

June 23, 2005

Robin Samuelson
Bristol Bay Economic Development Corporation
P.O. Box 1464
Dillingham, Alaska 99576

Dear Mr. Samuelson:

Thank you for your letter of April 27, 2005, asking about the status of Amendment 71 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP). The amendment and associated regulatory revisions contain recommendations on eight issues related to the purpose of the Community Development Quota (CDQ) Program, the process for allocating quota among the CDQ groups, and oversight of the economic development aspects of the CDQ Program. The North Pacific Fishery Management Council (Council) approved Amendment 71 at its June 2002 meeting.

I apologize that it has taken so long to respond to your letter, but I determined that it was important to provide information to the Council about this action at its June 2005 meeting before responding to your letter. As NMFS reported to the Council, for reasons described in detail below, the agency has suspended further development of the FMP amendment and associated rulemaking for Amendment 71. NMFS intends to consult with the Council at its October 2005 meeting and request further direction on all of the issues in Amendment 71 related to the CDQ allocation process and government oversight of the program and the CDQ groups.

Since June 2002, NMFS has been developing a proposed rule that would implement the Council's recommendations on Amendment 71. However, a number of significant legal and policy issues have arisen that must be addressed in the action. These issues include:

1. questions about the eligibility status of the 65 communities currently participating in the CDQ Program;
2. advice from NOAA General Counsel (GC) that NMFS must revise its administrative decision making process to include an administrative appeals process for decisions about the approval of allocations among the CDQ groups, the Community Development Plans (CDPs), and amendments to the CDPs;

3. advice from NOAA GC that NMFS's administrative determinations to approve CDQ projects in the CDPs or in amendments to the CDP probably are federal actions subject to the National Environmental Policy Act, the Endangered Species Act, and other federal laws; and
4. the need for NMFS to establish the confidentiality status of information submitted by the State on behalf of the CDQ groups.

Under the current structure of the CDQ Program, resolution of these issues likely will increase the role of NMFS in oversight of the CDQ Program; change the nature of the oversight relationship between the State of Alaska (State) and NMFS; increase the time it will take NMFS to make administrative determinations about allocations, CDPs, and CDQ projects; and increase costs to the CDQ groups, the State, and NMFS. The administrative and financial implications of these legal issues were not included in the analysis reviewed by the Council at the time it took final action on Amendment 71.

NMFS notified the Council of these issues as they arose in 2003 and 2004. In April 2004, we advised the Council that the issues identified thus far were significant enough to require revisions to the analysis for Amendment 71 and additional review by the Council. NMFS recommended that the eight issues in Amendment 71 be divided into the following three actions:

- Issues 1 through 6, which address the CDQ allocation process, the role of government in oversight of the CDQ Program, and oversight of subsidiaries were grouped under Amendment 71b and identified as issues that needed further analysis and review by the Council;
- Issue 7, which addresses the purpose of the CDQ Program and would allow the CDQ groups to invest up to 20 percent of their previous year's pollock CDQ royalties in non-fisheries related investments, was identified as Amendment 71a; and
- Issue 8, which was a regulatory amendment to simplify procedures for making quota transfers, identifying CDQ eligible vessels, and proposing alternative fishing plans, was promulgated through a final rule published on March 24, 2005 (70 FR 15010).

NMFS initially determined that Issue 7 could proceed to a proposed FMP amendment and proposed rule without further analysis or consideration by the Council. Given this determination, NMFS prepared a proposed rule and FMP amendment package to address the elements of Amendment 71a. However, in November 2004, the NMFS Office of Administrative Appeals (OAA) reversed the Sustainable Fisheries Division's (SFD's) initial administrative determination that disapproved two amendments to a CDP because the CDQ projects that were the subject of the amendments were not consistent with the goals and purpose of the CDQ Program to start or support commercial fisheries business related activities." (OAA Appeal No. 03-0022; November 26, 2004). Although it agreed that the multipurpose buildings that Norton Sound Economic Development Corporation proposed to fund through the amendments were not fisheries related, the OAA

determined that NMFS regulations did not specifically require that each CDQ project must be fisheries related. Further, the OAA determined that the purpose of the CDQ Program at 50 CFR 679.1(e) could only be applied in a general sense to the CDP as a whole, but could not be applied to individual CDQ projects. In other words, in reviewing a proposed CDP or a proposed amendment to a CDP, NMFS must consider only whether the CDP as a whole is consistent with the goals and purpose of the CDQ Program. The Alaska Regional Administrator affirmed the OAA's decision in December 2004.

