliberations on April 23, 1992; North Pacific Fishery Management Council Minutes for the 101st Plenary Session, April 22-26, 1992, page 10. Paired with Savonoski, King Salmon was added to the list of CDQ eligible communities on Table 1 in the regulations.

The second important change was to proposed section 675.27(d)(2)(iii). The preamble of the final rule states that this criterion was to be revised to change the language "waters of the Bering Sea" to "waters of the Bering Sea and Aleutian Islands management area and adjacent waters." Comment 7 and Response, 57 *Fed. Reg.* 54936, 54938, Nov. 32, 1992. NMFS determined that this change was appropriate in order to more accurately describe the applicable area using an already defined term at 675.2 in order to eliminate confusion about the meaning of this criterion. *Id.*, at 54938. Although the preamble stated that this change would be made to the final regulatory text, the stated change was not completely made – the portion of the phrase "and adjacent waters" was omitted in the final regulatory text. Section 675.27(d)(2)(iii) in the final rule references only "the Bering Sea and Aleutian Islands management area" and does not include the reference to adjacent waters. *Id.*, at 54944. The omission could be interpreted as a decision to permit only harvests from the EEZ to count towards satisfying this criterion. However, the preamble language evidences an intent that commercial and subsistence harvests from the EEZ as well as adjacent waters, which could be interpreted to include State waters to three nautical miles, would be considered in determining whether a community met this

[6]Although the preambles of the proposed and final rules state that the communities listed in Table 1 met the eligibility criteria (*see* 57 *Fed. Reg.* 46139, 46140 (Oct. 7, 1992); and 57 *Fed. Reg.* 54936, 54938 (Nov. 23, 1992)), King Salmon was not an ANCSA-certified native village at the time of the rulemaking. Through letter and email, the Department of Interior recently confirmed that King Salmon has not received ANCSA certification. Letter to Sally Bibb, NMFS, from Joe Labay, U.S. Department of Interior, Bureau of Land Management, dated June 8, 1999; and email to Sally Bibb from Joe Labay, dated July 22, 2003.

criterion.

In November 1993, NMFS issued a final rule implementing a CDQ program for halibut and sablefish harvested with fixed gear.[7] The preamble of the proposed rule states that the communities that were eligible to apply for the pollock CDQ program are the same communities that would be eligible to apply for sablefish and halibut CDQs.[8] As for the community eligibility criteria, there were no meaningful differences between the halibut/sablefish and pollock CDQ programs except for the language of the first and third criteria. The first criterion for the halibut/sablefish CDQ program specifically stated that communities on the Chukchi Sea coast (in addition to the Gulf of Alaska) were ineligible.[9] The third eligibility criterion for the halibut/sablefish CDQ program stated that the residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters "surrounding the community," rather than in "waters of the BSAI management area," the language used in the pollock CDQ program.[10] The list of eligible communities on Table 1 for the halibut/sablefish CDQ program remained the same as those listed on Table 1 for the pollock CDQ program.[11]

In December 1995, Amendment 38 to the BSAI FMP was implemented.[12] Amendment 38 continued the western Alaska pollock CDQ program, extending it to December 31, 1998. Amendment 38 contained no changes to the criteria for community eligibility.

In February 1996, a final rule was published that moved Table 1 in Part 675 (the list of eligible communities for the pollock CDQ program) to Part 672 and renumbered it as Table 7.[13]

On June 19, 1996, NMFS issued a final rule that consolidated CDQ program regulations found at Parts 672, 675 and 676 into Part 679.[14] The consolidation combined the pollock and the

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[7]58 *Fed. Reg.* 59375, Nov. 9, 1993. The halibut/sablefish fixed gear CDQ program was codified at 50 CFR Part 676.

[8]57 *Fed. Reg.* 57130, 57142, Dec. 3, 1992.

[9]58 *Fed. Reg.* 59375, 59411, Nov. 9, 1993.

[10]*Id.*

[11]*Id.*, at 59413.

[12]A proposed rule was published on September 18, 1995 (60 *Fed. Reg.* 48087) and the final rule was published on December 12, 1995 (60 *Fed. Reg.* 63654).

[13]61 *Fed. Reg.* 5608, February 13, 1996.

[14]61 *Fed. Reg.* 31228, June 19, 1996. The preamble of the final rule states that the rule does not make any substantive changes to the existing regulations but rather "reorganizes the management measures into a more logical and cohesive order, removes duplicative and outdated provisions, and makes editorial changes for readability, clarity and to achieve uniformity in regulatory language" in response to President Clinton's Regulatory Reform Initiative. *Id.* Because the rule made only non-substantive changes to existing regulations originally issued after prior notice

halibut/sablefish CDQ regulations into one subpart, Subpart C, which included one section with the criteria for community eligibility, section 679.30(d)(2). In doing so, some of the language that was unique to the halibut/sablefish eligibility criteria was replaced with language used in the pollock eligibility criteria. The new language, with references to changes from the halibut/sablefish eligibility criteria in brackets and bold, read as follows:

> Prior to approval of a CDP recommended by the Governor, NMFS will review the Governor's findings to determine that each community that is part of a CDP is listed in Table 7 of this part or meets the following criteria for an eligible community:
> (i) The community is located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nautical miles of the baseline of the Bering Sea. **[The halibut/sablefish CDQ program reference to the exclusion of Chukchi Sea coastal communities was removed.]**
> (ii) The community is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
> (iii) The residents of the community conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI. **[Note that the halibut/sablefish CDQ program language of "waters surrounding the community" was not incorporated into this criterion and only the language from the pollock CDQ program remained.]**
> (iv) The community has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision.

61 *Fed. Reg.* 31228, 31265-66, June 19, 1996. No changes were made to Table 7 and the list of eligible communities with this rulemaking.

On August 12, 1996, NMFS published a final rule adding the community of Akutan to Table 7 as an eligible community and removing the language in the fourth criterion that explicitly excluded Akutan as an eligible community.[15] 61 *Fed. Reg.* 41744. The proposed rule noted that when the pollock CDQ program was implemented in 1992, NMFS determined that Akutan met the first three eligibility criteria but failed to meet the fourth because a large groundfish processing plant

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and opportunity for comment, NMFS waived prior notice and delayed effectiveness under 5 U.S.C. 553(b)(B) and (d). *Id.*, at 31229.

[15]An additional minor change made by this rulemaking moved the statement "Other Communities That Do Not Appear on This Table May Also Be Eligible" that was within the Table into the heading for Table 7. 61 *Fed. Reg.* 41744, 41745, Aug. 12, 1996.

was located within Akutan's city limits.[16] However, the Aleutian Pribilof Island Community Development Association, a CDQ group, provided the Council and NMFS with information showing that despite the presence of the processing plant, the city of Akutan gained little benefit from it and in fact met the fourth criterion for community eligibility in the CDQ program.[17] The addition of Akutan to Table 7 resulted in 57 communities being listed as eligible to participate in the CDQ program.

On October 11, 1996, the Sustainable Fisheries Act (SFA), Pub. L. 104-297, was signed into law. Among other things, section 111 of the SFA amended the MSA at section 305(i)(1) to include specific provisions for a western Alaska CDQ Program.[18] Briefly, section 111 established a western Alaska CDQ program under which a percentage of the total allowable catch of each Bering Sea fishery is allocated to the program, set forth community eligibility criteria for participation in the CDQ program, and placed some temporary restrictions on the species and amounts that could be allocated to the CDQ program. While the MSA community eligibility criteria are similar in many respects to the regulatory criteria, they differ in some significant ways that are discussed in more detail below.

Both the House of Representatives and the Senate prepared bills to amend the MSA in the 104th Congress and both bills included provisions for the establishment of a western Alaska CDQ program. The House of Representatives' version was the Fishery Conservation and Management Amendments of 1995 (H.R. 39). The House Report (H.R REP. NO. 104-171 (1995)) that accompanied H.R. 39 explains that H.R. 39 would have codified the existing CDQ system for the Bering Sea and the existing criteria for approval as a qualified CDQ community. The House Report acknowledges that 56 communities were eligible to participate in the CDQ program at that time. The House Report also states that because of the benefits generated by the Council's and NMFS's CDQ program starting in 1992, the House Resources Committee determined that it was important to continue the CDQ program and that, in addition to pollock, sablefish and halibut, the program should be expanded to allow communities participating in the program the opportunity to harvest a percentage of the total allowable catch of each Bering Sea fishery.

The Senate bill, S. 39, was the Sustainable Fisheries Act, and the Senate bill ultimately was passed in lieu of the House bill.[19] The Senate Report (S. REP. NO. 104-276, at 26 (1996)) that accompanied S. 39 states that "New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." The most direct reference in the Senate Report to the eligibility criteria states that the SFA "would establish community eligibility criteria that are

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[16]61 *Fed. Reg.* 24475, May 15, 1996.

[17]*Id.*, at 24475-76.

[18]The statutory language in the MSA for community eligibility is presented later in this memorandum in comparison form to the current regulatory text.

[19]Sustainable Fisheries Act, Pub. L. No. 104-297, 1996 U.S.C.C.A.N. (110 Stat. 3559) 4073.

based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs." *Id.*, at 28.

In 1998, shortly after the passage of the SFA, NMFS expanded the CDQ program into a multispecies program that allocated 7.5 percent of all BSAI groundfish TACs not already covered by a CDQ program along with a pro-rata share of the prohibited species catch limit, and a graduated percentage of BSAI crab to the CDQ program.[20] While many changes were made to the CDQ program with the multispecies amendment, the community eligibility criteria continued as it had been published in the consolidation rule with the subsequent change to include Akutan – no substantive changes were made to the wording of the eligibility criteria and no changes were proposed to Table 7.[21] Neither the proposed nor the final rules included an explanation as to how the regulatory definition of eligible community compared to the MSA language at section 305(i)(1)(B) or whether the regulatory and the statutory eligibility criteria were consistent with each other. The definition of eligible community that was included in the final rule for the multispecies CDQ program is the current definition of eligible community.[22]

By letter dated March 8, 1999, the State recommended to NMFS that eight additional communities be deemed eligible for participation in the CDQ Program.[23] After reviewing the State's recommendation and supporting documentation, NMFS, by letter dated April 19, 1999, agreed with the State's recommendations and determined that the eight communities were eligible for the CDQ Program, bringing the total number of eligible communities to 65. In August 2001, NMFS proposed to add these eight communities to Table 7,[24] but withdrew the change in the final rule, stating that revisions to Table 7 would be considered by NMFS in a future rulemaking that would address a wider range of CDQ issues.[25] Despite their not being listed on Table 7, these eight communities have been considered eligible for the CDQ program

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[20]62 *Fed. Reg.* 43866, 43872, Aug. 15, 1997 (proposed rule); 63 *Fed. Reg.* 8356, Feb. 19, 1998; 63 *Fed. Reg.* 30381, 30398, June 4, 1998; and 63 *Fed. Reg.* , Oct. 1, 1998 (three final rules).

[21]With this rulemaking, the eligibility criteria in section 679.30(d)(2) were moved to the definitions section of Part 679, section 679.2, to define the term "eligible community."

[22]The regulatory language in the final rule for the Multispecies CDQ Program (i.e. the current regulatory definition of eligible community) is presented later in this memorandum in comparison form to the statutory language of the MSA.

[23]The eight additional communities are Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.

[24]66 *Fed. Reg.* 41664, August 8, 2001.

[25]67 *Fed. Reg.* 4100, January 28, 2002.

since April 19, 1999.[26]

Applicable Legal Standards for Statutory Construction

Under the rules of statutory construction, the language of a statute is controlling and takes precedence over the language of an existing regulation if the regulation is not consistent with the statutory language. A statute is the charter for the administrative agency charged with implementing it.[27] A regulation issued by an agency under the authority of a particular statute therefore must be authorized by and consistent with the statute and administrative action in excess of the authority conferred by the statute is *ultra vires*.[28] Because Congress is the source of a federal administrative agency's powers, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation implementing that statute.[29] Additionally, because the legislative process culminates in an official, authoritative expression of legal

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[26]Under the current regulations, NMFS must make determinations as to whether the communities represented by the CDPs meet the eligibility criteria in 50 C.F.R. 679.2. During the application process for the 2001-2002 CDQ allocation cycle, a challenge was raised by one of the CDQ groups, questioning whether some of the communities considered eligible by the State and NMFS actually met the eligibility criteria, particularly the criterion requiring one half of a community's current commercial and subsistence fishing effort be conducted in the waters of the BSAI. For the 2001-2002 allocation cycle, NMFS stated in its decision memorandum that all 65 communities were considered eligible for the 2001-2002 allocation cycle because NMFS previously approved the State's recommendations that the communities were eligible to participate in the CDQ program and no new information was presented that demonstrates ineligibility. Decision Memorandum from James W. Balsiger to Penelope D. Dalton, dated January 17, 2001.

Although none of the CDQ groups challenged the eligibility status of any of the 65 communities during the application process for the 2003-2005 CDQ allocation cycle, in accordance with its regulations, NMFS made determinations as to whether the communities represented by the CDPs met the eligibility criteria in section 679.2. During its review, NMFS concluded that 57 of the communities listed in the CDPs were eligible communities and met the requirements of 679.30(a)(1)(iv) and 679.2 by virtue of the fact that they were listed on Table 7. Letter to Jeffery W. Bush, Deputy Commissioner, Alaska Department of Community and Economic Development, From James W. Balsiger, dated January 17, 2003, Attachment 2, at 13-15. As for the eight remaining communities (those communities deemed eligible in April 1999), NMFS re-reviewed the information submitted by the State in 1999 and found that the State had applied a much broader scope than was set forth in the fishing effort criterion and had submitted information that appeared to indicate that some of the communities probably do not meet that criterion. *Id.*, at 15-16. As a result, NMFS stated that several of these eight communities may not meet all of the eligibility criteria and therefore may not be eligible to participate in the CDQ program. *Id.*, at 16. However, because NMFS lacked all of the information necessary to conclude definitively that these communities were ineligible to participate, NMFS determined that, until it can thoroughly examine all of the relevant information regarding eligibility for all communities currently listed in the CDPs, all 65 communities represented by the CDPs were deemed eligible to participate in the 2003-2005 allocation cycle. *Id.*

[27]Singer, Norman J., Sutherland Statutory Construction § 31.02 (5th ed. 1992).

