

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re two Community Development Plan	)	
substantial amendments of	)	Appeal No. 03-0022
	)	
NORTON SOUND ECONOMIC	)	DECISION
DEVELOPMENT CORPORATION,	)	
Appellant	)	November 26, 2004
_____	)	

STATEMENT OF THE CASE

Norton Sound Economic Development Corporation (NSEDC) is one of six regional groups organized under, and participating in, the Western Alaska Community Develop Quota (CDQ) Program.<sup>1</sup> On May 12, 2003, NSEDC submitted to the State of Alaska two substantial amendments (03-05NS and 03-06NS) to NSEDC’s Community Development Plan (CDP) for the 2003 - 2005 CDQ allocation cycle.

Substantial amendment 03-05NS proposes that NSEDC contribute up to \$250,000 to the Native Village of White Mountain (IRA) to partially fund the construction of a multipurpose building in White Mountain, Alaska. Substantial amendment 03-06NS similarly proposes that NSEDC contribute up to \$250,000 to the Chinik Eskimo Community (IRA) to partially fund the construction of a multipurpose building in Golovin, Alaska.

After reviewing the amendments, the State of Alaska, Department of Community and Economic Development, recommended that the NMFS Alaska Region disapprove both amendments on the grounds that the proposed projects did not “meet the fisheries-related requirement for CDQ projects” in federal regulation 50 C.F.R. §679.1(e). The State determined that the projects in NSEDC’s substantial amendments were “not intended to start or support commercial fisheries business activities that will result in an ongoing, regionally based, fisheries-related economy.” Therefore, the State concluded, “state and federal regulations do not allow for the approval of the proposed amendment at this time.”<sup>2</sup>

In two Initial Administrative Determinations (IADs), dated August 14, 2003, the NMFS Alaska

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<sup>1</sup>50 C.F.R. §679.30.

<sup>2</sup>The State of Alaska based its recommendation for disapproval of the substantial amendments on its finding that they are “inconsistent with the standards, policies, and requirements per 6 AAC 93.055(b)(1) and (f)(1)(A) and the goals and purpose of the CDQ program per 50 C.F.R. 679.1(e).” The State also expressed “additional areas of concern” about the ownership of the buildings, responsibility for their maintenance and operating costs, a lack of investment guidelines, and the account from which the projects would be funded. Letters from Commissioner Edgar Blatchford to NMFS Alaska Regional Administrator James W. Balsiger at 1 (July 11, 2003).

Region CDQ Program Coordinator disapproved both substantial amendments. The IADs concurred with the State's recommendation and determined that the projects proposed in the substantial amendments were not consistent with the goals and purpose of the CDQ program, as stated in 50 C.F.R. §679.1(e).

NSEDC filed this appeal on October 6, 2003, seeking to overturn both disapprovals. NSEDC makes four arguments. First, NSEDC argues that these two substantial amendments are sufficiently "fisheries-related"<sup>3</sup> so as to be consistent with the goals and purpose of the CDQ program, as stated in 50 C.F.R. §679.1(e).

Second, NSEDC argues that 50 C.F.R. §679.1(e) is only a general statement of the ultimate goals and overall purpose of the CDQ program, and is not intended to impose a requirement that every CDQ project must be "fisheries-related." NSEDC argues that these projects need only meet the definition of "CDQ project" in 50 C.F.R. §679.2, which, they argue, does not require CDQ projects to be "fisheries-related." NSEDC argues that these projects do meet the definition of "CDQ project" and, therefore, should be approved.

Third, even though NMFS says that 50 C.F.R. §679.1(e) requires every CDQ project to be "fisheries-related," NSEDC asserts that, in practice, NMFS does not actually require every project to be "fisheries-related." NSEDC asserts that NMFS has approved CDQ projects that have no fisheries-related purpose. Therefore, NSEDC argues, these two substantial amendments should not be disapproved on the grounds they are not sufficiently fisheries-related.

Fourth, NSEDC argues that the "plain meaning" of 50 C.F.R. §679.1(e) requires only CDQ projects funded by "first generation monies" to be "fisheries-related"; and CDQ projects funded by "second generation monies" are not required to be "fisheries-related." NSEDC argues that because these two CDQ projects would be funded by "second generation monies," they are not required to be "fisheries-related."

NSEDC's first argument is addressed in issue number one below. NSEDC's second and third arguments are addressed in issue number two. I do not decide the issue raised by their fourth argument because I resolve the case based on the first two issues.

I held an in-person oral hearing in this matter on July 14, 2004, in Juneau, Alaska. The sole witness was NMFS Alaska Region CDQ Program Coordinator Sally Bibb. NSEDC was represented by attorney Donald Craig Mitchell.

