



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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May 23, 2022

MEMORANDUM FOR: Council Members
North Pacific Fishery Management Council

FROM: Demian A. Schane
Chief, Alaska Section
NOAA Office of General Counsel

SUBJECT: Recusal Determination for the June 2022 Council Meeting

NOAA General Counsel, Alaska Section has reviewed the North Pacific Fishery Management Council's June 2022 draft agenda for recusal issues.

Under 50 C.F.R. § 600.225(b)(9)(ii), none of the agenda items for the June 2022 meeting constitutes a “particular matter primarily of individual concern,” and none of the Council members is recused from participating on any agenda item under that regulation.

Under 50 C.F.R. § 600.235, the following agenda items are not “Council decisions” as that term is defined at 50 C.F.R. § 600.235(a); therefore, no recusal determinations are required for these actions:

- C3 BSAI Crab – (a) Aleutian Islands golden king crab ABC/OFL, SAFE report, Crab Plan Team report; (b) adopt alternatives for snow crab rebuilding plan analysis
- C5 Observer Program – (a) Annual Report for 2021 – Review, FMAC report, Enforcement Committee report; (b) PCFMAC report on partial coverage cost efficiencies – Review

Under 50 C.F.R. § 600.235, the following final action constitutes a “Council decision”; therefore, the recusal regulations at 50 C.F.R. § 600.235 apply:

- C1 Central GOA rockfish adjustments – Final Action.

For the C-1 agenda item and pursuant to 50 C.F.R. § 600.235(c), we have determined that Council Member Campbell is required to be recused from voting on this matter because the Council's decision will have a significant and predictable effect on Ms. Campbell's financial interests as disclosed in the report she filed under 50 C.F.R. § 600.235(b). See Memorandum of May 19, 2022, from T. Meyer, Alaska Section, NOAA GC, to D. Schane, Alaska Section, NOAA GC (attached).

In addition, we have determined that, for the C-1 agenda item, none of the other appointed Council Members (Members Down, Jensen, Kimball, Kinneen, Mezirow, and Vanderhoeven) is required to be recused from voting on this Council decision under 50 C.F.R. § 600.235 because none of them has either (1) a financial interest in the fishery that would be affected by this final action or (2) a



significant financial interest in the fishery that would be affected by the decision. Although the regulations at 50 C.F.R. § 600.235 do not require any recusals among these other Council Members for the C-1 agenda item, any one of them may voluntarily recuse himself or herself under 50 C.F.R. § 600.235(d) if he or she believes that a Council decision would have a significant and predictable effect on that individual's financial interest.

According to the regulations at 50 C.F.R. § 600.235(g), any Council member may file a written request to NOAA General Counsel for a review of this determination. Requests for review should be e-mailed to Kristen Gustafson, Deputy General Counsel, NOAA Office of the General Counsel at Kristen.L.Gustafson@noaa.gov. A request for review must be received by Ms. Gustafson by June 2, 2022. Please see the regulations at 50 C.F.R. § 600.235(g) for more information on requests for review.



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This Document Contains Data Deemed Confidential under the Magnuson-Stevens Fishery Conservation and Management Act That Has Been Redacted

Date: May 19, 2022

To: Demian A. Schane
Chief, Alaska Section, NOAA General Counsel

From: Thomas Meyer
Attorney-Advisor, Alaska Section, NOAA General Counsel

Re: Recusal Examination for the North Pacific Fishery Management Council's June 2022 Decision on the Rockfish Program - C1 Agenda Item (Central Gulf of Alaska Rockfish Adjustments)

Summary

At its June 2022 meeting, the North Pacific Fishery Management Council (NPFMC or Council) is scheduled to make a final decision on modifications to the Central Gulf of Alaska (GOA) Rockfish Program. This document examines whether any of the seven affected individuals on the Council must be recused from voting on the final action pursuant to section 302(j)(7) of the Magnuson-Stevens Conservation and Management Act (MSA), 16 U.S.C. § 1852(j)(7), and its implementing regulations, 50 C.F.R. §§ 600.225 and 600.235. For the reasons set forth below, Council member Campbell must be recused from voting on this Council decision. The remaining affected individuals (Council members Down, Jensen, Kimball, Kinneen, Mezirow, and Vanderhoeven) are not required to be recused from voting.

Statutory and Regulatory Background

Section 302(j)(7) of MSA, 16 U.S.C. § 1852(j)(7), and that provision's implementing regulations, 50 C.F.R. §§ 600.225 and 600.235, govern the ability of a Council member to participate in and/or vote on a Council decision.

Regulations at 50 C.F.R. § 600.225 include the rules of conduct for Council members and employees. Section 600.225(b) states: "Councils are responsible for maintaining high standards of ethical conduct among themselves, their staffs, and their advisory groups. In addition to abiding by the applicable Federal conflict of interest statutes, both members and employees of the Councils must comply with the following standards of conduct," and then the regulation lists nine standards.

Among those nine standards, 50 C.F.R. § 600.225(b)(9)(ii) states: "No Council member may participate personally and substantially as a member through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a particular



matter primarily of individual concern, such as a contract, in which he or she has a financial interest, even if the interest has been disclosed in accordance with § 600.235.”

