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

June 1, 2007

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

Chris Oliver
Executive Director
North Pacific Fishery Management Council

FROM: Lisa L. Lindeman
Alaska Regional Counsel

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

STATEMENT OF ISSUE

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

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

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

SHORT ANSWER

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

BACKGROUND

When the CDQ program was initially implemented in 1992 in accordance with general provisions of the MSA,[2] the MSA did not include any provisions that specifically addressed the CDQ program. In 1996, the MSA was amended to include several provisions at section 305(i)(1) that governed certain aspects of the CDQ program.[3] Recently, the Coast Guard Act extensively amended section 305(i)(1) and fundamentally changed many features of the CDQ program as developed by the Council and NMFS.[4] Among other things, section 305(i)(1) establishes a CDQ program Panel[5] and sets forth new roles and responsibilities for the Panel, the Council, NMFS, and the State of Alaska (State) in the administration of the CDQ program.[6]

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

> (1) coordinating and facilitating activities of the CDQ entities under the program;[7]

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

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

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

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

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

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

(2) establishing a system to be applied in the decennial review and adjustment of entity allocations that allows each entity participating in the program to assign relative values to statutorily-specified criteria to reflect the particular needs of its villages;[8]
(3) allocating "seven-tenths of one percent of . . . the amount allocated to the program by subclause (I) or (II) of subparagraph (B)(ii) . . . among the eligible entities;"[9] and
(4) administering those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, as the case may be.[10]

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

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

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[8] Section 305(i)(1)(H)(ii) (16 U.S.C. § 1855(i)(1)(H)(ii)).
[9] Section 305(i)(1)(C) (16 U.S.C. § 1855(i)(1)(C)).
[10] Section 305(i)(1)(G)(iii)(I) (16 U.S.C. § 1855(i)(1)(G)(iii)(I)). Because the section is 305, the subsection is (i), and the paragraph is (1), the phrase "this paragraph" refers to aspects of the program addressed within section 305(i)(1). For clarity, the remainder of this memorandum will reference section 305(i)(1) instead of "this paragraph." Additionally, this memorandum does not provide any legal opinion regarding the State of Alaska, its role in the CDQ program, or its legal relationship with the Panel.
[11] Section 305(i)(1)(G)(iv) (16 U.S.C. § 1855(i)(1)(G)(iv)).
[12] *See* Attachments A and B to this memorandum.
[13] See Attachment A at 1.
[14] See Attachment A at 4. In its letters to NMFS, the Panel notes that while the statutory language provides the Panel with a choice in exercising its authority, either through private contractual arrangement or recommendation to the appropriate governmental entity, it concludes "that Congress intended it to administer all aspect [sic] of the CDQ program through private contractual arrangements, including the administration of Panel operations, except for the . . . six elements of the program that are "addressed" within the meaning of the Act." For those aspects of the CDQ program that are addressed in section 305(i)(1), the Panel states that it "will limit its role to the advisory capacity when necessary." The Panel expresses an opinion as to whether certain aspects of the program that are addressed in section 305(i)(1) should be contained within an FMP and asks that NMFS consult the Panel when undertaking rulemaking related to the six areas it believes are within the agency's authority to administer.
[15] Both letters generally identify the same six aspects, although the Panel's January 16, 2007, letter (Attachment B) provides additional detail: (1) CDQ program purposes and the regulation of fish harvesting and processing, establishment of fish harvesting and processing rights, and program allocations; (2)

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

ANALYSIS

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

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

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

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

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

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

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

CONCLUSION

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

Approved: _____ Date: 6-1-07
Deputy General Counsel

Attachments

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

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

Attachment A

November 28, 2006

Via Facsimile: 907-586-7249

Douglas Mecum
Deputy Administrator, Alaska Region
National Marine Fisheries Service

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

Dear Doug:

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

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

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

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

(G) ADMINISTRATIVE PANEL.—

(i) ESTABLISHMENT.—There is established a community development quota program panel.

(ii) MEMBERSHIP.—The panel shall consist of 6 members. Each entity participating in the program shall select one member of the panel.

(iii) FUNCTIONS.—The panel shall—

(I) administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, as the case may be; and

(II) coordinate and facilitate activities of the entities under the program.

(iv) UNANIMITY REQUIRED.—The panel may act only by unanimous vote of all 6 members of the panel and may not act if there is a vacancy in the membership of the panel.

