



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**

*National Marine Fisheries Service*

*P.O. Box 21668*

*Juneau, Alaska 99802-1668*

June 14, 2007

Morgen Crow, Executive Director  
Western Alaska Community Development Association  
711 H Street, Suite 200  
Anchorage, Alaska 99501

Dear Mr. Crow:

This letter responds to a request from the Western Alaska Community Development Association (WACDA) for information about the process that should be followed to comply with certain requirements of section 305(i)(1)(C) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). In part, this section authorizes WACDA to allocate 0.7% of the total allowable catches (TACs) for all groundfish allocated to the Community Development Quota (CDQ) Program, except pollock and sablefish, among the CDQ groups. It also requires the Secretary of Commerce to make these allocations based on the nontarget needs of the eligible entities (CDQ groups) in the absence of a panel decision.

Members of WACDA have asked three questions:

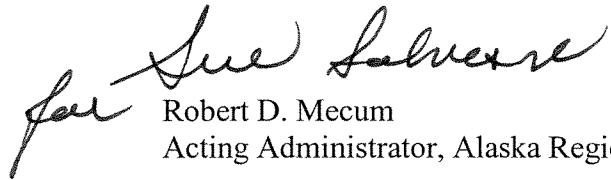
1. When should WACDA submit its allocation percentages to NMFS?
2. If WACDA cannot reach a unanimous decision about these allocations, how long would it take NMFS to make these allocations?
3. If NMFS has to make these allocations on behalf of the Secretary of Commerce (Secretary), could NMFS consider an alternative that would use the same percentage allocations among the CDQ groups as currently are in effect for the 10% of each TAC allocated to the CDQ Program?

Detailed answers to these questions and other information about our interpretation of the Magnuson-Stevens Act requirements related to WACDA's percentage allocations are contained in the attachment to this letter. In summary, we request that WACDA submit its allocations to NMFS by November 1 to provide time to establish quota balances for each CDQ group for the next year. If WACDA is unable to submit allocations, NMFS will make these allocations through proposed and final rulemaking. We estimate that this process will take at least six months and could take up to nine months or more, depending on how long it takes to prepare the analysis of alternative percentage allocations and to identify a preferred alternative. For reasons described in more detail in the attachment, we have determined that the alternative of using the current percentage allocations is not consistent with the Magnuson-Stevens Act because these percentage allocations were not based solely on the nontarget needs of the CDQ groups.



Please contact Sally Bibb at (907) 586-7389 or [sally.bibb@noaa.gov](mailto:sally.bibb@noaa.gov) if you have any additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Sue Salvendy". The signature is written in a cursive style with a large initial "S".

for Robert D. Mecum  
Acting Administrator, Alaska Region

Attachment

## Attachment – Response to Questions about Allocation of 0.7% of the TACs Among the CDQ Groups

### Background

Section 305(i)(1)(C) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requires the following:

(C) ALLOCATIONS TO ENTITIES.—Each entity eligible to participate in the program shall be authorized under the program to harvest annually the same percentage of each species allocated to the program under subparagraph (B) that it was authorized by the Secretary to harvest of such species annually as of March 1, 2006, except to the extent that its allocation is adjusted under subparagraph (H). Such allocation shall include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006. Voluntary transfers by and among eligible entities shall be allowed, whether before or after harvesting. Notwithstanding the first sentence of this subparagraph, seven-tenths of one percent of the total allowable catch, guideline harvest level, or other annual catch limit, with the amount allocated to the program by subclause (I) or subclause (II) of subparagraph (B)(ii), shall be allocated among the eligible entities by the panel established in subparagraph (G), or allocated by the Secretary based on the nontarget needs of eligible entities in the absence of a panel decision.

The “panel” referred to in this requirement is WACDA.

Subclause (I) refers to section 305(i)(1)(B)(I) of the Magnuson-Stevens Act, which requires the following:

(I) the allocation under the program for each directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) shall be a total allocation (directed and nontarget combined) of 10.7% effective January 1, 2008;

The allocations to the CDQ Program made under this subclause start on January 1, 2008. The species that are included in these allocations are all of the groundfish species allocated to the CDQ Program, except pollock and sablefish. For 2008, the total allowable catch categories for which WACDA is authorized to submit allocations are listed in Table 1.