## ISSUES

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<sup>3</sup>The term "fisheries-related" is used in this Decision as shorthand for "starting or supporting commercial fisheries business activities that will result in an ongoing, regionally based, fisheries-related economy." This is the critical language of 50 C.F.R. §679.1(e) from which NMFS determines whether a CDQ project is "fisheries-related" or not, i.e., whether it is consistent with the goals and purpose of the CDQ program.

1. Did NMFS properly determine that the projects proposed in substantial amendments 03-05NS and 03-06NS do not start or support commercial fisheries business activities?
2. May NMFS disapprove substantial amendments 03-05NS and 03-06NS on the grounds that they are inconsistent with 50 C.F.R. §679.1(e)?

## ANALYSIS

### **1. Did NMFS properly determine that the projects proposed in substantial amendments 03-05NS and 03-06NS do not start or support commercial fisheries business activities?**

In the IADs, the NMFS Alaska Region CDQ Program Coordinator determined that NSEDC's substantial amendments are inconsistent with 50 C.F.R. §679.1(e), which states:

The goals and purpose of the CDQ program are to allocate CDQ to eligible Western Alaska communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally based, fisheries-related economy.

After reviewing the substantial amendments and the State of Alaska's recommendations, Ms. Bibb determined that the primary purpose of the White Mountain multipurpose building (03-05NS) is "to provide a new facility to meet the needs of White Mountain for community meetings, gatherings, and the Head Start Program and to provide office space to the Native Village of White Mountain's Tribal Council."<sup>4</sup> Ms. Bibb determined that the primary purpose of the Golovin multipurpose building (03-06NS) is "to provide new office space for the Chinik Eskimo Community and other facilities for children's services, visitor lodging, and community gatherings and meetings."<sup>5</sup>

Ms. Bibb cited two statements by NSEDC to the effect that both buildings are intended to further the economic and social development in the community, and that the purpose of grants awarded by the Economic Development Administration<sup>6</sup> to partially fund these buildings is to diversify the local economy in the wake of poor fish returns to the region. Ms. Bibb concluded that the primary purpose of both multipurpose buildings is to support sectors of the economy different

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<sup>4</sup>IAD (03-05NS) at 4.

<sup>5</sup>IAD (03-06NS) at 4.

<sup>6</sup>The Economic Development Administration (EDA) is an agency of the U.S. Department of Commerce that makes investments "to provide economically distressed communities with a source of funding for planning, infrastructure development, and business financing that will induce private investment in the types of business activities that contribute to long-term economic stability and growth." EDA website (visited November 24, 2004) <<http://www.eda.gov/AboutEDA/AbtEDA.xml>>.

from the fisheries sector of the economy.<sup>7</sup>

Ms. Bibb stated that NSEDC did not provide any information about a particular commercial fisheries business that would rely on any facilities in the multipurpose buildings, or information suggesting that the buildings are essential to the development of new commercial fisheries businesses in either village.<sup>8</sup> Although NSEDC had stated that both facilities would be “made available” for various fisheries-related purposes, Ms. Bibb noted that, at least in the case of the White Mountain project, this would be “at some indeterminate time in the future” and therefore too indefinite.<sup>9</sup> Ms. Bibb determined that the primary purpose of the buildings is not related to “starting or supporting commercial fishing business activities” and, thus, the substantial amendments are inconsistent with the goals and purpose of the CDQ program stated at 50 C.F.R. §679.1(e).<sup>10</sup>

NSEDC points out that “NMFS does not contest NSEDC’s factual representations regarding the fisheries-related uses that will be made of the two multipurpose buildings.”<sup>11</sup> And on the precise issue of whether the multipurpose buildings are sufficiently fisheries-related, I interpret the thrust of NSEDC’s argument to be that “starting or supporting commercial fisheries business activities” need not be *the only or the primary* purpose of the projects; rather, it is sufficient that this is *a* purpose of the projects.<sup>12</sup>

In response to my order of June 25, 2004, Ms. Bibb wrote that she used the term “primary purpose” to develop the rationale for initial disapproval of NSEDC’s two substantial amendments, and she deemed it appropriate for the specific circumstances of these amendments.<sup>13</sup> At the hearing, Ms. Bibb agreed that use of the term “primary purpose” was intended as a way of getting at the ultimate question of whether a CDQ project is sufficiently fisheries-related.<sup>14</sup> She further testified that, in deciding whether these multipurpose buildings were sufficiently fisheries-related, she considered that they are not themselves commercial

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<sup>7</sup>IADs at 4.

<sup>8</sup>*Id.* at 4-5.

<sup>9</sup>IAD (03-05NS) at 4.

<sup>10</sup>IADs at 3.

<sup>11</sup>Appeal at 8.