[28]*Id.*

[29]*Id.*

standards and directives,[30] the deference typically afforded to an agency interpretation of a statute will not apply when the agency's interpretation is in conflict with a subsequently enacted legislative mandate.[31]

Prior to the SFA, the Council and NMFS interpreted the MSA as providing the authority to develop and implement the western Alaska CDQ Program, including the criteria that would be considered for community participation. Congress acknowledged the existence of this authority in the legislative history for the SFA. S. REP. NO. 104-276, at 27. In October 1996, when the MSA was amended, Congress spoke to the issue of community eligibility and provided definable boundaries for community participation in the CDQ program. And although Congress stated in the legislative history that the SFA would establish community eligibility criteria that are based upon those previously developed by the Council and NMFS, Congress did not use language that is identical to the regulatory eligibility criteria. Based on the rules of statutory construction outlined above, the eligibility criteria set forth in the MSA control and take precedence over the regulatory criteria set forth in 50 C.F.R. § 679.2 to the extent there is any conflict between the statutory and regulatory language. Additionally, because Congress has now specifically addressed the issue of community eligibility for the CDQ Program, NMFS's previous interpretation of the MSA as providing the Council and agency the ability to implement eligibility criteria consistent with the general provisions of the MSA cannot be maintained to the extent that the regulatory criteria are in conflict with the statutory language of the MSA.

When there is a question concerning the interpretation of a statute, several principles of law are applied and considered in order to interpret the statute's meaning. These principles are known as the rules of statutory construction. One of the guiding principles of statutory interpretation is that when the language of the statute is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the statute to give it meaning.[32] This is known as the plain meaning rule. Only statutes that are ambiguous are subject to the process of statutory interpretation.[33] Ambiguity exists when a statute is capable of being understood by reasonably well informed persons in two or more different senses.[34] Even if a specific provision is clearly worded, ambiguity can exist if some other section of the statutory program expands or restricts the provision's meaning, if the plain meaning of the provision is repugnant to the general purview of the act, or if the provision when considered in conjunction with other provisions of

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[30] *Id.*, at § 27.01.

[31] *Id.*, at § 31.06.

[32] Singer, Norman J., Sutherland Statutory Construction § 46:01(6th ed. 2000).

[33] *Id.*

[34] *Id.*, at § 46:04.

the statutory program, or with the legislative history of the subject matter, import a different meaning.[35]

Interpretation of the MSA eligibility criteria and determinations as to whether the regulatory language is inconsistent or in conflict with the statutory language

This section of the memorandum provides a legal interpretation of the MSA eligibility criteria as well as a comparison of the statutory and regulatory language to determine whether inconsistencies or conflicts exist between the two texts. This is presented in a paragraph-by-paragraph format.

The following is a side-by-side comparison of the regulatory[36] and statutory text:

Regulatory text at 50 C.F.R. 679.2	Statutory text at 16 U.S.C. 1855(i)(1)(B)
Eligible community means a community that is listed in Table 7 to this part or that meets all of the following requirements:	To be eligible to participate in the western Alaska community development quota program under subparagraph (A) a community shall – **[this introductory text makes no reference to or incorporation of Table 7 or the communities listed on it; each community must meet all of following the eligibility criteria in order to participate in the CDQ Program]**
(1) The community is located within 50 nm from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the most western of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nm of the baseline of the Bering Sea.	(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea **[substantively identical to the regulatory language];**
	(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean **[substantively identical to the regulatory language at 679.2 although it omits the regulatory clarification that even if a community is within 50 nm of the baseline of the Bering Sea, it is not eligible if it is located on the GOA coast of the North Pacific Ocean];**

[35] *Id.*, at § 46:01.

[36] The regulatory text displayed in this comparison is the current regulatory language. It is also substantively identical to the regulatory language that existed at the time of passage of the SFA.

Regulatory text at 50 C.F.R. 679.2 (con't)	Statutory text at 16 U.S.C. 1855(i)(1)(B) (con't)
	(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register **[criterion not within the regulatory language]**;
(2) That is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.	(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village **[substantively identical to the regulatory language]**;
(3) Whose residents conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI.	(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands **[statutory language does not use the term BSAI but instead uses the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"]**; and
(4) That has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The community of Unalaska is excluded under this provision.	(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments **[statutory language does not use the term BSAI but instead uses the term Bering Sea; also omits the specific exclusion of Unalaska from the CDQ program]**.

Statutory criteria addressing geographical location, ANCSA certification, and consistency with regulatory provisions

The statutory language used in paragraphs 305(i)(1)(B)(i) and (ii) (dealing with geographical location), and paragraph (iv) (requiring ANCSA certification) is clear and unambiguous and there is no need for interpretation. Furthermore, the language used in these paragraphs is substantively identical to the first and second eligibility criteria within the regulatory definition of eligible community at 679.2. Paragraph 305(i)(1)(B)(iii) is not included in the regulatory definition but contains clear and unambiguous language and merely requires communities to meet the regulatory criteria. Based on this comparison, no inconsistencies or conflicts between the statutory and the regulatory language appear to exist for these paragraphs and therefore no changes to the regulatory language are required to make it consistent with the statutory language.

Mandatory nature of statutory criteria and lack of statutory reference to Table 7

Under the rules of statutory construction, use of the word "shall" (except in its future tense) typically indicates a mandatory intent.[37] The introductory language of section 305(i)(1)(B) clearly and unambiguously indicates that a community shall satisfy all of the criteria in order to be eligible. There is no permissive language within the section that would allow the waiver of one or more of the criteria, nor is there language that would recognize some other form of eligibility, such as a grandfather clause. Because the Council and NMFS may only develop regulations that are authorized by and consistent with the statute, the Council and NMFS do not have any discretion to implement or maintain regulations that omit, add, or modify any of the MSA community eligibility requirements. Therefore, only communities that meet all of the MSA eligibility criteria can participate in the CDQ program.

As explained earlier, the ability to be determined an eligible community under the regulations creates an either/or situation – a community can be eligible because it meets all of the regulatory eligibility criteria or it can be eligible by virtue of its listing on Table 7. In other words, under NMFS regulations, a community can participate in the CDQ program even if the community does not meet all of the regulatory eligibility criteria as long as it is listed on Table 7. Because the statute mandates consistency with each eligibility criterion and does not provide an alternative, the lack of statutory reference to Table 7 creates a discrepancy between the statute and the regulations. However, the discrepancy is problematic only if there are communities listed on Table 7 that do not meet all of the statutory criteria. At this time, there is at least one community, King Salmon, that does not meet all of the statutory eligibility criteria. Because Table 7 lists at least one community that does not meet all of the statutory eligibility criteria, NMFS regulations with respect to eligibility through listing on Table 7 are *ultra vires* and Table 7 must be amended to include only those communities that meet all of the MSA eligibility criteria.

Statutory criterion addressing commercial or subsistence fishing effort

MSA section 305(i)(1)(B)(v) requires eligible communities to "consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands." There are two points of interpretation necessary with this criterion. The first point deals with determining from where must commercial or subsistence fishing effort have come in order to satisfy the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands." The second point deals with when must commercial or subsistence fishing effort have occurred in order to satisfy the word "current."

[37] Singer, Norman J., Sutherland Statutory Construction § 25.04 (5th ed. 1992).

1. Interpretation of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"

Although the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" is not defined within the MSA, a plain reading of the phrase indicates that the area encompasses all State and Federal waters of the Bering Sea or waters surrounding the Aleutian Islands. While the MSA is focused on the regulation of fishing activities conducted in the exclusive economic zone (EEZ), which, in the case of Alaska, begins at 3 nautical miles from the baseline of the territorial sea and extends seaward to 200 nautical miles, Congress did not include the term "EEZ" in the statutory text of this criterion.[38] Congress is well aware of and familiar with the term "EEZ" and its meaning, and uses the term elsewhere in the MSA. Its omission in this criterion coupled with the plain language reading of the phrase argues in favor of an inclusive reading of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" as meaning State as well as Federal waters.[39]

Furthermore, Congress clearly intended both subsistence harvests and commercial harvests to qualify in satisfying this criterion.[40] As explained below, because subsistence harvests cannot come from the EEZ, in order to give meaning to all of the words in this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must include harvests from both State and Federal waters.

Subsistence rights can exist under common law through the establishment of exclusive aboriginal title or non-exclusive aboriginal rights, or they can be conferred by statute. In order for fishing or hunting to be considered a subsistence activity, aboriginal title to an area or non-exclusive aboriginal rights over an area must be established, or a statute must recognize the activity as subsistence. Several court cases have ruled on the question of whether native villages can assert exclusive aboriginal title or non-exclusive aboriginal rights under common law or statutory rights in the fishery resources of the EEZ off Alaska. The first of these is *Amoco*

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[38]The legislative history includes a reference to harvests within the EEZ for this criterion. In the Senate Report, there is the following sentence: "New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." (Emphasis added.) S. REP. NO. 104-276, at 26 (1996). Although Congress references historic harvests from the EEZ, it is unlikely that Congress meant only harvests from the EEZ. This is based on the discussion above and also other references in the legislative history that indicate the CDQ program is to be administered as it has been by the Council and NMFS, which means historic harvests from State as well as Federal waters would be considered in satisfying this criterion.

[39]"While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000).

[40]It is important to note that fishing effort in this criterion is not limited to groundfish fishing and includes other species of fish, such as halibut and salmon.

Production Co. v. Village of Gambell, 480 U.S. 531, 546-48 (1987).[41] In *Amoco*, the Supreme Court held that Title 8 of the Alaska National Interest Lands Conservation Act (ANILCA), which statutorily recognized Alaska natives' use of public lands for subsistence hunting and fishing, did not apply to the Outer Continental Shelf (OCS) because ANILCA defines public lands to mean federal lands situated "in Alaska" which includes coastal waters to a point three miles from the coastline, where the OCS commences, but does not include waters seaward of that point.[42] In *Native Village of Eyak v. Trawler Diane Marie* (*Eyak I*), 154 F.3d 1090, 1092 (9th Cir. 1998), the court held that federal paramountcy precluded aboriginal title in the OCS.[43] And finally, in *Native Village of Eyak v. Evans (Eyak II)*, No. A98-0365-CV (HRH) (D. Alaska, September 25, 2002), the court held that non-exclusive aboriginal rights could not exist in the OCS due to federal paramountcy and the holding in the *Eyak I* case.[44]

As a result of these holdings, subsistence harvest cannot be considered to come from the EEZ. Because commercial or subsistence harvests can be used to qualify a community for the CDQ program, to interpret the phrase "waters of the Bering Sea or waters surrounding the Aleutian

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[41]In this case, the Alaska native villages of Gambell and Stebbins challenged an OCS lease sale, claiming that under ANILCA the OCS was public land within Alaska, the sale would have adversely affected their aboriginal rights to hunt and fish on the OCS, and that the Secretary of the Interior had failed to comply with section 810(a) of ANILCA which provides protection for natural resources used for subsistence in Alaska. *Amoco*, at 534-35. An earlier decision by the Ninth Circuit had held that the phrase "in Alaska" in section 810(a) was ambiguous and interpreted it to include the OCS. People of Gambell v. Clark, 746 F. 2d 572, 575 (1984).

[42]The MSA defines "EEZ" as "the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States." 16 U.S.C. 1802(11). In *Amoco*, the Supreme Court found that the Submerged Lands Act, 43 U.S.C. § 1312, was made applicable to the State of Alaska under the Alaska Statehood Act and that under section 4 of the Submerged Lands Act, the seaward boundary of a coastal State extends to a line three miles from its coastline and at that line, the OCS commences. *Amoco*, at 547. Therefore, the seaward boundary of the State of Alaska is three nautical miles from its coastline. As such, both the EEZ and OCS start at the same point off the coast of Alaska and for purposes of this discussion, the conclusions reached in these cases regarding the OCS are applicable to the EEZ.

[43]In this case, several Alaska native villages challenged the halibut and sablefish IFQ regulations promulgated by the Secretary of Commerce as violating their rights to the exclusive use and occupancy of the Outer Continental Shelf (OCS). The villages claimed that for more than 7,000 years their members have hunted sea mammals and harvested the fishery resources of the OCS and argued that they are entitled to exclusive use and occupancy of their respective areas of the OCS, including exclusive hunting and fishing rights, based upon unextinguished aboriginal title.

[44]*Eyak II* considered whether non-exclusive hunting and fishing rights on the OCS are legally different from exclusive hunting and fishing rights based on aboriginal title which were precluded by the court in *Eyak I*. Finding that there is no difference between an exclusive claim to hunt and fish in the OSC and a non-exclusive claim when it comes to the doctrine of federal paramountcy, the *Eyak II* court held that since the MSA's passage in 1976, the United States has asserted sovereign rights and exclusive fishery management authority over all fish and continental shelf fishery resources within the EEZ and that the plaintiffs' claims of non-exclusive aboriginal rights in the OCS conflicted with the U.S. assertion and were inconsistent with the paramount rights of the federal government in areas of the ocean beyond the three-mile limit of state jurisdiction. 12-13, 36. The district court decision in *Eyak II* currently is on appeal to the Ninth Circuit.

Islands" as only applying to the EEZ would make ineligible any subsistence harvests by the communities. Such an interpretation would ignore or fail to give meaning to all the words used in the criterion and would be contrary to the rules of statutory construction.[45] Therefore, in order to give full meaning to the language of this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must be interpreted to mean State or Federal waters of the Bering Sea or Aleutian Islands.

Given this interpretation, is the regulatory language consistent with this statutory criterion regarding the location of qualifying harvests? There are two regulatory definitions of "BSAI," one for purposes of the commercial king and Tanner crab fisheries, the other for purposes of the groundfish fisheries. 50 C.F.R. 679.2. Both refer only to waters of the EEZ.[46] Given the statutory interpretation above, an inconsistency exists between the statutory and regulatory texts and the regulatory text should be amended to conform with the statutory language. Although this discrepancy exists between the two texts, in practice, NMFS may have applied this criterion as mandated by the MSA language. Recall that earlier in this memorandum it was noted that for both the original pollock CDQ final rule in November 1992 and the halibut/sablefish CDQ final rule in November 1993, commercial or subsistence harvests from Federal or State waters may have been used to determine community eligibility. *See* discussion *infra* on pages 4-5. In order to determine whether all appropriate Federal and State waters commercial or subsistence harvests were considered in a community's eligibility evaluation, NMFS should re-examine the information submitted for currently eligible communities for consistency with this MSA criterion.[47]

2. Interpretation of the term "current"

The second point of interpretation with this criterion deals with when must commercial or subsistence harvests have occurred in order to satisfy the criterion given the use of the word "current." The term "current" appeared in the original language for the pollock CDQ program in 1992 and has been interpreted by NMFS to mean the level of a community's commercial or subsistence harvests at the time of initial evaluation for eligibility. If a community's harvests satisfied this criterion at the time of initial evaluation, then the community was determined to

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[45]"No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found that will give force to and preserve all the words of the statute." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000).