Table 1. Groundfish Total Allowable Catch Categories that WACDA is Authorized to Allocate Among the CDQ Groups (based on 2007-08 quota categories)

Pacific cod	BS Greenland turbot
EAI/BS Atka mackerel	Arrowtooth flounder
CAI Atka mackerel	Flathead sole
WAI Atka mackerel	EAI Pacific ocean perch
Yellowfin sole	CAI Pacific ocean perch
Rock sole	WAI Pacific ocean perch

AI = Aleutian Islands

EAI = Eastern Aleutian Islands

BS = Bering Sea

AI = Central Aleutian Islands

WAI = Western Aleutian Islands

Under the requirements of section 305(i)(1)(C), 10% of the allocation to the CDQ Program for these species will be allocated among the CDQ groups based on the percentage allocations that were in effect on March 1, 2006. These percentage allocations are listed in a *Federal Register* notice published on August 31, 2006 (71 FR 51804) and will remain in effect unless changed by the allocation adjustment process described in section 305(i)(1)(H). The remaining 0.7% of the TACs for these species will be allocated among the CDQ groups based on the percentage allocations submitted by WACDA. If WACDA does not submit percentage allocations, the Secretary is required to make these allocations based on the nontarget needs of the eligible CDQ groups.

#### WACDA's Percentage Allocations

Process for establishing WACDA's percentage allocations: The Magnuson-Stevens Act does not require WACDA to obtain approval from NMFS for its percentage allocations or submit an explanation or rationale to NMFS. WACDA is authorized to make the final decision about these allocations. NMFS is not authorized or required to review and approve WACDA's allocations or its rationale. Therefore, NMFS will accept the allocations submitted by WACDA and establish allocations of 0.7% of the applicable TACs among the CDQ groups in accordance with the allocations submitted by WACDA.

Duration of percentage allocations: The Magnuson-Stevens Act also does not specify the length of time WACDA's percentage allocations are to be effective. Therefore, WACDA may make allocations of 0.7% of the TACs for the quota categories listed in Table 1 for one year, a specific number of years, or indefinitely until changed by WACDA. However, due to the difficulties of changing allocations once annual quota balances are established, NMFS requests that the allocations not be made for less than one year. In addition, once allocations are submitted by WACDA and annual quota balances are established for the CDQ groups, NMFS requests that these allocations not be changed mid-year.

Deadline for submittal to NMFS: The Magnuson-Stevens Act did not specify a deadline for WACDA to submit its percentage allocations to NMFS. However, NMFS must have these allocations to establish the quota balances for each CDQ group. These balances are established on January 1 of each year. Therefore, NMFS requests that WACDA submit its percentage allocations by November 1 to provide us time to input this information into the computer programs that establish account balances. The portion of the CDQ reserves equal to 0.7% of each TAC will remain unallocated until NMFS receives WACDA's allocations or NMFS makes these allocations after WACDA notifies NMFS that WACDA is unable to make the allocations.

Format for submittal: NMFS also requests that WACDA provide its percentage allocations in writing in a format that demonstrates that these allocations were made in compliance with section 305(i)(1)(G)(iv) that requires that "The panel may act only by unanimous vote of all 6 members of the panel and may not act if there is a vacancy in the membership of the panel."

### If WACDA is Unable to Make the Percentage Allocations

The Magnuson-Stevens Act requires the Secretary to make the percentage allocations of 0.7% of TACs in the absence of a panel decision. The allocations approved by the Secretary must be based on the nontarget needs of CDQ groups. If NMFS, acting on behalf of the Secretary, is required to allocate the 0.7% of TACs among the CDQ groups, these allocations will be made through proposed and final rulemaking. That process requires the preparation of an analysis that considers reasonable alternatives to address the problem, selection of a preferred alternative with a rationale for that selection, publication of a proposed rule in the *Federal Register*, a public comment period, and publication of a final rule in the *Federal Register*. The final rule would be effective 30 days after its publication in the *Federal Register*. We project that the rulemaking process would take at least six months and could take up to nine months or more, depending on how long it takes to prepare the analysis of alternative percentage allocations and to identify a preferred alternative.