The Coast Guard Act's subparagraph setting eligibility standards for CDQ groups, significantly, requires them to acquiesce to the Panel's authority (the Panel-related provisions are shown in bold):

(E) ELIGIBILITY REQUIREMENTS FOR PARTICIPATING ENTITIES.—To be eligible to participate in the program, an entity referred to in subparagraph (D) shall meet the following requirements:

(i) BOARD OF DIRECTORS.—The entity shall be governed by a board of directors. At least 75 percent of the members of the board shall be resident fishermen from the entity's member villages. The board shall include at least one director selected by each such member village.

(ii) PANEL REPRESENTATIVE.—The entity shall elect a representative to serve on the panel established by subparagraph (G).

(iii) OTHER INVESTMENTS.—The entity may make up to 20 percent of its annual investments in any combination of the following:

(I) For projects that are not fishery-related and that are located in its region.

(II) On a pooled or joint investment basis with one or more other entities participating in the program for projects that are not fishery-related and that are located in one or more of their regions.

(III) For matching Federal or State grants for projects or programs in its member villages without regard to any limitation on the Federal or State share, or restriction on the source of any non-Federal or non-State matching funds, of any grant program under any other provision of law.

> (iv) FISHERY-RELATED INVESTMENTS.—The entity shall make the remainder percent of its annual investments in fisheries-related projects or for other purposes consistent with the practices of the entity prior to March 1, 2006.
>
> (v) ANNUAL STATEMENT OF COMPLIANCE.—Each year the entity, following approval by its board of directors and signed by its chief executive officer, shall submit a written statement to the Secretary and the State of Alaska that summarizes the purposes for which it made investments under clauses (iii) and (iv) during the preceding year.
> **(vi) OTHER PANEL REQUIREMENTS.—The entity shall comply with any other requirements established by the panel under subparagraph (G).**

The new law also requires the Panel, in subparagraph (a)(1)(H), to "establish a system to be applied [in the decennial review] that allows each entity participating in the program to assign relative values to ... criteria to reflect the particular needs of its villages."

Conference Report. The Conference Report briefly describes each portion of the Conference substitute. It characterizes the Panel thus:

> The Conference substitute establishes a community development quota program panel. The CDQ Panel will consists consist [sic] of a member from each of the six CDQ groups. The CDQ Panel removes the need for governmental oversight of the CDQ program and encourages the CDQ groups to work together. Decisions by the CDQ Panel require the unanimous vote of all six Panel members. The Panel may not act if there is a vacancy.

Conference Report, p. 78.

Panel's mandate. As set out above, Congress has ordered three Panel functions: Subparagraph (G) directs the Panel (1) to "administer those aspects of the [CDQ] program not otherwise addressed in this paragraph,"[1]/ and (2) to coordinate and facilitate activities of the entities under the program; and subparagraph (H) requires the Panel (3) to establish a system for the State's use in its decennial review, the first of which will occur in 2012.

Panel's discretion. The above-quoted subparagraph 416(a)(1)(G) permits the Panel to choose, in administering the aspects of the program that fall into its purview, whether to do so through private contractual arrangement or through recommendations to the appropriate governmental entity. (This recommendation function is discussed further below.)

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[1]/ As you know, the "paragraph" is the entire CDQ program portion of the new law.

Construction. As you may know, the Ninth Circuit Court of Appeals generally relies on the "plain meaning" rule in construing statutes: a court will apply the plain meaning of a statute, along with legislative history, unless to do so would yield an absurd result. The court follows the lead of the United States Supreme Court in applying this rule. "'When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Camacho v. Bridgeport Financial, Inc.*, 420 F.3d 1078 (9th Cir. 2005), quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

The language of Sec. 416(a)(1)(G) is very plain indeed – it requires the Panel to administer every aspect of the CDQ program that the rest of the CDQ provisions do not address. The CDQ groups acknowledge that the paragraph does address the following aspects, which therefore are not left to the Panel's administration:

- Allocations, including harvesting and processing ((a)(1)(B) and (C));
- identification of eligible participating communities ((a)(1)(D));
- CDQ group eligibility standards, including governance, investment types, and annual statement of compliance ((a)(1)(E));
- requirements for and limits to oversight of CDQ groups and share ownership and annual reports to communities ((a)(1)(G));
- the State's decennial review of each group's performance (based on criteria to be set by the Panel) and adjustment of allocations based on the review ((a)(1)(H)); and
- the definition of a community development plan ((a)(1)(J)).[2/]