[46]For King and Tanner crab, "BSAI Area" is defined as "those waters of the EEZ off the west coast of Alaska lying south of Point Hope (68 degrees 21' N. lat.), and extending south of the Aleutian Islands for 200 nm west of Scotch Cap Light (164 degrees 44'36" W. long). For groundfish fisheries, "BSAI management area" is defined as "the Bering Sea and Aleutian Islands subareas . . . ." Both subareas are defined as those portions of the EEZ contained within identified statistical areas. 50 C.F.R. § 679.2

[47]It is important to note that a community's commercial or subsistence fishing effort in State or Federal waters south of the Aleutian Islands would also qualify under this criterion given the statutory reference to waters surrounding the Aleutian Islands.

have satisfied this criterion and no subsequent consideration of a community's harvests was required by NMFS.

The statutory language at 305(i)(1)(B)(v) also uses the term "current" to describe commercial or subsistence harvests. The term is not defined in the MSA and it is subject to several different interpretations. Three possible interpretations are:

> (1) harvests as of the date the SFA was enacted – *i.e.,* on October 11, 1996, more than half of a community's commercial or subsistence harvests must have been from the waters of the Bering Sea or waters surrounding the Aleutian Islands;
> (2) harvests at any given time – *i.e.,* a community must have harvests that would satisfy this criterion at every evaluation period in order to remain an eligible community; or
> (3) harvests that, at the time of initial evaluation for eligibility, satisfy this criterion – *i.e.,* a community would only have to satisfy this criterion at the time it was or is initially considered for eligibility and, once determined to be an eligible community, would thereinafter satisfy this criterion.

In this situation, agencies are permitted to develop a reasonable interpretation of a term.[48] Because the term is ambiguous, the rules of statutory construction permit the use of intrinsic and extrinsic aids in developing an interpretation.[49] For this particular term, there are no intrinsic aids that help illuminate the word's meaning. As for the legislative history, there is nothing that directly assists with an interpretation of the term "current," although there are statements within the legislative history that describe the section as codifying the existing regulatory eligibility criteria, acknowledge that there were 56 communities eligible to participate in the CDQ program at the time of passage of the SFA, and that indicate Congress wanted the communities currently participating in the CDQ Program to continue to be participating communities.[50]

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[48]*See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that if statute is silent or ambiguous with respect to specific issue, agency's interpretation of statute must be upheld if agency's construction of statute is permissible and not arbitrary, capricious, or "manifestly contrary to the statute").

[49]Intrinsic aids are found within the text of the statute such as the use of context, definition sections, punctuation, etc. Singer, Norman J., Sutherland Statutory Construction § 47:01(6th ed. 2000). Extrinsic aids are sources outside the text of the statute and include the legislative history of a statute, such as committee reports, floor statements, etc. *Id.*, at § 48:01.

[50]H.R. REP. NO. 104-171, at section 14 (1995); S. REP. NO. 104-276, at 28 (1996). Representative Young stated that "The enactment of section 111(a) of S. 39 will provide the North Pacific Fishery Management Council and the Secretary of Commerce the statutory tools required to improve the efficiency of their implementation of the western Alaska community development quota program. And the enactment of section 111(a) will codify Congress strong support for the council and the Secretary's innovative effort to provide fishermen and other residents of Native villages on the coast of the Bering Sea a fair and equitable opportunity to participate in Bering Sea fisheries that prior to the creation of the western Alaska community development quota program was long overdue." CONG. REC. H11418, H11438 (daily ed. Sept. 27, 1996) (statement of Rep. Young).

Since the addition of eligibility criteria to the MSA in October 1996, NMFS appears to have continued its interpretation of the regulatory definition of the term "current" and applied that interpretation to the statutory term with its implementation of the multispecies CDQ program in 1998 and its approval of the eight additional communities in April 1999. As described earlier, the multispecies CDQ program did not change the regulatory eligibility criteria or the communities listed on Table 7. NMFS did not re-evaluate the eligibility of each community for consistency with the current harvests criterion but rather continued with its pre-SFA interpretation that current harvests meant harvests at the time of a community's initial evaluation for eligibility. Similarly, with NMFS's approval of the eight additional communities in 1999, NMFS evaluated a community's harvests as of the time of initial evaluation for eligibility (*i.e.*, 1999) and did not just look at harvests as of October 1996. Also, during the last two CDQ allocation cycles, NMFS has not evaluated a community's commercial or subsistence harvests to determine the community's continuing eligibility. NMFS's continuation of its pre-SFA interpretation of the term "current" since the passage of section 305(i)(1)(B)(v) implies an interpretation of the statutory word "current" that eliminates the first and second possible interpretations of the term.

Because the statutory language is ambiguous with regards to the meaning of the term "current" in 305(i)(1)(B)(v), NMFS was permitted to develop a reasonable interpretation of the term. It appears from actions taken by NMFS subsequent to the passage of section 305(i)(1)(B)(v) that NMFS has applied its past regulatory interpretation. Because the interpretation is within the agency's authority under the MSA, is a logical way to define the term, and appears consistent with the few Congressional statements included within the legislative history regarding this aspect of the criteria, NMFS's interpretation is a reasonable interpretation of the term "current." Because the regulatory language is similar to the statutory language and because the agency's interpretation is reasonable, the regulation is consistent with the statutory provision regarding the term "current" in 305(i)(1)(B)(v) and no changes to the regulations are needed.

Statutory criterion prohibiting previously developed harvesting or processing capability

MSA section 305(i)(1)(B)(vi) excludes communities from the CDQ program that have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries of the Bering Sea. The language of this criterion is almost identical to that in the regulations, two differences being that (1) the statutory language references Bering Sea whereas the regulatory language references groundfish fisheries participation in the BSAI, and (2) the regulatory language specifically excludes Unalaska from participation in the CDQ program under this criterion.

The statutory language is relatively clear and unambiguous[51] and includes State and Federal waters that are considered within the Bering Sea. Aside from the non-substantive discrepancy regarding the specific exclusion of Unalaska, the only discrepancy between the statutory and regulatory texts is the lack of identical language regarding the geographical reference. However, the visual discrepancy does not amount to a substantive difference between the two texts because the statutory term "Bering Sea" includes waters directly north of the Aleutian Islands. Due to the FMP management area divisions between the Bering Sea and the Aleutian Islands, the regulatory text must reference both areas in order to encompass the same area. Therefore, there are no inconsistencies between the statutory and regulatory text and no changes to the regulatory text are necessary.

Status of the eight communities deemed eligible in 1999

As described above, upon recommendation of the State, NMFS determined in April 1999 that eight additional communities were eligible to participate in the CDQ program. Although the language of section 305(i)(1)(B) makes no reference to limiting the number of eligible communities to those that were participating at the time the MSA was enacted, there is a reference in the legislative history to this effect. In the Senate Report accompanying the SFA, there is the following sentence: "The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Fishery Management Council and the Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs. (Emphasis added)"[52]

You have specifically asked whether this language in the Senate Report must be interpreted as limiting the opportunity to participate in the CDQ program to only those communities that participated in October 1996, thus excluding the eight additional communities that were not deemed eligible until 1999. We are of the opinion that such an interpretation would be contrary to the plain language of the statute. The language at section 305(i)(1)(B) clearly states that any community that meets the eligibility criteria set forth in subparagraphs (i) through (vi) is an eligible community for purposes of the western Alaska CDQ program. Furthermore, the section includes no words that could be construed as limiting participation to only a subgroup of communities that meet those criteria. Therefore, the eight communities determined to be eligible in April 1999 may continue to participate in the western Alaska CDQ program as long as they meet the eligibility criteria set forth in section 305(i)(1)(B). Given the concerns previously expressed by NMFS as to whether these communities do in fact meet the criteria, the eligibility

[51]The term "substantial" in this criterion could be considered ambiguous. However, aside from the geographic reference discrepancy, there are no meaningful differences between the statutory and regulatory language and no statements in the legislative history to indicate that the statutory language is meant to be interpreted or applied in a manner different from the State's and NMFS's previous interpretation and application.

[52]S. REP NO. 104-297, at 28.

of these eight communities should be re-examined in light of the MSA criteria and the legal interpretations provided above.

Conclusions

In your memorandum, you state that NMFS prefers an interpretation of the MSA that would allow the agency to revise the regulations to be consistent with the MSA, but would not require the agency to re-evaluate the eligibility status of the 57 communities determined to be eligible through rulemaking approved and implemented prior to the MSA amendments. Such an interpretation would require the determination that the MSA criteria for community eligibility in the CDQ program are not substantively different from the regulatory criteria contained within the definition of eligible community at 50 C.F.R. 679.2. Based on the foregoing legal analysis, such an approach is not supported.

To summarize the foregoing legal opinions:

– no regulatory change is necessary to the introductory text of the definition of eligible community; however, all communities listed on Table 7 must be communities that have been determined to satisfy all the statutory eligibility criteria.
– no regulatory changes are needed to paragraphs 1 or 2 of the definition of eligible community.
– the regulatory language in paragraph 3 of the definition of eligible community should be amended to clarify that commercial or subsistence fishing effort from State or Federal waters of the Bering Sea or waters surrounding the Aleutian Islands will be considered under this criterion. No other regulatory changes to this paragraph are needed although it is recommended that NMFS clarify its interpretation of the term "current" in this paragraph.
– no regulatory change is needed to paragraph 4 of the definition of eligible community.
– regulatory changes are needed to Table 7 such that only communities that meet all of the statutory criteria are listed in Table 7.
– the eligibility status of all 65 communities currently eligible to participate in the CDQ program should be re-examined in light of this legal opinion to determine whether each community meets all of the statutory eligibility criteria.
– under the MSA, there is no date by which a community must be deemed eligible in order to participate in the CDQ program, and any community that meets the statutory eligibility criteria is eligible to participate in the western Alaska CDQ program.

cc: Jane Chalmers
GCF
Sally Bibb

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

June 13, 2003

MEMORANDUM FOR: Lisa L. Lindeman
Alaska Regional Attorney

FROM: For James W. Balsiger
Administrator, Alaska Region

SUBJECT: Interpretation of the Magnuson-Stevens Fishery Conservation and Management Act Requirements With Respect to Communities Eligible for the Community Development Quota Program

The Sustainable Fisheries Act of 1996 amended the Magnuson-Stevens Fishery Conservation and Management Act (MSA) to include community eligibility requirements for the Western Alaska Community Development Quota (CDQ) Program in section 305(i)(1)(B). At the time these amendments were made, we did not identify any need to revise NMFS regulations about eligibility for the CDQ Program.[1] However, due to questions raised by a CDQ group in October 2000, we realized that we may need to examine the consistency of regulations at 50 CFR part 679 with the MSA eligibility criteria and, possibly, re-evaluate the eligibility of at least some communities.

CDQ Program eligibility requirements currently are included in the MSA, the Fishery Management Plan for the Bering Sea and Aleutian Islands Area (FMP), and in 50 CFR part 679. The exact wording of these criteria differ among the three documents. These differences complicate evaluation of consistency and the eligibility status of a community. We intend to prepare an analysis to determine what, if any, revisions are needed to the FMP and NMFS regulations. However, in order to prepare that analysis, we request written legal advice about how to interpret and apply the criteria for community eligibility in the MSA. We are specifically interested in how to apply the statement in the Senate Report on page 4101, that says "The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs." (excerpt attached)

Should we consider the consistency of the eligibility criteria in the FMP and NMFS regulations by comparing these criteria only to the eligibility criteria in the MSA, or should we also consider the intent of Congress as expressed in the Senate Report? If we consider the intent of Congress in the Senate Report, could we conclude that NMFS should not re-evaluate the eligibility of those

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[1]See "Guide to the Sustainable Fisheries Act" by Margaret Frailey Hayes, 2/28/97, page 48.

57 communities determined to be eligible through rulemaking prior to the MSA amendments? If we made that conclusion, could we also conclude that no communities could be determined eligible for the CDQ Program after the effective date of the Sustainable Fisheries Act, because the Senate Report says "*limiting* such eligibility to those villages, including Akutan, that presently participate"?

The application of the criteria and the resulting eligibility status of some of the CDQ communities will differ depending on which approach we take. NMFS prefers an interpretation of the MSA that would allow us to revise our regulations to be consistent with the MSA, but would not require us to re-evaluate the eligibility status of the 57 communities determined eligible for the CDQ Program through rulemaking approved prior to the MSA amendments. We do, however, believe that the eligibility status of the eight communities determined eligible by NMFS in 1999 but not listed in Table 7, must be re-evaluated and any eligible communities that result from this re-evaluation must be added to Table 7 through proposed and final rulemaking before the next CDQ allocation cycle.

We are fairly certain that application of the current MSA criteria to the 57 communities listed on Table 7 will identify at least one community that doesn't meet the critiera. For example, King Salmon is not certified as a Native village under the Alaska Native Claims Settlement Act. This fact was recognized at the time King Salmon was determined eligible for the CDQ Program in 1992 and listed on Table 7. However, NMFS regulations allow a community to be eligible for the CDQ Program by meeting the eligibility criteria or by being listed on Table 7. This allowance was not included in the MSA eligibility criteria. The outcome of re-evaluation of the other 56 communities on Table 7 would depend on how some of the less objective criteria, such as "current fishing effort," are defined and applied. We are concerned about the negative social and economic consequences, the instability, and the controversy that will occur if we determine that some of the communities that have been participating in the program since 1992 are no longer eligible. In addition, we believe that it is clear from the Senate Report that Congress did not intend to implement different community eligibility criteria or require NMFS to re-evaluate the eligibility status of the communities currently listed on Table 7.

We must present an analysis of this issue to the Council at its October 2003 meeting. The requested legal advice is needed before alternatives for this analysis can be identified and analyzed. If we determine that any communities currently considered eligible for the CDQ Program do not meet the eligibility criteria, we would like to notify these communities well in advance of the October meeting so that they have an opportunity to provide additional information for the analysis and prepare testimony for the Council meeting. Therefore, we would appreciate your legal advice on this matter as soon as possible and preferably no later than July 15, 2003.