Associated with the voting standard above, section 302(j)(7)(A) of the MSA provides that “an affected individual required to disclose a financial interest . . . shall not vote on a Council decision which would have a significant and predictable effect on such financial interest.” 16 U.S.C. § 1852(j)(7)(A). That section also states: “A Council decision shall be considered to have a significant and predictable effect on a financial interest if there is a *close causal link* between the Council decision and *an expected and substantially disproportionate benefit* to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery.” *Id.* (emphases added).

Pursuant to 50 C.F.R. § 600.235(c)(5), NOAA’s Office of General Counsel will determine that an expected and substantially disproportionate benefit exists if an affected individual has a significant financial interest in the fishery or sector of the fishery that is likely to be positively or negatively affected by the Council decision. A “significant financial interest” means a greater than 10-percent interest in the total harvest, marketing, or processing of the fishery or sector of the fishery affected by the Council decision, or full or partial ownership of 10 percent of the vessels using the same gear type within the fishery or sector of the fishery affected by the Council decision. 50 C.F.R. § 600.235(a).

Affected Individuals

Particular Council members of the NPFMC, described as affected individuals, are subject to the recusal regulations. Of the eleven voting Council members, seven members (Campbell, Down, Jensen, Kimball, Kinneen, Mezirow, and Vanderhoeven) are affected individuals, as defined at 50 C.F.R. § 600.235(a), in that they were appointed by the Secretary of Commerce to serve as voting members of the NPFMC in accordance with section 302(b)(2) of the MSA, 16 U.S.C. § 1852(b)(2).

In accordance with section 302(j)(2) of the MSA and 50 C.F.R. § 600.235(b)(1) and (b)(2), these seven members have disclosed and reported their financial interests in harvesting, processing, marketing, lobbying, or advocacy activities by filing with the Executive Director of the NPFMC their annual, updated NOAA Form 88-195, Statement of Financial Interests.

Council Decision

Recusal determinations are triggered when there is a Council decision. “Council decision” is defined at 50 C.F.R. § 600.235(a) as an “approval of a fishery management plan (FMP) or FMP amendment (including any proposed regulations); request for amendment to regulations implementing an FMP; finding that an emergency exists involving any fishery (including recommendations for responding to the emergency); and comments to the Secretary on FMPs or amendments developed by the Secretary. It does not include a vote by a committee of a Council.”

At its February 2022 meeting, the Council adopted two alternatives and four options for

considering changes to the GOA Rockfish Program. Those are:

- Alternative 1: Status Quo
- Alternative 2: Change the season start date and modify the harvesting, processing, and cooperative holding caps (options are not mutually exclusive).
 - Option 1: Change the Rockfish Program season start date from May 1 to April 1.
 - Option 2: Eliminate the CV cooperative holding cap (30% QS assigned to CV sector).
 - Option 3: Increase the processing cap to 35 – 40% of the CV quota share pool for sablefish, Pacific cod, and/or primary rockfish.
 - Option 4: Revise the vessel aggregated rockfish (POP, northern rockfish and dusky rockfish) harvesting cap by capping only POP harvests at 8% of the CV POP quota share pool.

At its upcoming June 2022 meeting, the NPFMC is scheduled to take final action on agenda item C1, which involves potential amendments to the GOA Rockfish Program. The Council’s action on the Rockfish Program regulatory amendments is a “Council decision” as it will result in a Council recommendation for regulatory amendments to the Rockfish Program.

Fishery or Sector of the Fishery Affected by the Council Decision

When developing a recusal determination, NOAA’s Office of General Counsel considers the scope of the Council determination. Looking at the action and alternatives before the NPFMC, we find that the “fishery or sector of the fishery” affected by the Council decision is the catcher vessel and shoreside processor sector of the GOA Rockfish Program. Although the Rockfish Program includes catcher-processor sector participants and one option will affect them, this determination does not consider that sector because no Council member has any association with it. The bulk of the options affect the Rockfish Program catcher vessel and shoreside processor sectors. Due to that circumstance, this determination focuses on that sector.

According to the regulations at 50 C.F.R. § 600.235(c)(2), “[t]he relative financial interests of the affected individual and other participants will be determined with reference to the most recent fishing year for which information is available.” The 2021 fishing year is the most recent fishing year for which complete Rockfish Program harvesting and landings information is available. The total landed harvest of Rockfish Program species by participating catcher vessels (excluding catcher-processors) in 2021 was 16,986 metric tons (mt). Therefore, the 10% threshold for determining significant financial interest in harvesting, processing, or marketing is 1,698.6 mt.

Whether the Rockfish Program C1 Action Is a Particular Matter Primarily of Individual Concern under 50 C.F.R. § 600.225(b)(9)(ii)

In some instances, a Council action may benefit a sole Council member or just a handful of fishery participants. The C1 Rockfish Program action is not a particular matter primarily of individual concern for any affected individual. The alternatives and options apply to a large number of participants who harvest Rockfish Program species with trawl catcher vessels and

who process those species at several shore-based Kodiak processing plants. The action would affect more than one Council member and more than a few fishery participants and is thus not a particular matter primarily of individual concern.