The CDQ groups hope that NMFS staff's failure to mention the Panel does not evidence a reading of the phrase "not otherwise addressed" to include in the Panel's authority no aspect of the program on which the paragraph even arguably touches. We expect that such a narrow view of the Panel's authority would find little support within your office. The CDQ groups would look instead to the broad statement of the Conference Report, which describes the Panel as a body that "removes the need for

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[2/] The paragraph mentions community development plans elsewhere, but only in the following contexts, none of which detracts from the Panel's mandate to administer all but the definition of CDPs: (1) an explicit statement that the Secretary has no approval authority for such plans or their amendments((a)(1)(I)); (2) a specification that CDQ groups are exempt from State regulation of their community development plans ((a)(1)(F)(iv)); and (3) a requirement that the Panel establish a system for the CDQ groups' use in the decennial review, including as one criterion the groups' "[a]chieving of the goals of the entity's community development plan" ((a)(1)(H)(ii)(IV)).

governmental oversight of the CDQ program." "Oversight" is supervision, which for the CDQ program has been historically a function of both State and federal agencies. When this phrase is read with the language of (G) that directs the Panel to administer all aspects not otherwise addressed, and with the limited items addressed in Section 416, it is clear that Congress intended to place considerable authority in the Panel. Any other interpretation would contradict the Conference's word "removes"; had the Conference, in establishing the Panel, intended merely to "limit" governmental oversight, it would have said so.

Also, of course, a very narrow interpretation of "not otherwise addressed," in a way that deletes, or all but deletes, the Panel's authority and significance, would nullify the statute's establishment of and directives to the Panel. An interpretation that renders this key portion of the new statute meaningless would not withstand judicial scrutiny.

Authority to recommend regulatory revisions. A second matter of interest raised by the NMFS Staff discussion paper is the Secretary of Commerce's implementation of Section 305(i)(1) of the MSA as amended by Section 416 of the Coast Guard Act.

In order to implement amended section 305(i)(1) of the MSA, among other necessary regulatory actions, the Secretary must amend 50 C.F.R. 679.1(e), amend several definitions contained in 50 C.F.R. 679.2, and rewrite 50 C.F.R. 679.30. At page 21 of its Staff discussion paper, NMFS indicates that it intends to recommend to the Secretary that he make those regulatory changes through Amendment 71 to the BSAI groundfish fishery management plan (FMP) and Amendment 22 to the crab FMP.

There are two significant legal problems with that approach. The first problem is that Congress has not delegated the Secretary authority to address the regulatory issues above-listed through FMPs, since those issues relate to the generic operation of the western Alaska CDQ program, rather than to the participation of the six CDQ groups in particular fisheries that the Secretary oversees through regulations that implement particular FMPs.

Section 303(a) and (b) of the MSA lists fourteen provisions that the Council shall recommend, and twelve discretionary provisions that the Council may recommend, for the Secretary's inclusion in an FMP. None of those provisions authorizes the Secretary to include in an FMP generic subject matters that relate to CDQ groups' participation in the CDQ program generally. If NMFS has a different view, we would appreciate NMFS' identifying the specific provisions of section 303(a) and/or (b) of the MSA that it believes delegate to the Secretary authority to implement amended section 305(i)(1) of the MSA through the BSAI groundfish and crab FMPs.

The second problem is that the paper, as discussed at more length above, omits to mention (other than in passing, in Tables 1 and 5) the CDQ Panel that Congress established in amended section 305(i)(1)(G) of the MSA. Nor does the paper acknowledge the authority that Congress delegated to the Panel to elect to submit to the Secretary directly its recommendations regarding regulatory matters. Instead, the staff

discussion paper indicates that NMFS believes these matters should be handled through Council recommendations to the Secretary regarding amendments to FMPs.

Again, in pertinent part, amended section 305(i)(1)(G)(iii) provides that the Panel "*shall* - (I) administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, *as the case may be*" (emphasis added). The Panel has a choice of carrying out its duty to administer aspects of the program by either entering into private contracts or submitting recommendations directly to the Council, Secretary, or State.