Attachment

SUSTAINABLE FISHERIES ACT

P.L. 104–297, see page 110 Stat. 3559

DATES OF CONSIDERATION AND PASSAGE

Senate: September 18, 19, 1996

House: September 18, October 18, 1995; September 27, 1996

Cong. Record Vol. 141 (1995)

Cong. Record Vol. 142 (1996)

Senate Report (Commerce, Science, and Transportation Committee) No. 104–276, May 23, 1996
[To accompany S. 39]

House Report (Resources Committee) No. 104–171, June 30, 1995
[To accompany H.R. 39]

The Senate bill was passed in lieu of the House bill. The Senate Report (this page) is set out below and the President's Signing Statement (page 4120) follows.

SENATE REPORT NO. 104–276

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 39) "A bill to amend the Magnuson Fishery Conservation and Management Act to authorize appropriations, to provide for sustainable fisheries, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE OF THE BILL

The purpose of S. 39, the Sustainable Fisheries Act, is to extend the authorization of appropriations for the Magnuson Fishery Conservation and Management Act (Magnuson Act) through fiscal year (FY) 2000. The bill, as reported, also would: (1) require action to prevent overfishing and rebuild depleted fisheries; (2) expand existing Federal authority to identify and protect essential fish habitat; (3) minimize waste and discards of unusable fish; (4) streamline the approval process for fishery management plans and regulations; (5) tighten financial disclosure and conflict-of-interest requirements for members of regional fishery management councils (Councils); (6) impose a moratorium on management programs that allow individual fishing quotas and establish a lien registry and fees for such plans; (7) authorize fishing capacity reduction programs and fisheries disaster relief; (8) broaden and update federal fishery financing programs; and (9) reauthorize other fishery pro-

otherwise finance their operations. While loans for vessels can be secured with a preferred ship mortgage filed in a central registry administered by the Coast Guard under chapter 313 of title 46 of the United States Code, currently there is no comparable mechanism for limited access system permits, an increasingly important component of fisheries conservation and management. New section 305(h) would establish a registry system for limited access system permits intended to be the exclusive means of perfecting security against third parties without notice. The registry system should reduce the risk that security granted by a permit holder will be encumbered by someone else, and reduce the transaction costs associated with financing limited access system permits. The registry system would be exclusive and administered centrally, thereby eliminating the uncertainty presently facing lenders and other secured parties as to the appropriate jurisdiction in which to file. However, the Committee anticipates that the system would be administered on a regional basis, within the region where the particular fishery management plan has been developed, to increase convenience and to eliminate the need to file in multiple jurisdictions or regularly check filings. The registry system would be required to allow for the registration of title to, and interests in, limited access permits, as well provide procedures for changes in the registration of title to such permits upon the occurrence of involuntary transfers, judicial or nonjudicial foreclosures of interest and the enforcement of judgments on interests. The Committee intends that the Secretary rely on other applicable law, including the Uniform Commercial Code, with respect to matters not provided for by new section 305(h), in creating the registry system. Finally, the new subsection would authorize the Secretary to collect a fee of not more than one-half of one percent of the value of a limited access system permit upon registration and transfer to recover the costs of administering the registry system.

Section 111(e) of the reported bill would provide for the transition to the new registry system, requiring secured parties to submit evidence of perfection in a security to the Secretary within 120 days of the final regulations implementing the registry system in order for the perfected interest to remain perfected and effective.

Section 112.—Pacific Community Fisheries

Section 112 would add a new section 305(i) to the Magnuson Act to establish criteria and procedures for CDQ programs. Section 112 of the reported bill also authorizes grants for western Pacific community demonstration projects. The Magnuson Act was enacted to phase out foreign fishing in the U.S. EEZ and when necessary to allocate the resulting fishing opportunities to U.S. fishermen in a manner that would be "fair and equitable to all such fishermen". New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act.

Between 1976 and 1992, the Eskimo, Aleut and Indian fishermen who resided in Alaska villages along the Bering Sea coast, from Norton Sound to the north side of the Aleutian Islands and including the Pribilof Islands, were not afforded fair and equitable com-

mercial fishing opportunities in the Bering Sea. While fishermen from these communities historically had fished in the Bering Sea for commercial and subsistence purposes, they did not have a fair and equitable opportunity to benefit as the Bering Sea commercial fisheries were "Americanized" because they lacked the significant capital investment needed to participate in the fisheries.

In 1989, Bering Sea fishermen and residents, including Harold Sparck, a long-time resident and leader in western Alaska, brought this matter to the North Pacific Council's attention. At the January 1990 meeting of the North Pacific Council, a member of the North Pacific Council from the state of Washington moved to include CDQs in the analysis of the allocation scheme being considered for the Bering Sea/Aleutian Islands pollock fishery. The motion carried without objection.

After thorough review and public comment, the North Pacific Council adopted a pollock CDQ program in 1991 as part of the pollock fishery inshore/offshore allocation program that passed by a final vote of nine to two. Under this program, 7.5 percent of the annual total allowable catch of Bering Sea pollock is allocated to villages that participate in a western Alaska CDQ program. In 1991, the Council also approved (by a final vote of seven to four, with the NMFS regional director and one member from Alaska voting against, and two members from Washington voting in favor) a halibut and sablefish IFQ program that established a second western Alaska CDQ program under which percentages of the annual total allowable catch of Bering Sea halibut and sablefish are allocated to villages that participate in the program.

In 1993, a lawsuit was filed against the halibut and sablefish program by the Alliance Against IFQs. As an ancillary claim, the Alliance's complaint alleged that the Magnuson Act did not authorize the North Pacific Council to establish the halibut and sablefish CDQ program because the implementation of the program would violate Magnuson Act national standards four and five. In December of 1994, the United States District Court for the District of Alaska rejected this contention, determining that the Magnuson Act delegated the North Pacific Council authority to establish the program and that implementation of the program does not violate provisions of the Magnuson Act.

In June of 1995, the North Pacific Council renewed the pollock CDQ program by unanimous consent (with one abstention). The Council also voted at the meeting (by a vote of eight to two) to allocate 7.5 percent of the total allowable catch of Bering Sea crab to a western Alaska CDQ program, and (by a vote of seven to three, with the NMFS regional director voting against, one member from Washington voting in favor, and one abstention) to allocate 7.5 percent of the total allowable catch of groundfish to a western Alaska CDQ program.

By June of 1995, therefore, the North Pacific Council had recommended allocations to western Alaska CDQ programs for pollock, halibut, sablefish, crab and groundfish—the principal commercially important Bering Sea fishery resources. The Committee notes that these CDQ allocations were supported by North Pacific Council members from Alaska, Washington and Oregon, and that none of the CDQ allocations was recommended by the Council

without the support of one or more North Pacific Council members from Washington or Oregon. New section 305(i) of the Magnuson Act would explicitly provide for the western Alaska CDQ programs and combine them in a single program for regulatory efficiency.

While the North Pacific Council has taken action to begin to provide the opportunities envisioned by the Magnuson Act for fishermen in western Alaska communities, the Western Pacific Council has not yet taken such action with respect to fishermen from western Pacific communities. These fishermen, like the Alaska fishermen, have historically participated in western Pacific fisheries, but have had increasing difficulty in maintaining their participation as the fisheries have changed since enactment of the Magnuson Act. New section 305(i) would authorize the Western Pacific Council to use CDQs and other authority to ensure that western Pacific community fishermen have a fair opportunity to participate in western Pacific fisheries.

CDQ programs would contribute to the development of local economies and markets, the social and economic well-being of participants through enhanced self-sufficiency, and improvements in local infrastructures. Testimony presented to the Committee also indicated that western Alaska CDQ programs have provided millions of dollars in direct economic benefits to the fishermen and vessel owners who are partners with CDQ organizations in harvesting these fishery quotas.

New subsection (i) of section 305 of the Magnuson Act would require the North Pacific Council and the Secretary to establish a western Alaska community development program under which a percentage of the total allowable catch of each Bering Sea fishery is allocated to the program. Bering Sea CDQ programs already recommended or submitted by the North Pacific Council would be combined into a single, more efficient western Alaska CDQ program. The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs.

This subsection would establish a moratorium through FY 2000 on the submission by the North Pacific Council of a fishery management plan, amendment or regulation to provide a percentage of a Bering Sea fishery for the western Alaska CDQ program unless the Council had recommended a CDQ allocation in the fishery prior to October 1, 1995. The moratorium therefore would limit the new combined western Alaska CDQ program to the pollock, halibut, sablefish, crab and groundfish fisheries until September 30, 2000. In addition the Secretary would be prohibited during that period from approving or implementing a greater percentage of the total allowable catch of the Bering Sea pollock, halibut, sablefish, crab or groundfish fisheries for the western Alaska CDQ program than the North Pacific Council had already recommended as of September 30, 1995 in those fisheries. The effect of this restriction with respect to pollock would be that North Pacific Council and Secretary would be required to continue to allocate a percentage of pollock to the western Alaska CDQ program, notwithstanding the current expiration date for pollock CDQs, but the Secretary would not be al-

Attachment 2

104-297 Magnuson-Stevens Act Section 305

(i) ALASKA AND WESTERN PACIFIC COMMUNITY DEVELOPMENT PROGRAMS.--

(1) (A) The North Pacific Council and the Secretary shall establish a western Alaska community development quota program under which a percentage of the total allowable catch of any Bering Sea fishery is allocated to the program.

(B) To be eligible to participate in the western Alaska community development quota program under subparagraph (A) a community shall--

(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to
the western most of the Aleutian Islands, or on an island within the Bering Sea;

(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;

(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;

(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding
the Aleutian Islands; and

(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless
the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from
previous investments.

©) (i) Prior to October 1, 2001, the North Pacific Council may not submit to the Secretary any fishery management plan, plan amendment, or regulation that allocates to the western Alaska community development quota program a percentage of the total allowable catch of any Bering Sea fishery for which, prior to October 1, 1995, the Council had not approved a percentage of the total allowable catch for allocation to such community development quota program. The expiration of any plan, amendment, or regulation that meets the requirements of clause (ii) prior to October 1, 2001, shall not be construed to prohibit the Council from submitting a revision or extension of such plan, amendment, or regulation to the Secretary if such revision or extension complies with the other requirements of this paragraph.

(ii) With respect to a fishery management plan, plan amendment, or regulation for a Bering Sea fishery that--

(I) allocates to the western Alaska community development quota program a percentage of the total allowable catch of such fishery; and

(II) was approved by the North Pacific Council prior to October 1, 1995; the Secretary shall, except as provided in clause (iii) and after approval of such plan, amendment, or regulation under section 304, allocate to the program the percentage of the total allowable catch described in such plan, amendment, or regulation. Prior to October 1, 2001, the percentage submitted by the Council and approved by the Secretary for any such plan, amendment, or regulation shall be no greater than the percentage approved by the Council for such fishery prior to October 1, 1995.

(iii) The Secretary shall phase in the percentage for community development quotas approved in 1995 by the North Pacific Council for the Bering Sea crab fisheries
as follows:

(I) 3.5 percent of the total allowable catch of each such fishery for 1998 shall be allocated to the western Alaska community development quota program;

(II) 5 percent of the total allowable catch of each such fishery for 1999 shall be allocated to the western Alaska community development quota program; and

(III) 7.5 percent of the total allowable catch of each such fishery for 2000 and thereafter shall be allocated to the western Alaska community development quota program, unless the North Pacific Council submits and the Secretary approves a percentage that is no greater than 7.5 percent of the total allowable catch of each
such fishery for 2001 or the North Pacific Council submits and the Secretary approves any other percentage on or after October 1, 2001.

(D) This paragraph shall not be construed to require the North Pacific Council to resubmit, or the Secretary to reapprove, any fishery management plan or plan amendment approved by the North Pacific Council prior to October 1, 1995, that includes a community development quota program, or any regulations to implement such plan or amendment.

(2) (A) The Western Pacific Council and the Secretary may establish a western Pacific community development program for any fishery under the authority of such Council in order to provide access to such fishery for western Pacific communities that participate in the program.

(B) To be eligible to participate in the western Pacific community development program, a community shall--

(i) be located within the Western Pacific Regional Fishery Management Area;

(ii) meet criteria developed by the Western Pacific Council, approved by the Secretary and published in the Federal Register;

(iii) consist of community residents who are descended from the aboriginal people indigenous to the area who conducted commercial or subsistence fishing using
traditional fishing practices in the waters of the Western Pacific region;

(iv) not have previously developed harvesting or processing capability sufficient to support substantial participation in fisheries in the Western Pacific Regional Fishery Management Area; and

(v) develop and submit a Community Development Plan to the Western Pacific Council and the Secretary.

(C) In developing the criteria for eligible communities under subparagraph (B)(ii), the Western Pacific Council shall base such criteria on traditional fishing practices in or dependence on the fishery, the cultural and social framework relevant to the fishery, and economic barriers to access to the fishery.

(D) For the purposes of this subsection "Western Pacific Regional Fishery Management Area" means the area under the jurisdiction of the Western Pacific Council, or an island within such area.

(E) Notwithstanding any other provision of this Act, the Western Pacific Council shall take into account traditional indigenous fishing practices in preparing any fishery management plan.

(3) The Secretary shall deduct from any fees collected from a community development quota program under section 304(d)(2) the costs incurred by participants in the program for observer and reporting requirements which are in addition to observer and reporting requirements of other participants in the fishery in which the
allocation to such program has been made.

(4) After the date of enactment of the Sustainable Fisheries Act, the North Pacific Council and Western Pacific Council may not submit to the Secretary a community development quota program that is not in compliance with this subsection.