<sup>12</sup>As I discuss later in this Decision, NSEDC also argues in the alternative that CDQ projects need not be fisheries-related at all because, NSEDC asserts, NMFS has approved projects that have *no* fisheries-related purpose.

<sup>13</sup>Bibb Written Statement at 4 (July 7, 2004).

<sup>14</sup>Transcript at 242, line 12, through 243, line 12.

fisheries businesses and do not directly support specific commercial fisheries businesses.<sup>15</sup> Ms. Bibb said that she used the term “primary purpose” to “explain that, in my view, the link to commercial fishing was a very small and not very strongly established part of the purpose of these buildings.”<sup>16</sup>

While there may be a variety of ways to determine whether a CDQ project starts or supports commercial fisheries business activities, the approach Ms. Bibb took in this case is entirely reasonable. She looked at all the purposes NSEDC gave for these multipurpose buildings and considered how significant, direct, and definite the fisheries-related purposes were. These are rational and appropriate criteria for deciding whether CDQ projects with multiple purposes are sufficiently fisheries-related to be deemed consistent with the goals and purpose of the CDQ program stated at 50 C.F.R. §679.1(e). Ms. Bibb thoughtfully articulated her reasoning. Therefore, I conclude that NMFS properly determined that the projects proposed in substantial amendments 03-05NS and 03-06NS do not start or support commercial fisheries business activities.

## **2. May NMFS disapprove substantial amendments 03-05NS and 03-06NS on the grounds that they are inconsistent with 50 C.F.R. §679.1(e)?**

The sole legal basis given for disapproving NSEDC’s substantial amendments is that NMFS deems them inconsistent with the goals and purpose of the CDQ program stated at 50 C.F.R. §679.1(e). NMFS states that it interprets this regulation to require every CDQ project to have as its purpose “starting or supporting commercial fisheries business activities.”<sup>17</sup> NMFS states that the CDQ regulations provide no exception to this requirement.<sup>18</sup>

At the same time, however, NMFS acknowledges that in practice it does not require every CDQ project to be “fisheries-related.” In fact, NMFS states that since early in the CDQ program it has consistently approved non-fisheries-related CDQ projects for all six CDQ groups.<sup>19</sup> These have included college scholarships that do not require recipients to study fisheries-related subjects; vocational training that is not limited to fishing industry jobs; and alcohol and drug abuse support or prevention programs.<sup>20</sup>

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<sup>15</sup>Transcript at 244, line 15, through 245, line 24.

<sup>16</sup>*Id.*

<sup>17</sup>Bibb Written Statement at 2 (July 7, 2004).

<sup>18</sup>*Id.* at 1.

<sup>19</sup>*Id.* at 2.

<sup>20</sup>*Id.*

In addition, testimony by Ms. Bibb and documents in the record have revealed that in the current CDQ allocation cycle alone (2003-2005) NMFS has also approved other non-fisheries-related projects, such as APICDA's miscellaneous grants program,<sup>21</sup> YDFDA's regional economic development coordinator,<sup>22</sup> CVRF's project management program,<sup>23</sup> and BBEDC's regional jobs and skills database.<sup>24</sup>

The non-fisheries-related CDQ projects have been approved on an ad hoc, case-by-case basis, not in accordance with any regulations or written policy.<sup>25</sup> NMFS has not clearly delineated the boundaries or described the characteristics of the types of non-fisheries-related projects that it will approve, nor has NMFS provided notice or guidance to the CDQ groups of which kinds of projects will and won't be approved.<sup>26</sup> Further, NMFS has not articulated any rational basis for distinguishing those non-fisheries-related projects that it has approved from these non-fisheries-related projects that it has disapproved in this case. Why, for example, are scholarships, vocational training programs, and alcohol/drug programs that do not start or support commercial fisheries business activities deemed consistent with the goals and purpose of the CDQ program, but multipurpose community buildings that will include a Head Start program, a learning center, a daycare center, and fisheries training classes are deemed inconsistent with the goals and purpose of the CDQ program?

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<sup>21</sup>Aleutian Pribilof Island Community Development Association. The miscellaneous grants program is described in the NMFS Program Coordinator's submittal of July 1, 2004, at 0100.

<sup>22</sup>Yukon Delta Fisheries Development Association. The regional economic development coordinator project is described in Exhibit 2.

<sup>23</sup>Coastal Villages Region Fund. The project management project is described in the NMFS Program Coordinator's submittal of July 1, 2004, at 0343.

<sup>24</sup>Bristol Bay Economic Development Corporation. The "Casting the Net – Developing a Regional Jobs and Skills Database" project is described in the NMFS Program Coordinator's submittal of July 1, 2004, at 0192.