The "aspects of the program not otherwise addressed in this paragraph" include matters, *e.g.*, the incidental catch of cod by vessels fishing in the CDQ program, that lie within the Council's authority to recommend to the Secretary amendments to FMPs. Recommendations directly to the Secretary will concern regulations that do not implement FMPs, such as the needed rewrite of 50 C.F.R. 679.30; to the State, the Panel will recommend content of the State laws described in amended section 305(i)(1)(F)(ii) and (iii) of the MSA.

In sum, NMFS should advise the Secretary not to undertake a stand-alone rulemaking that amends 50 C.F.R. 679.1(e), amends any definition in 50 C.F.R. 679.2, or rewrites 50 C.F.R. 679.30, until the Secretary first receives, and then evaluates, the Panel's recommendations.

Conclusion. The Panel hopes to discuss with NMFS the CDQ groups' and NMFS' positions with regard to the breadth of the CDQ Panel's authority, both in administering aspects of the CDQ program and in recommending regulations to the Secretary and the State. We believe that NMFS and the CDQ groups can reach an accommodation of both positions that will give effect to the Coast Guard Act while advancing the goals of the agencies and the groups.

We look forward to discussing these issues with you.

Sincerely,

Morgen Crow
Chair, Community Development Quota Panel

cc: Bill Hogarth, Assistant Administrator for Fisheries, NMFS
Sam Rauch, Deputy Assistant Administrator, NMFS
Dr. James Balsiger, Administrator, Alaska Region, NMFS
Chris Oliver - Executive Director, North Pacific Fishery Management Council

Western Alaska Community Development Association
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Attachment E

January 16, 2007

Via Facsimile: 907-586-7249

Douglas Mecum
Deputy Administrator, Alaska Region
National Marine Fisheries Service

Re: CDQ Program Panel Authority

Dear Doug:

The Western Alaska Community Development Association appreciates the NOAA/NMFS staff's meeting on December 20, 2006, with WACDA's Implementation Committee. The meeting was positive, productive and quite helpful in WACDA's undertaking the duties of the Community Development Quota Program Panel.

Panel established. In Subparagraph (a)(1)(G) of Section 416 of the Coast Guard and Maritime Transportation Act of 2006 (Coast Guard Act), Congress established the Community Development Quota Program Panel (the Panel), each of whose six members represents one of the CDQ entities:

(G) ADMINISTRATIVE PANEL.—
(I) ESTABLISHMENT.—There is established a community development quota program panel.
(ii) MEMBERSHIP.—The panel shall consist of 6 members. Each entity participating in the program shall select one member of the panel.
(iii) FUNCTIONS.—The panel shall—
(I) administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, as the case may be; and
(II) coordinate and facilitate activities of the entities under the program.
(iv) UNANIMITY REQUIRED.—The panel may act only by unanimous vote of all 6 members of the panel and may not act if there is a vacancy in the membership of the panel.

Legislative history. The congressional Conference Report on the Coast Guard Act (at page 78) characterizes the Panel as having broad authority over the CDQ program, removing the need for governmental oversight, so long as it works under unanimous consent of the six CDQ entities:

> The Conference substitute establishes a community development quota program panel. The CDQ Panel will consists consist [sic] of a member from each of the six CDQ groups. **The CDQ Panel removes the need for governmental oversight of the CDQ program and encourages the CDQ groups to work together.** Decisions by the CDQ Panel require the unanimous vote of all six Panel members. The Panel may not act if there is a vacancy.

In order to "remove the need for governmental oversight of the CDQ program," Congress charged the Panel to perform three functions: Subparagraph (G) directs the Panel (1) to "administer those aspects of the [CDQ] program not otherwise addressed in [the Coast Guard Act]" and (2) to coordinate and facilitate activities of the entities under the program; and subparagraph (H) requires the Panel (3) to establish a system for the State's use in its decennial review, the first of which will occur in 2012.

Construction. The Ninth Circuit Court of Appeals generally relies on the "plain meaning" rule in construing statutes: a court will apply the plain meaning of a statute, along with legislative history, unless to do so would yield an absurd result. The court follows the lead of the United States Supreme Court in applying this rule. "'When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'" *Camacho v. Bridgeport Financial, Inc.*, 420 F.3d 1078 (9th Cir. 2005), quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004).