Attachment 3

Communities Determined Eligible for the CDQ Program by NMFS through Rulemaking in 1992 and Administrative Determination in 1999

APICDA (6)	Pop.
Akutan	713
Atka	92
False Pass	64
Nelson Lagoon	83
Nikolski	39
Saint George	152
TOTAL	**1,143**

BBEDC (17)	Pop.
Aleknagik	221
Clark's Point	75
Dillingham	2,466
Egegik	116
Ekuk	2
Ekwok*	130
King Salmon/Savonoski	442
Levelok*	122
Manokotak	399
Naknek	678
Pilot Point	100
Port Heiden	119
Portage Creek*	36
South Naknek	137
Togiak	809
Twin Hills	69
Ugashik	11
TOTAL	**5,932**

CBSFA (1)	Pop.
Saint Paul	532

CVRF (20)	Pop.
Chefornak	394
Chevak	765
Eek	280
Goodnews Bay	230
Hooper Bay	1,014
Kipnuk	644
Kongiganak	359
Kwigillingok	338
Mekoryuk	210
Napakiak*	353
Napaskiak*	390
Newtok	321
Nightmute	208
Oscarville*	61
Platinum	41
Quinhagak	555
Scammon Bay	465
Toksook Bay	532
Tuntutuliak	370
Tununak	325
TOTAL	**7,855**

NSEDC (15)	Pop.
Brevig Mission	276
Diomede	146
Elim	313
Gambell	649
Golovin	144
Koyuk	297
Nome	3,505
Saint Michael	368
Savoonga	643
Shaktoolik	230
Stebbins	547
Teller	268
Unalakleet	747
Wales	152
White Mountain	203
TOTAL	**8,488**

YDFDA (6)	Pop.
Alakanuk	652
Emmonak	767
Grayling*	194
Kotlik	591
Mountain Village*	755
Nunam Iqua	164
TOTAL	**3,123**

Total population of 65 CDQ communities (based on 2000 U.S. census) = 27,073

***Communities added to the CDQ Program in 1999**

Attachment 4

BSAI FMP Proposed Changes
DRAFT - September 15, 2003

Strike-outs would be removed from the FMP. **Bold** italicized text would be added to the FMP.

13.4.7.3 COMMUNITY DEVELOPMENT QUOTAS

I. PURPOSE AND SCOPE. The Western Alaska Community Development Quota Program is established to provide fishermen who reside in western Alaska communities a fair and reasonable opportunity to participate in the Bering Sea/Aleutian Islands groundfish fisheries, to expand their participation in salmon, herring, and other nearshore fisheries, and to help alleviate the growing social economic crisis within these communities. Residents of western Alaska communities are predominantly Alaska Natives who have traditionally depended upon the marine resources of the Bering Sea for their economic and cultural well-being. The Western Alaska Community Development Quota Program is a joint program of the Secretary and the Governor of the State of Alaska. Through the creation and implementation of community development plans, western Alaska communities will be able to diversify their local economies, provide community residents with new opportunities to obtain stable, long-term employment, and participate in the Bering Sea/Aleutian Islands fisheries which have been foreclosed to them because of the high capital investment needed to enter the fishery.

The NMFS Regional Director shall hold the designated percent of the annual total allowable catch (TAC) of groundfish for each management area in the Bering Sea and Aleutian Islands for the western Alaska community quota as noted below. These amounts shall be released to ***qualified applicants representing*** eligible Alaska communities who submit a plan, approved by the Governor of Alaska, for its wise and appropriate use. Not more than 33 percent of the total Western Alaska community quota may be designated for a single CDQ applicant, except that if portions of the total quota are not designated by the end of the second quarter, applicants may apply for any portion of the remaining quota for the remainder of that year only.

The Western Alaska Community ***Development*** Quota program will be structured such that the Governor of Alaska is authorized to recommend to the Secretary that a Bering Sea Rim community be designated as an eligible fishing community to ***participate in the program.*** ~~receive a portion of the reserve.~~ To be eligible a community must meet the specified criteria ~~and have~~ developed ~~a fisheries development plan approved~~ by the Governor of Alaska, ***approved by the Secretary, and published in the Federal Register.*** The Governor shall develop ~~such recommendations in consultation with the Council. The Governor shall~~ ***and*** forward any such recommendations to the Secretary, following consultation with the Council. Upon receipt of such recommendations, the Secretary may designate a community as an eligible fishing community and, under the plan, may release appropriate portions of the reserve ***to qualified applicants representing eligible communities.***

13.4.7.3.2 ELIGIBLE WESTERN ALASKA COMMUNITIES.

The Governor of Alaska is authorized to recommend to the Secretary that a community within western Alaska which meets all of the following criteria be eligible for the Western Alaska Community ***Development*** Quota Program (hereinafter "the Program"):

(1) be located within 50 nm from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;

(2) not be located on the Gulf of Alaska coast of the north Pacific Ocean;

(3) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;

(4) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;

(5) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands; and

(6) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.

~~(1) be located on or proximate to the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands or a community located on an island within the Bering Sea, that the Secretary of the Interior has certified pursuant to section 11(b)(2) or (3) of Pub. L. No. 92-203 as Native villages are defined in section 3(c) of Pub. L. No. 92-203;~~

~~(2) be unlikely to be able to attract and develop economic activity other than commercial fishing that would provide a substantial source of employment;~~

~~(3) its residents have traditionally engaged in and depended upon fishing in the waters of the Bering Sea coast;~~

~~(4) has not previously developed harvesting or processing capability sufficient to support substantial participation in the commercial groundfish fisheries of the Bering Sea/Aleutian Islands because of a lack of sufficient funds for investing in harvesting or processing equipment; and~~

~~(5) has developed a community development plan approved by the Governor, after consultation with the North Pacific Fishery Management Council.~~

~~Also, Akutan will be included in the list of eligible CDQ communities.~~

13.4.7.3.3 Fixed Gear Sablefish CDQ Allocation

The NMFS Regional Director shall hold 20 percent of the annual fixed-gear Total Allowable Catch of sablefish for each management area in the Bering Sea/Aleutian Islands Area for the western Alaska sablefish community quota. The portions of sablefish TACs for each management area not designated to CDQ fisheries will be allocated as QS and IFQs and shall be used pursuant to the program outlined in Section 13.4.7.1.

13.4.7.3.4 Pollock CDQ Allocation

For a Western Alaska Community Quota, 50% of the BSAI pollock reserve as prescribed in the FMP will be held annually. This held reserve shall be released to communities on the Bering Sea Coast which submit a plan, approved by the Governor of Alaska, for the wise and appropriate use of the released reserve.

13.4.7.3.5 Multispecies Groundfish and Prohibited Species CDQ Allocations

CDQs will be issued for 7.5% of the TAC for all BSAI groundfish species not already covered by another CDQ program (pollock and longline sablefish). A pro-rata share of PSC species will also be issued. PSC will be allocated before the trawl/non-trawl splits. The program will be patterned after the pollock CDQ program, but will not contain a sunset provision.

PUBLIC TESTIMONY SIGN-UP SHEET FOR AGENDA ITEM C-2 CDQ

PLEASE SIGN ON THE NEXT BLANK LINE.
LINES LEFT BLANK WILL BE DELETED.

	NAME	AFFILIATION
~~1.~~	DON MITCHELL, STEVE RIEGER, EUGENE ASICKSIK	NSEDC
2.	Rob[illegible], Paul [illegible] +	BBEDC YDFDA, CVRF
~~3.~~ 2	Ragnar Alstrom + Robert Williams	
~~4.~~ 3		
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C-2

Robin Samuelson
Paul Peyton
Ragnar Alstrom
Robert Williams

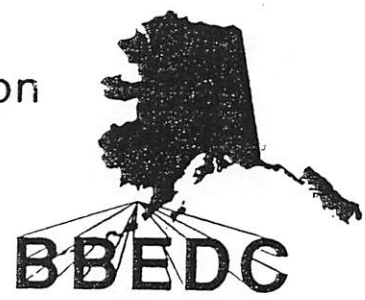
CDQ Community Eligibility

Proposed Statutory Language

All communities currently approved for participation in the western Alaska community development quota program, either listed in Table 7 to 50 CFR Part 679, or approved by NMFS on April 19, 1999, shall be deemed eligible for participation in the program, under the criteria set forth in 16 USC Sec. 1855 (i)(1)(B).

Bristol Bay Economic Development Corporation

P.O. Box 1464 • Dillingham, Alaska 99576 • (907) 842-4370 • Fax (907) 842-4336 • 1-800-478-4370



December 3, 2002

Honorable Senator Ted Stevens
222 W. 7th Avenue #2
Anchorage, Alaska 99513-7569

Dear Senator Stevens:

On behalf of the Bristol Bay Economic Development Corporation, Coastal Villages Region Fund and Yukon Delta Fisheries Development Association, three of the six CDQ groups, we request your help in the "determination of community eligibility" for the CDQ program. We are not advocating for additional communities to be eligible for inclusion into the CDQ, we are only saying that those communities that are currently participating in the CDQ program should remain eligible in the program.

During the recent state and federal deliberations concerning the 2003-2005 community development plan presentation and allocations, the question of the eight communities being able to participate in the CDQ program was raised. These complaints apparently renewed the concerns of NMFS legal counsel about legal challenges to its CDQ oversight role, including the process it used to approve the eight CDQ communities in 1999.

In light of these uncertainties, all six CDQ groups have jointly agreed and signed on the enclosed request to ask for Congressional action to confirm that all currently participating villages are eligible to continue to participate in the CDQ program. This will resolve any further uncertainties about such participation, thereby confirming actions taken by the representatives to those villages since 1999, when they were admitted to the program. This will also put to rest potential accounting for funds distributed by CDQ groups to and on behalf of those villages as a result of their participation.

I have personally talked to the State of Alaska CDQ oversight team, as well as representatives of NMFS who support this action 100%. In fact, no one to my knowledge opposes this action and all are willing to help you to get this matter passed in Congress.

Ragnar Alstrom of YDFDA, Morgen Crow of CVRF and I of BBEDC, request that this issue be dealt with as soon as possible. We are more than willing to meet with you or your staff, both in Anchorage or Washington DC to explain and help you on this matter.

Thank you for your past and continued support of the CDQ program. We will await word from you or your staff.

Sincerely,

H. Robin Samuelsen, Jr.
CEO/President, BBEDC

C. Morgen Crow
Executive Director, CVRF

Ragnar Alstrom
Executive Director, YDFDA

October 2, 2002

The Honorable Ted Stevens
United State Senate
522 Hart Senate Office Building
Washington, D. C. 20510

Dear Senator Stevens:

We understand that some question has been raised concerning the eligibility of some of the participating communities in the Community Development Program established under the Magnuson-Stevens Act. We want to resolve these uncertainties through legislative action in order to prevent any further instability in the program.

As a result, the undersigned submit the attached legislation for adoption by Congress to resolve the matter. It is our objective to confirm that all currently participating villages are eligible to continue in the CDQ program. Your immediate attention to this matter is gratefully appreciated.

Very truly yours,

ALEUTIAN PRIBILOF ISLAND COMMUNITY DEVELOPMENT ASSN.

Larry Cotter, Chief Executive Officer

BRISTOL BAY ECONOMIC DEVELOPMENT CORP.

Robin Samuelsen, President/CEO

CENTRAL BERING SEA FISHERMEN'S ASSN.

Phillip Lestenkof, President

COASTAL VILLAGES REGION FUND

Board President

Morgen Crow, Executive Director

NORTON SOUND ECONOMIC DEVELOPMENT CORP.

Eugene Asicksik, CEO & President

YUKON DELTA FISHERIES DEVELOPMENT ASSN.

Ragnar Alstrom, Executive Director

Bristol Bay Economic Development Corporation

P.O. Box 1464 • Dillingham, Alaska 99576 • (907) 842-4370 • Fax (907) 842-4336 • 1-800-478-4370

TO: MATT PAXSON

FROM: H. ROBIN SAMUELSEN JR. Robin
PRESIDENT/CEO

SUBJECT: CDQ COMMUNITY ELIGIBILITY

DATE: JULY 23, 2003

Hi Matt,

Here's the information you requested. As I stated on the phone today, no one is opposed to doing this, NMFS, State of Alaska and all six of the CDQ groups. This language will only recognize those villages or communities that are already in the CDQ program.

The NMFS has put the NPFMC on notice of a problem and in fact the NOAA General Council is going to be coming out with a paper sometime within the next few weeks, which the NPFMC will be taking up on their October agenda.

What we are requesting is that Senator Stevens fix this problem before it gets to the NPFMC and the NOAA attorneys get involved. We the CDQ groups feel that we cannot wait for the rewrite of the Magnuson-Stevens Fishery Conservation and Management Act .

If I can be of further assistance to you or Senator Stevens on this matter please call. Thank You.

COMMUNITY ELIGIBILITY IN WESTERN ALASKA CDQ PROGRAM

The Community Development Program established under the Magnuson-Stevens Act provides that eligible communities may participate in the program by joining any one of the six CDQ groups formed in Western Alaska to implement the program. Because population statistics and the number of eligible community participants can have an effect on the allocations of fisheries quota to each CDQ group, questions have been raised about the continuing eligibility of certain villages to participate in the program.

The determination of community eligibility has been a developing process since the Magnuson-Stevens Act established the CDQ program some ten years ago. In 1992 the North Pacific Fisheries Management Council (Council) approved the community eligibility criteria for the CDQ program. Under criteria specified in 50 CFR 679.2, the State of Alaska CDQ Team recommended, and the Council approved, a listing of approved villages determined to be eligible to apply for community development quotas. The list is found in Table 7 to Part 679.

In 1998 the Alaska Department of Community and Regional Affairs received a request from a Bristol Bay area village that it be reconsidered for eligibility in the CDQ program. Upon review of the request, including an exhaustive review of communities similarly situated, in 1999 the State of Alaska CDQ Team determined that an additional eight communities, located within the boundaries of three of the six CDQ groups, should be included in the program. The Administrator of the Alaska Region of the National Marine Fisheries Service adopted the State recommendations and, by letter of April 19, 1999, the Administrator certified the participation of these additional eight communities. The certification letter indicated that, in future rulemaking, Table 7 to Part 679 would be updated to reflect this action. Such an update of the table has not occurred. Nonetheless, the eight communities have fully participated since 1999 as members of their respective CDQ groups.

After the 2001-2002 fisheries quota allocations were made by the State and federal reviewers, and approved by the Council, one of the CDQ groups initiated litigation in a broad complaint about the manner and means used to award those allocations. Most of the CDQ groups intervened in the litigation to oppose the complaint and, after a hearing on a motion for summary judgment, an Anchorage federal district court judge denied the claim. It was not appealed. Nonetheless, in bringing the action, counsel for the federal regulators apparently became alarmed about the process utilized to certify the participation of the additional eight communities.

More recently, during the state and federal deliberations concerning the 2003-2005 fisheries quota allocations, complaints were apparently again lodged about the eligibility of certain communities to participate in the CDQ program. Although no formal action has yet been taken, these complaints apparently renewed the concerns of the counsel for the federal regulators about the community eligibility question.