Section 305(i)(1)(B)(ii) requires that the allocations to the program “shall be a total allocation (directed and nontarget combined).” Therefore, although allocations to each CDQ group for all groundfish except pollock and sablefish will be made in two parts (allocation of the 10% of the TACs and allocation of the 0.7% of the TACs), a single quota balance will be established for each quota category for each CDQ group. Allocation of the 0.7% of the TACs could be made after the start of the fishing year because the CDQ groups will have quota balances from the 10% percent of the TAC on which to start fishing. It is unlikely that any of the CDQ groups will use up all of these allocations and need their portion of the 0.7% of the TACs until later in the year.

The 0.7% of the TACs that would be allocated to the CDQ Program starting on January 1, 2008, would remain unallocated among the CDQ groups until either receipt of WACDA’s percentage allocations or the effective date of the final rule implementing the Secretary’s percentage allocations, whichever is earlier.

### Could NMFS Consider Current Percentage Allocations as an Alternative?

A member of the WACDA asked whether NMFS could consider the percentage allocations in effect on March 1, 2006, as an alternative, if NMFS were required to make the percentage allocations. For the following reasons, we have determined that the percentage allocations in effect on March 1, 2006, for the groundfish species in Table 1 could not be considered as an alternative by the Secretary because these percentage allocations are based on factors in addition to the nontarget needs of the CDQ groups. Section 305(i)(1)(C) requires the Secretary to consider only the nontarget needs of the CDQ groups. To consider percentage allocations that were developed based on factors other than nontarget needs would be inconsistent with the Magnuson-Stevens Act.

The percentage allocations in effect on March 1, 2006, are based on recommendations submitted by the State of Alaska (State) to NMFS on October 15, 2002, and approved by NMFS on January 17, 2003. Some of the percentage allocations recommended by the State for 2003-2005 were unchanged from those recommended by the State for 2001-2002. Therefore, for these species, the State’s rationale also relied on its 2001-2002 recommendations and rationale. The State

distinguished between “primary target species” and “bycatch” species. The primary target species were: pollock, Pacific cod, Atka mackerel, sablefish (fixed gear), yellowfin sole, rock sole, flathead sole, halibut, and crab. The bycatch species were sablefish from the trawl allocation of the TAC, Greenland turbot, arrowtooth flounder, other flatfish, rockfish, and the “other species” category. All of the primary target species identified by the State continue to be allocated to the CDQ Program (see Table 1). Some of the species identified as bycatch species by the State were identified by NMFS in 2007 as directed fisheries of the BSAI and, therefore, continue to be allocated to the CDQ Program (Greenland turbot, arrowtooth flounder, and Pacific ocean perch).

The rationale for the State’s percentage allocation recommendations for the primary target species is described in its October 15, 2002, letter to NMFS. On page 11, the State wrote that “Many factors are carefully considered during the allocation process. Criteria in state and federal regulations are followed in conjunction with input from the public hearing and private interview with the CDQ group. ...The broad categories were Population and Economic Need, CDP Achievement, Community, Regional, and Statewide Benefits, Community Outreach and Involvement, Management Effectiveness, and CDQ Program Standards.” On page 10, the State wrote that “All other changes to the 2003-2005 allocation recommendations were computed by the state’s formula-based bycatch matrix that relied on CDQ group harvest statistics.”

Based on this explanation, we conclude that the percentage allocations in effect on March 1, 2006, under section 305(i)(1)(C) of the Magnuson-Stevens Act for the primary target species were developed by the State and approved by NMFS based on factors other than nontarget needs. Therefore, NMFS could not consider these percentage allocations as an alternative in its rulemaking to establish allocations of the 0.7% of the TACs based on nontarget needs. Although an argument could be made that the current percentage allocations of Greenland turbot, arrowtooth flounder, and Pacific ocean perch were made based on nontarget needs because the State made these allocation recommendations based on its bycatch matrix model, this model was last updated in 2002 based on fishery data from 2001 and earlier. Allocation percentages of the target species have increased since then and the now outdated catch data that supported the bycatch matrix model would not provide the best available data for NMFS’s future consideration of nontarget needs.