The Panel points to the broad statement of the Conference Report, quoted above, which describes the Panel as a body that "removes the need for governmental oversight of the CDQ program." "Oversight" is supervision, which for the CDQ program has been historically a function of both State and federal agencies. When this phrase is read with the language of (G) that directs the Panel to administer all aspects not otherwise addressed, and with the limited items addressed in Section 416, as discussed below, it is clear that Congress intended to place considerable authority in the Panel. Any other interpretation would contradict the Conference's word "removes"; had the Conference, in establishing the Panel, intended merely to "limit" governmental oversight, it would have said so.

A very narrow interpretation of "not otherwise addressed," in a way that deletes, or all but deletes, the Panel's authority and significance, would nullify the statute's establishment of and directives to the Panel. An interpretation that renders this key portion of the new statute meaningless would not withstand judicial scrutiny. *See American Trucking*, 531 U.S. 457 (2001).

Aspects addressed. In administering the CDQ program, the Panel may act through private contractual arrangements or through recommendations to the appropriate governmental entity. Congress did not make clear which program aspects could be undertaken by contract and which aspects would be left to mere advice of affected agencies, except to note that the Panel was bound by those aspects of the law "addressed" in the Act, which will be administered by the National Marine Fisheries Service or other governmental agencies. As a result, the CDQ Panel has concluded that Congress intended it to administer all aspect of the CDQ program through private contractual arrangements, including the administration of Panel operations, except for the following six elements of the program that

are "addressed" within the meaning of the Act. In these six instances, the Panel will limit its role to the advisory capacity when necessary. The Panel will adopt administrative definitions and procedures by contractual agreement, binding on the Panel entities.

1. CDQ program purposes and the regulation of fish harvesting and processing, establishment of fish harvesting and processing rights and CDQ program allocations (Sec. 416(a)(1)(A), (B) and (C)).

2. Identification of eligible participating communities and their respective assignments to the six named CDQ entities (Sec. 416(a)(1)(D)).

3. CDQ entity eligibility standards, including governance, investment types, and annual statement of compliance (Sec. 416(a)(1)(E)). However, since such definitions are not addressed in the legislation, the Panel will adopt by contract definitions to implement the reasonable administration of the eligibility requirements, since such definitions were not addressed in the legislation, including such terms as "resident fishermen," "annual investments," "not fishery-related," "fisheries-related projects," the process for selecting members of the entity boards of directors from the villages, and the contents of the Annual Statement of Compliance.

4. Excessive share ownership, harvesting, and processing limitations on CDQ entities and requirements for State regulation of CDQ entities established by the Coast Guard Act (Sec. 416(a)(1)(F)). However, since it is not addressed in the legislation, the Panel will adopt by contract the process and contents of the annual reports submitted to the entities' member villages.

5. The State of Alaska's decennial review of each entity's performance (based on criteria to be set by the Panel), any adjustment of allocations based on the review, and any reallocation (Sec. 416(a)(1)(H)). However, since it is not addressed in the legislation, the Panel will establish by contract the system and criteria under which each of the six entities shall be measured consistent with the Coast Guard Act.

6. The definition of a community development plan (Sec. 416(a)(1)(J)). However, since it is not addressed in the legislation, the Panel will adopt by contract the contents and time frame for submission of these plans, and the method for review and distribution to its board of directors and other interested parties.

Because of the Panel's unique authority and responsibility under the Coast Guard Act, we urge NMFS to consult the Panel when NMFS undertakes rulemaking related to the six areas that are in NMFS' purview. For its part, the Panel is developing a procedure for providing notice to NMFS of all its unanimous decisions, including private contractual arrangements.

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

Sincerely,

Morgen Crow
Chair, Community Development Quota Panel

cc: Bill Hogarth, Assistant Administrator for Fisheries, NMFS
Sam Rauch, Deputy Assistant Administrator, NMFS
Dr. James Balsiger, Administrator, Alaska Region, NMFS

Attachment C

SEC. 305(i)(1) of the MSA, as amended by the Coast Guard Act (July 2006) and the MSA reauthorization (December 2006).
Revised 2/5/07.

(1) WESTERN ALASKA COMMUNITY DEVELOPMENT QUOTA PROGRAM.—

(A) IN GENERAL.—There is established the western Alaska community development quota program in order—

(i) to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area;
(ii) to support economic development in western Alaska;
(iii) to alleviate poverty and provide economic and social benefits for residents of western Alaska; and
(iv) to achieve sustainable and diversified local economies in western Alaska.