In light of these uncertainties, the six CDQ groups have jointly agreed to ask for Congressional action to confirm that all currently participating villages are eligible to continue to participate in the CDQ program. This will resolve any further uncertainties about such participation, thereby confirming actions taken by the representatives of those villages since 1999 when they were admitted to the program. This will also put to rest potential accounting for funds distributed by CDQ groups to and on behalf of those villages as a result of their participation.

Public Review Draft

REGULATORY IMPACT REVIEW/INITIAL REGULATORY FLEXIBILITY ANALYSIS

For proposed

AMENDMENT 71

to the Fishery Management Plan for
Bering Sea/Aleutian Islands Groundfish

To implement policy and administrative changes to the Western Alaska Community Development Quota Program

prepared cooperatively by staff of the:

North Pacific Fishery Management Council
605 West Fourth Avenue, Suite 306
Anchorage, Alaska 99501

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

May 15, 2002

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4.0 IMPACTS OF THE ALTERNATIVES

This section provides information on the policy, regulatory, economic, and socioeconomic impacts of the alternatives including the nature of the impacts, quantifying the economic impacts when possible, and discussion of the tradeoffs between benefits and costs. The groups that may be affected by the action are described in Section 2.0. That section provides information on the eligible communities, the organizational structure of the CDQ groups, and information on the CDQ allocated to each group since the implementation of the program. The nature of the action and the alternatives and options under consideration lend to a more qualitative analysis of the impacts and a general policy discussion in several instances. However, quantitative analysis is included when it is appropriate to evaluate the impacts of an alternative and the data is available.

As described in Section 1, the RIR is designed to provide information to determine whether the proposed regulation is likely to be "economically significant" under E.O. 12866. A "significant regulatory action" is one that is likely to:

> (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
>
> (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
>
> (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
>
> (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

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

Background

Issue 1 provides three alternatives for the process that will be used in the future to make allocations of groundfish, crab, halibut, and prohibited species quota among the CDQ groups. The alternatives do not address the total amount of each of these species allocated to the CDQ Program annually (the CDQ reserves) - only the process through which the CDQ reserves are divided up among the CDQ groups.

Alternative 1: No Action: NMFS's regulations governing the CDQ allocation process would not be revised. The administrative process described in Section 3 would continue.

Alternative 2: Improved Administrative Process: NMFS and the State would continue to make CDQ allocations through an administrative process. However, NMFS regulations would be revised to provide the opportunity for the CDQ groups to comment on the State's initial CDQ allocation recommendations and to appeal NMFS's initial administrative determination to approve the State's allocation recommendations.

Alternative 3: Rulemaking: CDQ allocations among the CDQ groups would be established in NMFS regulations through proposed and final rulemaking following the same process used to allocate other federally managed fishery resources. The Council would develop CDQ allocation recommendations, and NMFS would implement the Council's recommended allocations in NMFS regulations. NMFS would not make independent decisions about the CDQ allocations, but it would review the Council's allocation recommendations for compliance with the MSA and other applicable laws. The State of Alaska could remain involved in the CDQ allocation process by making recommendations to the Council rather than to NMFS.

At the June 2001 Council meeting, NMFS recommended that the Council consider alternative roles for NMFS, the State, and the Council in the CDQ allocation process to address concerns that have developed about the allocation process and the appropriate role for the various government agencies involved in this process.[4] Some level of concern about the CDQ allocation process probably has existed since implementation of the program in 1992. However, current discussions can be primarily traced back to a disagreement that developed in late 1998 between the State and Norton Sound Economic Development Corporation (NSEDC) about whether government oversight extended to the CDQ groups' subsidiaries. This disagreement remains unresolved and is the subject of Issue 6 in this analysis.

Some of the groups have stated that it is difficult to understand the basis for the State's CDQ allocation recommendations. They have requested that the process be improved so that they can better understand the evaluation criteria that will be used, the priority of these criteria, and how performance against the criteria will be measured. Several groups have asked to be allowed to respond to or rebut the State's CDQ allocation recommendations before they are finalized or to appeal these recommendations to NMFS. At least two of the groups are seeking a larger role for NMFS in the CDQ allocation process.

H.R. 5565, which was introduced in late 2000 and reintroduced as H.R. 553 in 2001, illustrates Congressman Don Young's concern about the CDQ allocation process, the level of government oversight, and other aspects of the program (see Section 1.2.3). In late 2001, APICDA and the Central Bering Sea Fishermen's Association (CBSFA) wrote letters to NMFS challenging the State's 2001-2002 CDQ allocation recommendations. When NMFS approved the State's recommendations, APICDA sued NMFS in Federal District Court (see Section 1.2.4).

The following summary of Judge Holland's opinion in the APICDA lawsuit is taken from a memorandum dated February 5, 2002, from Jonathan Pollard, NOAA General Counsel Attorney-Advisor, to Lisa Lindemen, NOAA General Counsel for Alaska.

On January 30, 2002, Judge H. Russell Holland issued an order upholding NMFS' approval of the 2001-2002 CDQ pollock allocation for the APICDA. As described in Section 1.2.4, Judge Holland's opinion on the APICDA lawsuit addressed the roles of the State and NMFS and the procedure NMFS followed in reviewing and ultimately approving the State's CDQ allocation recommendations. Judge Holland noted that the administrative record demonstrated that NMFS and the State took their CDP development, review and approval responsibilities seriously. Judge Holland wrote that --

> [o]nce it became clear to NMFS that the State's initial recommendation did not provide sufficient explanation [for the State's recommendations], NMFS called upon the State to

[4]Section 1.2 provides additional information about these issues.

> provide what was lacking, and the State did so. APICDA asserts that NMFS merely made "passing reference" to the arguments that APICDA raised and that NMFS' approval constitutes a rubber-stamping of the State's recommendations. That is patently not the case. NMFS initially rejected the State's recommendations because of a lack of supporting rationale. NMFS also states that it had considered the arguments presented in APICDA's correspondence of October 31, 2001, when it decided to reject the State's initial recommendations. The rejection forced the State to provide additional analysis, which it did, including at times specific reference to APICDA's concerns. Upon reviewing the resubmitted recommendations, NMFS considered APICDA's concerns. In fact, NMFS devoted entire sections of its analysis to the arguments that APICDA raised throughout the process, addressing those alternatives with specific facts found and rationale provided by the State. Although the federal regulations expounding upon NMFS' role in the CDQ allocation process are admittedly sparse, NMFS performed its functions fully and properly with careful consideration of APICDA's arguments. The Secretary's approval of the State's recommendations was neither arbitrary nor capricious.
>
> APICDA v U.S. DOC, at pages 24-25.

Judge Holland held that NMFS' decision to approve the State's recommendation was reasonable because NMFS "accepted and considered" APICDA's objections to the State's recommendations during NMFS' review, and because NMFS and the State responded to those objections on the record. Although federal regulations do not require NMFS and the State to respond APICDA's objections, Judge Holland found that in practice NMFS and the State had used a procedure that demonstrated careful consideration of APICDA's arguments. Given the importance Judge Holland attached to this consideration, there is a significant likelihood that the decision might have been in favor of APICDA without this clear demonstration that APICDA's objections were considered on the record and rejected.

[End of excerpt from Pollard memo]

Judge Holland's opinion confirms what NMFS learned from the most recent CDQ allocation process. If CDQ allocations among the groups are going to continue to be made by NMFS through an administrative process, NMFS regulations must be improved to describe how NMFS will receive and consider comments or challenges to the State's CDQ allocation recommendations, and to include a process through which the CDQ groups can appeal NMFS's initial administrative determination on CDQ allocations. In addition, sufficient time to adequately complete all of the steps of the administrative process must be provided to the State, NMFS, and the CDQ groups. Alternative 2 describes how NMFS believes the administrative process should be improved, if the Council recommends continuing the current process for making CDQ allocations.

Council request for analysis of an additional alternative

At the December 2001 Council meeting, and prior to the resolution of the APICDA lawsuit, the Council requested the addition of the following alternative to the analysis:

Alternative 2a: *NMFS would continue to make CDQ allocations through an administrative process that continues to require the State to submit CDQ allocation recommendations. Regulatory amendments would be implemented to describe the administrative process that would be used to make CDQ allocations, including evaluation criteria.* ***No appeals process would be included.*** *The State would conduct a comment period and hearing as described in Issue 6,*

Alternative 2 - which states:

Develop a comment period for the State's allocation recommendations such that the State is required to:

1. *Issue initial CDQ allocation recommendations and an explanation of changes from the previous allocations;*
2. *Accept comments from the public and the CDQ groups;*
3. *Issue final allocation recommendations and a written response to comments, including the reason for any changes from the State's initial allocation recommendations;*
4. *Consult with the Council on the final allocation recommendations; and*
5. *Submit final recommendations to NMFS.*

NMFS has incorporated into Alternative 2 the elements of this proposed alternative that would require the State to include a comment period on its initial CDQ allocation recommendations before it submits its CDQ allocation recommendations to NMFS. However, NMFS did not include a separate alternative that would specifically *exclude* the ability of the CDQ groups to appeal NMFS's initial administrative determinations on CDQ allocations. NOAA General Counsel advises that any CDQ allocation determination pursuant to the MSA (as it is now drafted) is the ultimate responsibility of the Secretary of Commerce. As such, any person or group aggrieved by an agency initial administrative decision has an absolute right of an internal agency appeal as a matter of the constitutional right of procedural due process. Denial of such a right is not a legal option.

Removal of an alternative presented in the first draft

In the November 15, 2001, draft analysis, NMFS presented an alternative that would allocate the CDQ reserves directly to the State for purposes of the CDQ Program, instead of allocating CDQ to the individual CDQ groups. At the time that draft analysis was prepared, NOAA GC advised NMFS of potential legal problems with this alternative. Based on additional consultation with NOAA GC, NMFS has now determined that this alternative is not consistent with the MSA because the Secretary of Commerce cannot delegate to the State the final authority or responsibility to make allocations among the CDQ groups or communities. Although certain elements of the CDQ allocation process can be deferred to the State, as is done under the existing regulations, the Secretary is ultimately responsible to ensure that the CDQ allocations are consistent with the MSA and other applicable federal law. A MSA amendment would be needed to allow NMFS to allocate CDQ reserves to the State of Alaska for purposes of the CDQ Program and to specify that the State shall make allocations to CDQ groups pursuant to State law. Therefore, NMFS removed this alternative from the analysis. Under Issue 1, the Council may recommend that the CDQ allocations be made through an administrative process, as described in Alternatives 2, or through rulemaking, as described in Alternative 3.

The CDQ Policy Committee Recommendations

Consideration of Issue 1 was recommended by NMFS at the June 2001 Council meeting. The CDQ Policy Committee did not develop this issue or discuss the alternatives at its April and May 2001 meetings. Therefore, no specific recommendations were made by the committee with respect to Issue 1.

Alternative 1 - No Action

Under Alternative 1, NMFS's regulations governing the CDQ allocation process would not be amended to provide the opportunity for comment on the State's allocation recommendations or an appeal of NMFS's administrative determination about CDQ allocations. Existing regulations described in Section 3 and Appendix D would continue to guide the CDQ allocation process. The major problem with the existing regulations is that they do not provide guidance for how to address comments, challenges, or appeals to the State's CDQ allocation recommendations or to NMFS's initial administrative determination about these allocation recommendations. Based on experience during the recent CDQ allocation cycle and the outcome of the APICDA lawsuit, NMFS believes that the regulations need to provide this guidance. Under the existing CDQ allocation process, CDQ groups may comment to NMFS about the State's CDQ allocation recommendations. Two groups submitted letters of comment during NMFS's review of the State's 2001-2002 allocation recommendations. However, the lack of any reference to a comment period or an appeals process in NMFS regulations implies that these elements of the administrative process do not exist. In addition, the current 45 day review period allowed NMFS under the regulations does not provide sufficient time to conduct an appeals process that would provide the opportunity for a CDQ group to appeal, the opportunity for other groups to get involved in the appeal, and for NMFS to resolve the issues raised in the appeal before the existing allocations expire.

Proposed Procedure for the 2003-2005 CDQ Allocation Cycle

Current CDQ allocations expire on December 31, 2002. Preparation for the next CDQ allocation cycle has already begun, with the State announcing the next CDQ application period through a letter to the CDQ groups on January 22, 2002. The allocation process will end in late 2002 with NMFS's decision on the State's CDQ allocation recommendations. With this schedule, it is clear that regulations revising the CDQ allocation process based on the Council's preferred alternative in this analysis will not be implemented in time to guide the current CDQ allocation process. Therefore, the next CDQ allocations will be made based on current regulations. However, the State and NMFS are suggesting some improvements to the process that are consistent with current regulations, but will respond to some of the problems identified with the current process. These improvements include some elements of the improved administrative process described in Alternative 2.

The State is proposing a three year allocation cycle, covering 2003, 2004, and 2005. Some of the changes proposed by the State and supported by NMFS include the State issuing its initial CDQ allocation recommendations about one month before the October 2002 Council meeting and providing a 10-day comment period during which the CDQ groups can comment on the State's initial allocation recommendations. The State will respond to these comments in writing and provide both the comments and responses to the Council at the October 2002 Council meeting. Once NMFS receives the State's CDQ allocation recommendations (by October 15, 2002), NMFS will accept comments from the CDQ groups for 15 days. NMFS will consider all comments received in the 15-day period, all information submitted by the State, and any information submitted by the Council. This schedule is necessary for NMFS to complete its review of the State's CDQ allocation recommendations within the required 45-day period and before the CDQ fisheries start in January 2003.

Following is a summary of the schedule proposed for the 2003-2005 CDQ allocation process which includes references to the elements of the schedule that are required under current regulations. The remaining elements are at the discretion of the State and NMFS. Elements of the process that were not specifically included in the last CDQ allocation cycle are highlighted in bold.