The SFD's interpretation that NMFS's regulations required all CDQ projects to be "fisheries related" was a significant assumption in the analysis prepared for Council action on Amendment 71. This interpretation provided the basis for the Council's recommendation to "expand" the purpose of the CDQ Program and to "allow" the CDQ groups to invest in non-fisheries related projects. Once NMFS accepted the new interpretation of its regulations under the NSEDC appeal decision, the status quo on which the Council based its recommendations about allowing non-fisheries related investments changed. NMFS now must apply a significantly more expansive interpretation of its regulations to the review of future CDPs and amendments. Therefore, the Council's belief that Amendment 71a would "expand" and "allow" a wider range of investments is no longer valid relative to the re-interpreted status quo. In fact, under the NSEDC decision, the Council's recommendations could be considered more restrictive than the status quo.

Additional issues that have arisen more recently, when combined with the issues described above, have resulted in NMFS's determination to suspend work on Amendment 71a until we can obtain further direction from the Council. These events include: (1) the Council's discussion of the CDQ allocation process at its April 2005 meeting, (2) the Council's initiative for creation of the State's blue ribbon panel to review the CDQ Program in its entirety, and (3) the indeterminate delay in the State's CDQ allocation process for 2006-2008.

Discussion at the April 2005 Council meeting: During the Council's April discussion of the State's CDQ allocation recommendations for 2006 - 2008, several Council members stated that it is nearly impossible to objectively define the term "sustainable" in the context of economic development projects. However, the Council has tasked NMFS with this exact project in the proposed rule for Amendment 71a because the Council's June 2002 recommendation would require NMFS to limit each CDQ group's annual investments in "non-fisheries related self-sustaining economic development projects in the CDQ region of Alaska." In order to monitor and enforce such a limit, NMFS must clearly define the characteristics of a non-fisheries related self-sustaining economic development project and, for every investment made by a CDQ group, NMFS would have to determine whether that investment met the criteria in NMFS regulations. Amendment 71a would increase NMFS's role in the CDQ Program by increasing the agency's responsibilities for review and approval of CDPs and CDQ projects and for monitoring and enforcing the investment limits recommended by the Council. Based on its April 2005 discussion, NMFS has determined that the Council should provide

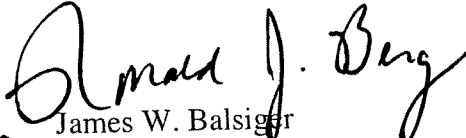
additional input on the direction NMFS is taking with the proposed rule before it is published for public comment.

The State's Blue Ribbon Panel: At its April 2005 meeting, and after a lengthy discussion about the State's initial CDQ allocation recommendations, the Council recommended that the State establish a blue ribbon panel "which, after a review of the CDQ program in its entirety, would provide a report and recommendations to the Governor." The Council recommended that the panel review current regulations, examine the CDQ groups' investments, and prioritize the types of investments and economic development projects that the CDQ groups should support. Specifically, the Council recommended that the panel review the "need to expand the opportunities for CDQ investments and developments outside fisheries businesses." In establishing the blue ribbon panel, the Governor of Alaska stated that the "panel will meet to conduct a thorough review of the CDQ program, including its regulations, investments, goals, timeline of allocations and state oversight." Allowable investments by the CDQ groups, specifically fisheries and non-fisheries related investments, is the subject of the proposed rule for Amendment 71a. NMFS has determined that it should not continue to develop the Council's 2002 recommendations on Amendment 71a while the blue ribbon panel is reviewing this issue, particularly because it is doing so specifically at the request of the Council.

The 2006-2008 CDQ allocation process: In October 2003, NMFS notified the Council and the public that an opportunity for the CDQ groups to administratively appeal to NMFS would have to be added to the CDQ allocation process. A schedule developed between NMFS and the State specified that the State would submit its allocation recommendations for 2006 - 2008 to NMFS by April 15, 2005, to provide NMFS enough time to complete the administrative appeals process and issue a final decision on CDQ allocations by December 31, 2005. However, on May 31, 2005, the State notified the CDQ groups that it would not submit its allocation recommendations to NMFS until after the Blue Ribbon Panel provided its report to the Governor of Alaska, which is expected to be later this summer or early fall. This schedule will not provide time for NMFS to review the State's recommendations, hold an administrative appeals process, and make a final agency decision before the current allocations expire at the end of 2005. Although not directly related to the issues addressed by Amendment 71a, this delay in the CDQ allocation process indirectly affects all aspects of the CDQ Program and must be considered when making long term plans for oversight and administration of the program by the State and NMFS. In the likely event that NMFS cannot complete final agency action on new CDQ allocations recommended by the State, NMFS is examining an option to extend the current CDQ allocations beyond December 31, 2005. The extended allocations would remain in effect until replaced by subsequent final agency action that changes the CDQ allocations. We will provide more information about extension of the current allocations as soon as possible.

Please contact Sally Bibb at 907-586-7389 if you have any further questions about the plans that I have described in this letter or our further consultation with the Council about CDQ Program allocations and oversight.

Sincerely,

For

James W. Balsiger
Administrator, Alaska Region

cc: NPFMC
CDQ groups
Cashen, ADCED