(B) PROGRAM ALLOCATION.—

(i) IN GENERAL.—Except as provided in clause (ii), the annual percentage of the total allowable catch, guideline harvest level, or other annual catch limit allocated to the program in each directed fishery of the Bering Sea and Aleutian Islands shall be the percentage approved by the Secretary, or established by Federal law, as of March 1, 2006, for the program. The percentage for each fishery shall be either a directed fishing allowance or include both directed fishing and nontarget needs based on existing practice with respect to the program as of March 1, 2006, for each fishery.

(ii) EXCEPTIONS.—Notwithstanding clause (i)—

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

(II) the allocation under the program in any directed fishery of the Bering Sea and Aleutian Islands (other than a fishery for halibut, sablefish, pollock, and crab) established after the date of enactment of this subclause shall be a total allocation (directed and nontarget combined) of 10.7 percent.

The total allocation (directed and nontarget combined) for a fishery to which subclause (I) or (II) applies may not be exceeded.

The following paragraph also was included in the MSA reauthorization (HR 5946), but this language is not an amendment to the MSA.

***EFFECTIVE DATE.**—The allocation percentage in subclause (I) of section 305(i)(1)(B)(ii) of the Magnuson-Stevens Fishery Conservation and Management Act (16*

U.S.C. 1855(i)(1)(B)(ii)), as amended by paragraph (1) of this subsection, shall be in effect in 2007 with respect to any sector of a fishery to which such subclause applies and in which a fishing cooperative is established in 2007, and such sector's 2007 allocation shall be reduced by a pro rata amount to accomplish such increased allocation to the program. For purposes of section 305(i)(1) of that Act and of this subsection, the term ``fishing cooperative'' means a fishing cooperative whether or not authorized by a fishery management council or Federal agency, if a majority of the participants in the sector are participants in the fishing cooperative.

(iii) PROCESSING AND OTHER RIGHTS.—Allocations to the program include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.

(iv) REGULATION OF HARVEST.—The harvest of allocations under the program for fisheries with individual quotas or fishing cooperatives shall be regulated by the Secretary in a manner no more restrictively than for other participants in the applicable sector, including with respect to the harvest of nontarget species.

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

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

(i) The villages of Akutan, Atka, False Pass, Nelson Lagoon, Nikolski, and Saint George through the Aleutian Pribilof Island Community Development Association.

(ii) The villages of Aleknagik, Clark's Point, Dillingham, Egegik, Ekuk, Ekwok, King Salmon/Savonoski, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, and Ugashik through the Bristol Bay Economic Development Corporation.

(iii) The village of Saint Paul through the Central Bering Sea Fishermen's Association.

(iv) The villages of Chefornak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tuntutuliak, and Tununak through the Coastal Villages Region Fund.

(v) The villages of Brevig Mission, Diomede, Elim, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, and White Mountain through the Norton Sound Economic Development Corporation.

(vi) The villages of Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village, and Nunam Iqua through the Yukon Delta Fisheries Development Association.

(E) ELIGIBILITY REQUIREMENTS FOR PARTICIPATING ENTITIES.—To be eligible to participate in the program, an entity referred to in subparagraph (D) shall meet the following requirements:

(i) BOARD OF DIRECTORS.—The entity shall be governed by a board of directors. At least 75 percent of the members of the board shall be resident fishermen from the entity's member villages. The board shall include at least one director selected by each such member village.

(ii) PANEL REPRESENTATIVE.—The entity shall elect a representative to serve on the panel established by subparagraph (G).

(iii) OTHER INVESTMENTS.—The entity may make up to 20 percent of its annual investments in any combination of the following:

(I) For projects that are not fishery-related and that are located in its region.

(II) On a pooled or joint investment basis with one or more other entities participating in the program for projects that are not fishery-related and that are located in one or more of their regions.

(III) For matching Federal or State grants for projects or programs in its member villages without regard to any limitation on the Federal or State share, or restriction on the source of any non-Federal or non-State matching funds, of any grant
program under any other provision of law.

(iv) FISHERY-RELATED INVESTMENTS.—The entity shall make the remainder percent of its annual investments in fisheries-related projects or for other purposes consistent with the practices of the entity prior to March 1, 2006.

(v) ANNUAL STATEMENT OF COMPLIANCE.—Each year the entity, following approval by its board of directors and signed by its chief executive officer, shall

submit a written statement to the Secretary and the State of Alaska that summarizes the purposes for which it made investments under clauses (iii) and (iv) during the preceding year.