January 22, 2002	The State announced the CDQ application process and schedule in a letter to the CDQ groups. This letter was sent out about 10 weeks before the application period begins on April 1, 2002.
April 1, 2002	State's CDQ application period begins.
July 1, 2002	Proposed CDPs (applications) due to the State.
August 27, 2002	State holds a public hearing in Anchorage (required by NMFS regulations).
Sept. 3-6, 2002	State issues its initial CDQ allocation recommendations.
Sept. 17-20, 2002	***State holds a 10-day comment period on its initial recommendations.***
Sept. 27, 2002	***State provides Council with response to comments and any revisions to initial CDQ allocation recommendations.***
October 2, 2002	State consults with Council during October Council meeting (required by NMFS regulations).
October 15, 2002	State submits CDQ allocation recommendations to NMFS (required by NMFS regulations). ***Through a letter to the CDQ groups, NMFS will announce the State's CDQ allocation recommendations and provide a 15-day comment period on these recommendations.***
October 30, 2002	***End of NMFS's 15-day comment period on State's recommendations.***
November 30, 2002	Deadline for NMFS's review of State's allocation recommendations (45 days from 10/15/02 - required by NMFS regulations).
Dec. 31, 2002	Last day to make allocation decisions before existing CDPs and allocations expire
Jan. 1, 2003	CDQ fishing under the new allocations can start. The earliest date the CDQ groups have wanted to start fishing in past years has been January 20 for the pollock CDQ fisheries. Some crab CDQ fisheries also can start relatively early in the year.

An important element proposed in Alternative 2 that is not included in the current regulations and cannot be provided without a regulatory amendment is a formal administrative appeals process. However, NMFS will review all comments submitted to the State about its initial CDQ allocation recommendations, to the Council at the time of the State consultation on its recommendations, and to NMFS during NMFS's review period. NMFS will address issues raised by the CDQ groups in its final agency action in a manner similar to how these issues were addressed for the 2001-2002 CDQ allocation cycle. Although this process is not defined in regulation and the current time schedule does not allow as much time as NMFS believes is desirable, the process was upheld by Judge Holland in his opinion on the APICDA lawsuit. Therefore, NMFS believes that

the current regulations and the improvements proposed above will provide a CDQ allocation process that complies with all applicable federal laws. However, NMFS does not support continuing the existing process in the future. Either NMFS's administrative regulations must be revised as proposed under Alternative 2 or the Council should recommend making CDQ allocations through rulemaking as described in Alternative 3.

Alternative 2 - Improve NMFS's administrative process for making CDQ allocations

Under Alternative 2, NMFS CDQ regulations would be amended to describe the administrative process NMFS would use to make CDQ allocation decisions and to describe the role that the State and Council would have in this process. NMFS believes revisions to the current CDQ allocation process must be implemented if the Council recommends that NMFS remain responsible for making the final decision about CDQ allocations. These revisions would strengthen the CDQ regulations by more clearly describing how CDQ allocations would be made and by providing an opportunity for CDQ groups to administratively appeal NMFS's decisions.

Under Alternative 2, NMFS would amend its CDQ regulations to add the following elements:

1. The State of Alaska would be required to provide the CDQ groups with the opportunity to comment on its initial CDQ allocation recommendations before the State consulted with the Council or submitted its recommendations to NMFS.

2. The State would be required to provide a copy of the written comments it received and its written response to these comments to the Council and NMFS in its CDQ allocation recommendations. The State also would be required to provide a written explanation if it revised its CDQ allocation recommendations in response to these comments.

3. NMFS would review the State's CDQ allocation recommendations. If the State's recommendations complied with NMFS regulations and all applicable federal law, NMFS would issue an initial administrative determination notifying the CDQ groups and the public of its intent to approve the State's recommendations.

4. A NMFS administrative appeals process would be described in regulations.

More detail on the CDQ allocation process proposed under Alternative 2 is provided below after the discussion of the proposed schedule of events.

Proposed Schedule of Events under Alternative 2

Following is an example of the schedule of events that might occur under Alternative 2.

> Note: "Year 0" means the year in which new CDQ allocations are needed. "Year-1" (year minus one) means the year prior to the year that fishing on the new allocations will start. "Year-2" means two years prior to the year that fishing on the new allocations will start. For example, for the 2003-2005 CDQ allocations, the allocation process started in January 2002 (Year-1) and the new CDQ allocations will be needed in January 2003 (Year 0).

October 1 The State's CDP application process would begin. The CDQ groups would have three

(Year-2)	months to prepare their proposed CDPs.
January 1 (Year-1)	Proposed CDPs (applications) would be due to the State. The State would have six weeks to develop its initial CDQ allocation recommendations.
February 1	State's public hearing.
February 15	The State would announce its initial CDQ allocations recommendations and a 30-day comment period. This comment period by the State would provide notice of the State's CDQ allocation recommendations and an opportunity for the CDQ groups to comment or challenge the State's allocation recommendations.
March 15	End of the State's comment period on its initial CDQ allocation recommendations.
Mar 15- early April	The State prepares its response to comments.
April Mtg	The State consults with the Council. The State provides the Council with (1) its initial CDQ allocation recommendations, (2) a copy of all comments received during its comment period, (3) a written response to the comments, and (4) any revisions made to its CDQ allocation recommendations.
May 1	The State submits its CDQ allocation recommendations, comments, and response to comments to NMFS. NMFS may allow an additional comment period during its review of the State's CDQ allocation recommendations.
July 1	NMFS completes review of the State's allocation recommendations and releases an initial administrative determination. NMFS administrative appeals process starts with the announcement of the initial administration determination for CDQ allocations. NMFS anticipates that up to 6 months could be needed to resolve appeals of the initial administration determination on CDQ allocations.
August 1	Deadline for CDQ groups to appeal NMFS's decision. If no appeals are received within 30 days, then the initial administrative determination of July 1 would become final agency action and establish CDQ and PSQ allocations for the next year.
December 1	Last date that NMFS appeals officer can issue a decision if new CDQ allocations are to be effective for the next year. This decision is final in 30 days unless the Regional Administrator overturns the appeals officer's decision or continues the appeal.
January 1 (Year 0)	CDQ fisheries can start.

Description of the CDQ Allocation Process under Alternative 2

The schedule under Alternative 2 is controlled by the need to provide NMFS six months for an administrative appeals process. This requires the administrative appeals process to start on July 1 so that NMFS would have sufficient time to resolve the appeals before December 31, when the CDQ allocations expire. If the administrative appeals process has to start on July 1, NMFS also must have its initial administrative determination on the State's CDQ allocation recommendations complete by July 1. The State is required to consult with the Council before it submits its CDQ allocation recommendations to NMFS. This consultation must occur at a Council meeting prior to July 1. The June Council meeting usually occurs in the first week of June, approximately three weeks before the July 1 deadline. However, the timing of the June Council meeting relative to the July 1 deadline does not provide sufficient time for the State to consult with the Council, submit its CDQ allocation recommendations to NMFS, and for NMFS to review the State's recommendations and issue an initial administrative determination. Therefore, consultation with the Council must occur at the April Council meeting. This would allow the State to submit its CDQ allocation recommendations to NMFS by May 1 and provide NMFS 60 days to review the State's recommendations before it had to issue an initial administrative determination on July 1.

If the State is required to consult with the Council at its April meeting, then the State's CDP application process would have to start on October 1 of the previous year so that the CDQ groups had time to complete their CDPs and the State had time to complete its process for developing CDQ allocation recommendations. The entire CDQ allocation process, from the time the State application process starts on October 1 (Year-2) to the time the CDQ fisheries start (Year 0) would take approximately 15 months.

The State's comment period would provide an opportunity for the CDQ groups to identify potential problems with the State's process for developing CDQ allocation recommendations, facts the State relied upon, or the State's rationale. The State would have the opportunity to address these issues before it submitted its recommendations and record to NMFS. Early identification of these issues may reduce the number of issues that have to be addressed by NMFS through the administrative appeals process. Comments submitted to the State, and the State's response to them, would be considered by the Council during its consultation with the State. They also would be provided to NMFS as part of the CDQ allocation recommendations the State submits to NMFS after the Council consultation.

NMFS regulations would continue to require that the CDQ allocations be based on the State's recommendations and that these recommendations comply with NMFS regulations, the MSA, and all other applicable federal law. NMFS would review the record submitted by the State, including any comments submitted by the CDQ groups during the State's comment period. If NMFS identified deficiencies in the State's recommendations, it would notify the State of the deficiencies and the State would be required to address these issues by submitting additional information or further explanation of its recommendations. Under the proposed schedule, NMFS would have 60 days (between May 1 and July 1) to review the State's recommendations and, if necessary, obtain additional information from the State. NMFS would not establish CDQ allocations independent of the State's recommendations.

NMFS would be required to issue its initial administrative determination approving the State's CDQ allocation recommendations by July 1. NMFS's administrative appeals process also would start on July 1. The CDQ groups would have 30 days to file an appeal with NMFS's Office of Administrative Appeals (OAA). The CDQ groups could appeal NMFS's determination on the basis that the State's recommendations did not comply with NMFS regulations or were not consistent with the MSA or other applicable federal law.

If no appeals were received, then NMFS's initial administrative determination would be the final agency action on CDQ allocations and these allocations would be effective January 1 of the following year.

Any appeals submitted would be considered by NMFS's OAA. All CDQ groups would have an opportunity to participate in any CDQ appeal because resolution of one group's allocation would necessarily affect all of the other groups. The OAA would have to impose relatively short deadlines for the submission of information and responses because of the need to have the appeals resolved before the existing allocations expired. The appeals officer would review NMFS's record supporting its initial administrative determination and the information available to NMFS at the time it made its decision. New factual information would not be considered in the appeals process. Therefore, if the CDQ groups believe that new or additional information should be considered by the State in making its allocation recommendations, these issues should be raised during the State's comment period so that this information can be considered by the State and available to NMFS at the time it reviews the State's allocation recommendations.

It is possible that, through the appeals process, NMFS would find a deficiency in the process the State followed that would require the State to conduct some or all of its allocation process over. For example, if the State failed to conduct the public hearing required in NMFS regulations, NMFS would have to require the State go back to the point in its allocation process where a public hearing was required, conduct the public hearing, and start its allocation process anew from that point. If this finding occurred late in the year, it is possible that the existing CDQ allocations would expire and that no new allocations would be in effect to replace them. In this case, the CDQ groups would not be able to start their CDQ fisheries in January.

Because of the risk that NMFS may not be able to complete its administrative process in the time period described above, NMFS considered recommending that existing CDQ allocations remain in effect until they are replaced by new CDQ allocations approved by NMFS. This proposal would ensure that the CDQ groups would not be prevented from harvesting CDQ allocations if NMFS could not resolve appeals and approve the State's allocation recommendations when the existing allocations expire. However, NMFS believes that this proposal could provide incentive for more lengthy and complicated appeals by groups who may benefit from delaying implementation of the new CDQ allocations. Therefore, NMFS is not suggesting that the Council consider revisions to the current regulations that require the CDQ allocations to expire at the end of each CDQ allocation cycle. However, some contingency plan must be established in case appeals are not resolved before new allocations are needed.

NMFS proposes that interim CDQ allocations would be implemented through NMFS regulations if appeals cannot be resolved by December 31 of the year that the existing allocations expire. For each CDQ group and each species category, the interim CDQ allocations would be the lower of the allocation the group received in the previous allocation cycle or the State's recommended CDQ allocation for the new allocation cycle. This proposal would reduce the amount of the CDQ reserve that could be harvested until the appeal was resolved and could reduce the total value of the CDQ harvests if the appeal was not resolved quickly. However, the proposal provides a solution that would allow most of the CDQ fisheries to continue in the next allocation cycle, but would not allocate the percentages under appeal.

Comparison of Schedule Proposed for 2003-2005 Cycle with Alternative 2

Table 4.1 shows a comparison between the schedule proposed for the 2003-2005 allocation cycle and the schedule proposed under Alternative 2. The CDQ allocation process proposed by the State for the 2003-2005 allocations will start approximately six months before the Council consultation in October 2002, and nine

months before the CDQ allocations expire on December 31, 2002. The State provides the CDQ groups with approximately three months to prepare their CDPs. The State then has six weeks to hold a public hearing and make its CDQ allocation recommendations. The schedule proposed under Alternative 2 provides the same amount of time for the CDQ groups to prepare their proposed CDPs (three months). However, the time available for the State to develop its initial CDQ allocation recommendations is reduced from two months to six weeks. These deadlines are not established in NMFS regulations, so they could be reduced or revised if the State decided that the steps in the process could be accomplished in less time.

Table 4.1: Comparison of the Schedule of Events under Alternatives 1 and 2

	Year - 2			Year - 1												Y0
PROPOSED FOR 2003-2005 CYCLE (occuring in 2002)	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J
CDP application process (3 months - 4/1/02 to 7/1/02)																
Proposed CDPs due to State (7/1/02)										X						
Public hearing (8/27/02)											X					
State's initial recommendations (9/6/02)												X				
State's comment period (9/6 - 20/02)												X				
Council consultation (10/2/02)													X			
State Recommendations to NMFS (10/15/02)													X			
NMFS comment period (10/15 - 30/02)													X			
End of NMFS 45-day review period													X			
Current allocations expire (12/31/02)														X		
CDQ Fisheries under new allocations can start															X	
ALTERNATIVE 2																
CDP application process (3 months, starting Oct. 1 of Year -2)																
Proposed CDPs due to State (Jan. 1)				X												
Public hearing (Feb. 1)					X											
State's initial recommendations (Feb 15)					X											
State's comment period (Feb 15 - Mar. 15)					X	X										
Council consultation (April meeting)							X									
State Recommendations to NMFS (May 1)								X								
NMFS issues initial administrative determination (July 1)										X						
NMFS Administrative Appeals (July 1 - Dec 31)																
Current allocations expire (Dec. 31)															X	
CDQ fisheries under new allocations can start (Jan 1)																X

Impacts of Alternative 2:

The primary benefit of Alternative 2 is an improved administrative process. During the most recent CDQ allocation process, in late 2000, NMFS unexpectedly received letters challenging the State's CDQ allocation recommendations and requesting that NMFS disapprove these recommendations. NMFS regulations did not provide notice to the CDQ groups that they could submit comments to NMFS during its review of the State's CDQ allocation recommendations, nor did the regulations provide guidance to NMFS about how to address such comments or appeals. Therefore, NMFS had to develop an appeals process to address the issues raised in these letters of challenge. Although this process was upheld in the APICDA lawsuit, NMFS anticipates that similar issues will arise in the future and regulations need to be revised to provide guidance to the State, CDQ groups, and NMFS about how to handle comments and appeals to the State's CDQ allocation recommendations and NMFS's administrative determinations about these recommendations. Improved administrative regulations will benefit all parties involved in the CDQ allocation process. All of the CDQ groups will be operating with a similar understanding of how to provide input into the CDQ allocation process. The State and NMFS will have a better understanding and the time to develop adequate administrative records and decision documents. NMFS also will strengthen its ability to defend its CDQ allocation decisions in court.