Close causal link

In developing a recusal determination, we must look at whether the Council action can lead to or cause an effect on the affected Council member's financial interest in the fishery. Under 50 C.F.R. § 600.235(c)(4)(i), a close causal link exists for Council decisions that require implementing regulations and that affect a fishery or sector of a fishery in which an affected individual has a financial interest, unless: (a) the chain of causation between the Council decision and the affected individual's financial interest is attenuated or is contingent on the occurrence of events that are speculative or that are independent of and unrelated to the Council decision; or (b) there is no real, as opposed to speculative, possibility that the Council decision will affect the affected individual's financial interest.

The C1 Council action to recommend several Rockfish Program regulatory changes would require implementing regulations that would affect catcher vessels that participate in the Rockfish Program fishery as well as processors that process program species harvested by catcher vessels. Therefore, a close causal link exists between the Council decision and any expected and substantially disproportionate benefit that an individual Council member may have in the affected fishery.

Existence of Expected and Substantially Disproportionate Benefit

Ms. Campbell

According to Ms. Campbell's financial disclosure statement dated January 14, 2022, Ms. Campbell is employed by Silver Bay Seafoods, which operates several shore-based seafood processing facilities in Alaska. Ms. Campbell has disclosed that, through another entity, she owns a small percentage of Silver Bay Seafoods.

NMFS fishery data indicate Silver Bay Seafoods received or processed Rockfish Program species harvested by Rockfish Program catcher vessels in 2021. Further, Silver Bay Seafoods is a member of a Rockfish Program cooperative, authorized to harvest and process Rockfish Program species.

Silver Bay Seafoods [REDACTED] of the 2021 CGOA Rockfish Program landings, an amount exceeding ten percent of the total shoreside processor landings. Based on this data, NOAA GC has determined that Ms. Campbell has an expected and substantially disproportionate benefit because she has a significant financial interest in the fishery or sector of the fishery that is likely to be positively or negatively affected by the C1 Rockfish Program Council decision.

Under 50 C.F.R. § 600.235(c)(1) & (3)(iii), Ms. Campbell is required to recuse herself from voting on any aspect of C1 Rockfish Program action.

Mr. Down

According to Mr. Down’s financial disclosure statement dated January 7, 2022, Mr. Down has no financial interest in the sector of the fishery affected by the Council decision. Therefore, in accordance with 50 C.F.R. § 600.235(c)(3)(i) and (ii), Mr. Down is not required to recuse himself from voting on any aspect of the C1 Rockfish Program action. If Mr. Down believes the Council decision would have a significant and predictable effect on his financial interests, he may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.

Mr. Jensen

According to Mr. Jensen’s financial disclosure statement dated January 27, 2022, Mr. Jensen has no financial interest in the sector of the fishery affected by the Council decision. Therefore, in accordance with 50 C.F.R. § 600.235(c)(3)(i) and (ii), Mr. Jensen is not required to recuse himself from voting on any aspect of the C1 Rockfish Program action. If Mr. Jensen believes the Council decision would have a significant and predictable effect on his financial interests, he may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.

Ms. Kimball

According to Ms. Kimball’s financial disclosure statement dated January 5, 2022, Ms. Kimball has no financial interest in the sector of the fishery affected by the Council decision. Therefore, in accordance with 50 C.F.R. § 600.235(c)(3)(i) and (ii), Ms. Kimball is not required to recuse herself from voting on any aspect of the C1 Rockfish Program action. If Ms. Kimball believes the Council decision would have a significant and predictable effect on her financial interests, she may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.

Mr. Kinneen

According to Mr. Kinneen’s financial disclosure statement dated February 3, 2022, Mr. Kinneen has no financial interest in the sector of the fishery affected by the Council decision. Therefore, in accordance with 50 C.F.R. § 600.235(c)(3)(i) and (ii), Mr. Kinneen is not required to recuse himself from voting on any aspect of the C1 Rockfish Program action. If Mr. Kinneen believes the Council decision would have a significant and predictable effect on his financial interests, he may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.

Mr. Mezirow

According to Mr. Mezirow’s financial disclosure statement dated January 27, 2022, Mr. Mezirow has no financial interest in the sector of the fishery affected by the Council decision. Therefore, in accordance with 50 C.F.R. § 600.235(c)(3)(i) and (ii), Mr. Mezirow is not required to recuse himself from voting on any aspect of C1 Rockfish Program action. If Mr. Mezirow

believes the Council decision would have a significant and predictable effect on his financial interests, he may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.

Ms. Vanderhoeven

According to Ms. Vanderhoeven's financial disclosure statement dated January 12, 2022, Ms. Vanderhoeven has no financial interest in the fishery affected by this Council action. Therefore, in accordance with 50 C.F.R. § 600.235(c)(3)(i) and (ii), Ms. Vanderhoeven is not required to recuse herself from voting on any aspect of C1 Rockfish Program action. If Ms. Vanderhoeven believes the Council decision would have a significant and predictable effect on her financial interests, she may, at any time before a vote is taken, announce to the Council an intent not to vote on the decision and identify the financial interest that would be affected.