(vi) OTHER PANEL REQUIREMENTS.—The entity shall comply with any other requirements established by the panel under subparagraph (G).

(F) ENTITY STATUS, LIMITATIONS, AND REGULATION.—
The entity—
(i) shall be subject to any excessive share ownership, harvesting, or processing limitations in the fisheries of the Bering Sea and Aleutian Islands Management Area only to the extent of the entity's proportional ownership, excluding any program allocations, and notwithstanding any other provision of law;

(ii) shall comply with State of Alaska law requiring annual reports to the entity's member villages summarizing financial operations for the previous calendar year, including general and administrative costs and compensation levels of the top 5 highest paid personnel;

(iii) shall comply with State of Alaska laws to prevent fraud that are administered by the Alaska Division of Banking and Securities, except that the entity and the State shall keep confidential from public disclosure any information if the disclosure would be harmful to the entity or its investments; and

(iv) is exempt from compliance with any State law requiring approval of financial transactions, community development plans, or amendments thereto, except as required by subparagraph (H).

(G) ADMINISTRATIVE PANEL.—

(i) ESTABLISHMENT.—There is established a community development quota program panel.

(ii) MEMBERSHIP.—The panel shall consist of 6 members. Each entity participating in the program shall select one member of the panel.

(iii) FUNCTIONS.—The panel shall—

(I) administer those aspects of the program not otherwise addressed in this paragraph, either through private contractual arrangement or through recommendations to the North Pacific Council, the Secretary, or the State of Alaska, as the case may be; and

(II) coordinate and facilitate activities of the entities under the program.

(iv) UNANIMITY REQUIRED.—The panel may act only by unanimous vote of all 6 members of the panel and may not act if there is a vacancy in the membership

of the panel.

(H) DECENNIAL REVIEW AND ADJUSTMENT OF ENTITY ALLOCATIONS.—

(i) IN GENERAL.—During calendar year 2012 and every 10 years thereafter, the State of Alaska shall evaluate the performance of each entity participating in the program based on the criteria described in clause (ii).

(ii) CRITERIA.—The panel shall establish a system to be applied under this subparagraph that allows each entity participating in the program to assign relative values to the following criteria to reflect the particular needs of its villages:

(I) Changes during the preceding 10-year period in population, poverty level, and economic development in the entity's member villages.

(II) The overall financial performance of the entity, including fishery and nonfishery investments by the entity.

(III) Employment, scholarships, and training supported by the entity.
(IV) Achieving of the goals of the entity's community development plan.

(iii) ADJUSTMENT OF ALLOCATIONS.—After the evaluation required by clause (i), the State of Alaska shall make a determination, on the record and after an opportunity for a hearing, with respect to the performance of each entity participating in the program for the criteria described in clause (ii). If the State determines that the entity has maintained or improved its overall performance with respect to the criteria, the allocation to such entity under the program shall be extended by the State for the next 10-year period. If the State determines that the entity has not maintained or improved its overall performance with respect to the criteria—

(I) at least 90 percent of the entity's allocation for each species under subparagraph (C) shall be extended by the State for the next 10-year period; and

(II) the State may determine, or the Secretary may determine (if State law prevents the State from making the determination), and implement an appropriate reduction of up to 10 percent of the entity's allocation for each species under subparagraph (C) for all or part of such 10-year period.

(iv) REALLOCATION OF REDUCED AMOUNT.—If the State or the Secretary reduces an entity's allocation under clause (iii), the reduction shall be reallocated among other entities participating in the program whose allocations are not reduced during the same period in proportion to each such entity's allocation of the applicable species under subparagraph (C).

(I) SECRETARIAL APPROVAL NOT REQUIRED.—Notwithstanding any other provision of law or regulation thereunder, the approval by the Secretary of a community development plan, or an amendment thereof, under the program is not required.

(J) COMMUNITY DEVELOPMENT PLAN DEFINED.—In this paragraph, the term 'community development plan' means a plan, prepared by an entity referred to in subparagraph (D), for the program that describes how the entity intends—

(i) to harvest its share of fishery resources allocated to the program, or

(ii) to use its share of fishery resources allocated to the program, and any revenue derived from such use, to assist its member villages with projects to advance economic development, but does not include a plan that allocates fishery resources to the program.