The primary costs of Alternative 2 are (1) the allocation process will take more time to accommodate the administrative appeals process, (2) the appeals process may increase administrative costs for the CDQ groups, (3) the expanded administrative process will require the State and NMFS to devote more time to the CDQ allocation process.

The allocation process will require more time: As described above, Alternative 2 would increase the time required for the CDQ allocation process from nine months to 15 months, to provide a six months administrative appeals process. Under Alternative 2, the State would have to start the CDP application process on October 1, 15 months prior to when the new CDQ allocations must be effective.

Starting the CDQ allocation process earlier means that the State would have less up-to-date information to rely upon in developing its recommendations. A number of the evaluation criteria the State considers in making its CDQ allocations recommendations are related to past performance of the CDQ group in implementing its CDPs. The State considers such things as how well the CDQ groups have used the CDQ allocations to provide benefits to the communities through fisheries-related investments and employment, training, and education opportunities; financial performance of the for-profit investments; and performance of the board of directors. Evaluating these factors requires information about past performance. Under the current process, the State is evaluating this information between July 1 and late September of the year prior to the new allocations. The most up-to-date information available to the State at the time it makes its CDQ allocation recommendations (in September) is from the previous years' audited financial statements, which are submitted to the State by May 31 of each year (for the previous year). In addition, the State reviews the unaudited first and second quarter reports from the CDQ groups, which are current through June 30.

Under Alternative 2, the State would be reviewing proposed CDPs and performance data from January 1 through February 15 of the year prior to the year in which the new allocations are needed. The audited financial statements from the previous year would not be available at that time. Therefore, the State would have to rely on the audited financial statements from two years previous and unaudited quarterly reports for the first, second, and third quarters of the previous year. Once the State has made its CDQ allocation

recommendations, revisions of these recommendations for updated data cannot be made without requiring the State and NMFS to begin consideration of the CDQ allocations all over.

The time lag in data considered for allocations is not unique to the CDQ allocations. Most of the fishery allocations made through rulemaking take several years from the time the analysis is completed by the Council to the time that the allocations are implemented by NMFS. The analysis supporting the allocation decision must be based on the information that was considered by the decision-makers at the time that they made their allocation recommendations. The process of reviewing and approving allocations - whether it is through rulemaking or through an administrative process - takes time. NMFS believes that the longer schedule under Alternative 2 is a necessary trade-off for improving the administrative process used to make CDQ allocations.

Costs to the CDQ groups: If one or more CDQ groups appeal NMFS's initial administrative determination, all CDQ groups will have to get involved in the appeals process in some manner. The groups that appeal will have considered the administrative costs involved in an appeal and decided that those costs are justified in order to resolve issues they believe are important. However, even the CDQ groups that do not appeal are likely to incur administrative costs associated with the appeal. At the very least they would have to support staff, legal counsel, or consultants to remain informed and involved in the appeals process. They also may determine that it is necessary to get directly involved in the appeals process to protect their interests in the CDQ allocations.

Costs to the State and NMFS

Current costs:

Both the State of Alaska and NMFS incur costs associated with management and oversight of the CDQ Program. The State of Alaska has an annual budget of $250,000 for the administration and oversight of the CDQ Program in the Department of Community and Economic Development. This budget covers salary, administrative expenses and travel the three positions devoted exclusively to the CDQ Program and CDQ-related travel costs for the three deputy commissioners on the CDQ Team. This budget does not cover any salary or administrative costs for the deputy commissioners, any costs associated with Department of Fish and Game's management of the crab CDQ fisheries, or the costs of any other State employees that may become involved in CDQ Program issues (e.g. Governor's Office, Department of Law). Since 2000, the State has collected $250,000 annually from the CDQ groups through a State CDQ fee authorized by the Alaska Legislature. Fifty percent of the annual program costs are divided equally among the six CDQ groups and the other 50 percent is based on the value of each groups' allocations, as determined by the State of Alaska.

NMFS Sustainable Fisheries Division has four staff who work on various aspects of the CDQ Program. The CDQ Program Coordinator is responsible for general oversight of CDQ Program-related activities associated with management of the CDQ fisheries, the CDQ allocations, and administration of the economic development aspects of the CDQ Program. The CDQ fisheries regulation specialist is responsible for the day-to-day management of the CDQ fisheries (50%), analysis and implementation of fisheries regulations (25%), and CDQ administration related to maintenance of the CDPs and review of proposed amendments (25%). A computer programmer devotes approximately 80% of her time to development and maintenance of the computer programs and databases that support management of the CDQ fisheries and monitoring the group's quotas. NMFS's at-sea scales coordinator spends approximately 60% of his time on CDQ Program-related scales issues (inspections, recordkeeping, coordination with industry, rulemaking, contracting, etc.). These

duties associated with these four positions can be divided generally into (1) CDQ fisheries management, and (2) CDQ administration and oversight. NMFS estimates that the fisheries management tasks costs approximately $300,000 per year and the CDQ administration tasks costs approximately $150,000 per year. These costs include salary, benefits, travel, and overhead associated with the four CDQ Program staff in the Sustainable Fisheries Division.

NMFS also has program management costs in the Restricted Access Management Division for the halibut CDQ fisheries, NMFS Enforcement for enforcement of fishing regulations in both the halibut and groundfish CDQ fisheries, and NOAA General Counsel. In 2001, six attorneys in NOAA General Counsel contributed work on CDQ issues related to enforcement actions; review of analysis and rulemaking documents; legal advice on the CDQ allocations and development of the CDQ policy analysis; and the APICDA lawsuit.

Changes in Agency Costs Under Alternative 2

The primary change in NMFS costs associated with Alternative 2 would be the additional work necessary for the Office of Administrative Appeals to conduct an appeals process related to the CDQ allocations. At this time, NMFS does not anticipate that additional OAA staff would be hired for the CDQ appeals. However, given the short time frame of these appeals and the importance of resolving them before the allocations expire, these appeals will have to be given priority over all other pending appeals. The OAA currently handles appeals of administrative determinations by the Restricted Access Management Division for the Individual Fishing Quota Program, the License Limitation Program, and moratorium programs. Resolution of appeals for these other programs may be delayed during the CDQ appeals process.

The actual costs to NMFS of the appeals process , in staff time or delay of other appeals, would depend on how frequently the CDQ allocations are conducted, which the Council will consider under Issue 2. The more frequently the allocations are made, the higher the cost of the appeals process are likely to be. Another factor in the costs of the appeals process is how frequently a CDQ group appeals, how many groups appeal during an allocation cycle, and how complicated the appeals are. If NMFS receives no appeals during an allocation process, then no additional costs will be incurred by the Office of Administrative Appeals. The more groups that participate in an appeal or the more complicated the issues, the longer the appeals process will take and the more it will cost for NMFS to administer. However, the additional cost of an appeals process may be balanced by reduced costs associated with defending NMFS in court if the appeals process results in less Federal court litigation.

Alternative 2 would require NMFS to devote additional staff resources to support its responsibilities in the CDQ allocation process. However, Alternative 2 represents what NMFS believes are its existing responsibilities, so increased staff resources cannot be attributed solely to the Council selecting Alternative 2. Increased demands on NMFS staff for oversight of the CDQ allocation process and administration of the economic development aspects of the program started occurring over a year ago with the 2001-2002 allocation cycle and they are expected to continue in the future as the program grows and the CDQ groups diverge in their views about the appropriate level of government oversight and increasingly request NMFS to get involved in disputes between the groups and the State.

One additional staff person is needed to fulfill the expanding responsibilities for CDQ administration and a larger role in oversight of the economic development aspects of the program. If additional staff are not hired, existing staff will have be redirected to fulfill NMFS's legal responsibilities for oversight of CDQ allocations and the administration of the CDQ Program. The most likely outcome of this change in priorities will be that

the Alaska Regional Office will no longer be able to devote staff specifically to analysis and rulemaking related to CDQ fisheries management issues unless these issues become a high enough priority to justify assigning non-CDQ Program staff to the project. At existing staff levels NMFS also anticipates that there will be some delay in implementing the Council's preferred alternatives under this analysis because NMFS staff available to work on rulemaking will be required to participate in the 2003-2005 CDQ allocation process starting in the last summer of 2002 through January 2003.

Alternative 3 - CDQ allocations would be made by the Council and NMFS through rulemaking

Under Alternative 3, allocations of CDQ and PSQ reserves to individual CDQ groups would be published in NMFS regulations and the Council would make periodic allocations through proposed and final rulemaking. The Council would develop the CDQ allocation recommendations through its standard process for fishery allocations. The State could provide initial recommendations to the Council, but the Council would be responsible for CDQ allocations through its recommendations to NMFS for a regulatory amendment. NMFS would review the Council's allocation recommendations and analysis for compliance with MSA national standards and other applicable federal law in the same way it reviews all regulatory amendment proposals by the Council. Under the Administrative Procedure Act, the CDQ groups and any other member of the public would have 30 days from the date the final rule is published to challenge the CDQ allocations in court. After the end of the 30 days, the regulatory amendments to implement the Council's recommended CDQ allocations would be final regulations in place until they expire or were amended. Under Alternative 3, a NMFS administrative appeals process would not be necessary.

If the Council made CDQ allocation decisions through periodic rulemaking, NMFS regulations may or may not contain instructions for how this process would occur, depending on whether the CDQ allocations were made as stand-alone allocations or through the groundfish specifications process. For example, regulations governing the groundfish specifications process at 50 CFR 679.20(a)(3) contain a list of factors that the Council must consider in setting annual total allowable catch limits. A similar set of guidelines to the Council could be developed for CDQ allocations based on the evaluation criteria selected under Issue 5. If the CDQ allocations were made as stand-alone regulatory amendments, NMFS CDQ regulations would include a table of allocations to each CDQ group that were developed by the Council and approved by NMFS, but would not have to contain regulations about how the Council developed the allocations.

The following is an example of the schedule of events for CDQ allocations that might occur under Alternative 3.

Schedule of Events for Alternative 3

The following represents a fairly optimistic schedule for Council decisions on the CDQ allocations and NMFS implementation of the allocations through proposed and final rulemaking.

October Mtg (Year -2)	The State or the CDQ groups would submit proposed CDPs and allocation recommendations (the State) or allocation requests (the CDQ groups) to the Council. Between the October and February meetings, Council staff would prepare an analysis (EA/RIR/RIR) of a range of alternative CDQ allocations.
February (Year-1)	Council reviews initial draft analysis of alternative CDQ allocations.

March 1 (Year -1)	Council sends draft analysis on CDQ allocations, with alternatives, out for public review.
April Mtg (Year-1)	Council takes final action on CDQ allocation recommendations, providing explanation of reasons for recommended CDQ allocations that comply with MSA national standards and other applicable federal law.
July 1 (Year-1)	NMFS publishes a proposed rule for the Council's CDQ allocations, with a 30 day comment period.
August 1 (Year-1)	End of comment period on Council's CDQ allocations.
December 1 (Year-1)	Last date to publish a final rule implementing the Council's CDQ allocations if these allocations are to be effective by January 1.
January 1 (Year 0)	Effective date of final rule amending NMFS regulations to implement the Council's CDQ allocations. MSA deadline for challenging the rule in court (30 days from the date the final rule is published in the *Federal Register*).
January 1 (Year 0)	CDQ fisheries can start.

The Council would be directly involved in recommending allocations of the CDQ reserves among the eligible communities or CDQ groups. The percentage allocation of each CDQ and PSQ reserve to each CDQ group would be included in NMFS regulations, would be implemented through proposed and final rulemaking, and could be revised through periodic regulatory amendments developed by the Council and approved by NMFS. Alternative 3 would require the Council to undertake analysis of the performance of the CDQ groups and to evaluate this performance against the goals and objectives of the program and any evaluation factors established in regulation. The Council could request that the State of Alaska continue to provide recommendations for CDQ allocations and the supporting analysis. NMFS would review the Council's CDQ allocation recommendations and, if they complied with the MSA and other applicable law, they would be implemented through rulemaking. In this respect, NMFS would be responsible for the final decision on CDQ allocations through the decision to approve a rule.

One advantage of the Council taking the responsibility for this role in the CDQ Program is that the Council was established to perform this type of function - allocating fishery resources among competing users. One disadvantage of this alternative is that some Council members may have to recuse themselves from the CDQ allocation decisions because of their financial interest in the CDQ Program through employment or business relationships with the CDQ groups.

The role of the State in the CDQ allocation process would be advisory to the Council. The State could perform many of its current functions of reviewing and evaluating CDPs and making CDQ allocation recommendations. The major difference with Alternative 3 would be that the State would be providing its recommendations to the Council as part of the Council's allocation process rather than submitting its recommendations to NMFS for NMFS review and approval. The State also could submit comments and recommendations to NMFS through the public comment period on the proposed rule to implement the Council's CDQ allocations. The State's role in administration and oversight of the CDQ Program would be

established through the Council's selection of preferred alternatives for the relevant Issues 2 through 9.

Table 4.2 compares the proposed schedule of events under Alternatives 2 and 3.

Table 4.2 Comparison of the Schedule of Events under Alternatives and 2 and 3

	Year - 2			Year - 1												Y0
	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D	J
ALTERNATIVE 2 - Administrative Process																
CDP application process (3 months, starting Oct. 1 of Year -2)																
Proposed CDPs due to State (Jan. 1)				X												
Public hearing (Feb. 1)					X											
State's initial recommendations (Feb 15)					X											
State's comment period (Feb 15 - Mar. 15)					X	X										
Council consultation (April meeting)							X									
State Recommendations to NMFS (May 1)								X								
NMFS issues initial administrative determination (July 1)										X						
NMFS Administrative Appeals (July 1 - Dec 31)																
Current allocations expire (Dec. 31)															X	
CDQ fisheries under new allocations can start (Jan 1)																X
ALTERNATIVE 3 - Rulemaking																
Submit proposed CDPs and allocation requests to Council (Oct, Y-2)	X															
Council reviews initial draft analysis (Feb, Year-1)					X											
Council sends draft analysis out for review (March 1)						X										
Council takes final action on allocations (April mtg)							X									
NMFS publishes proposed rule (July 1)										X						
End of comment period on proposed rule (August 1)											X					
Last day to publish final rule (December 1)															X	
Effective data of final rule, last day to sue NMFS (Jan 1)																X