<sup>25</sup>"[W]e have not explicitly made those exceptions, but by our actions of approving CDPs from the inception of the program that included projects that do not meet that requirement, we have made those exceptions. But I don't interpret our regulations as allowing those exceptions." Bibb, Testimony at page 28, lines 18 - 24.

<sup>26</sup>"One common concern of the CDQ groups has been the uncertainty surrounding allowable investments and the lack of guidance in Federal regulations. A potential negative impact of Alternative 1 [taking no action and maintaining the current Federal regulations] is that the CDQ groups would likely continue to develop their CDPs without a clear understanding of the types of projects authorized under the CDQ program." Regulatory Impact Review/Initial Regulatory Flexibility Analysis (Public Review Draft) for Proposed Amendment 71 to the Fishery Management Plan for Bering Sea/Aleutian Islands Groundfish to implement policy and administrative changes to the Western Alaska Community Development Quota Program at 176 (April 2002). See, "RIR/IRFA (May 2002) (viewed November 26, 2004) at <<http://www.fakr.noaa.gov/analyses/list.htm#cdq>>

I agree with NSEDC that 50 C.F.R. §679.1(e) is a “general statement of the end goals and ultimate purpose of the CDQ program . . . .”<sup>27</sup> The language of this provision does not logically suggest that it should be read as a substantive requirement that each CDQ project in itself must be intended to achieve the goals and purpose of the program.

NMFS is correct that the general CDQ regulations of §679.30 should be construed in light of the goals and purpose of the CDQ program stated in §679.1(e).<sup>28</sup> It is “an elementary rule of construction that all sections of an act relating to the same subject matter should be considered together unless to do so would be plainly contrary to the legislative intent. Insofar as possible the separate effect of each individual part or section of an act is made consistent with the whole.”<sup>29</sup>

It is significant that the statement of goals and purpose was placed outside of the general CDQ regulations section (§679.30) and in a section that separately describes the purpose and scope of each of the fishery management programs administered by the NMFS Alaska Region (§679.1). This separate placement within the regulatory scheme, as well as the text of the provision itself, supports the view that the general statement of goals and purpose of the CDQ program was intended to be descriptive and to provide guidance for the implementation of the program, but not to impose a substantive “fisheries-related” amendment to the definition of “CDQ project” found in §679.2. Contrary to NMFS’s view expressed in the IADs,<sup>30</sup> allowing some CDQ projects to be non-fisheries-related does not mean the agency is ignoring §679.1(e) altogether or diminishing its importance. It is clear from NMFS’s record of approving “non-fisheries-related” CDQ projects that the agency does not find them by definition to be inconsistent with the goals and purpose of the CDQ program.

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<sup>27</sup>Appeal at 13.

<sup>28</sup> “[A]ll of the provisions of a regulatory program must be considered together and one provision cannot be proscribed [sic] an interpretation that would undermine other provisions of the regulatory program.” IADs at 6.

<sup>29</sup>2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION (SUTHERLAND) §47:06 (6<sup>th</sup> ed. 2000).

<sup>30</sup> “NMFS considers the regulatory goals and purpose of the CDQ program at 679.1(e) on an equal footing with the other regulatory provisions of the CDQ program and not merely informal guidance that can be ignored by the agency in implementing the CDQ program.” IAD (03-05NS) at 6; IAD (03-06NS) at 5.

If I were to find that NMFS truly does interpret the regulations to require that every CDQ project must be fisheries-related, then I would also have to find that NMFS applies this requirement in an arbitrary and, therefore, impermissible way. Rather, I find, based on the preponderance of the evidence in the record, that NMFS does not, in fact, interpret the regulations to require CDQ projects to be fisheries-related. Therefore, I conclude that NMFS may not disapprove substantial amendments 03-05NS and 03-06NS on the grounds that they are inconsistent with 50 C.F.R. §679.1(e).

The standard for disapproving a substantial amendment to a Community Development Plan (CDP) is found at 50 C.F.R. §679.30(g)(4)(iii), which provides:

(iii) If NMFS determines that the CDP, if changed, would no longer meet the requirements of this subpart, NMFS will notify the State in writing of the reasons why the amendment cannot be approved [emphasis added].

The words “this subpart” refer to Subpart C of 50 C.F.R. Part 679, which consists of only one regulatory section, §679.30, the general CDQ regulations. Therefore, NMFS must disapprove a substantial amendment if a CDQ group’s community development plan, as amended by the substantial amendment, would no longer meet the requirements of §679.30.

In the IADs, NMFS determined that [1] NSEDC and the State complied with the submission requirements at §679.30(g)(4)(i); [2] amendments 03-05NS and 03-06NS are “substantial amendments,” as defined in §679.30(g)(4)(iv); and [3] the information required by §679.30(g)(4)(v) was submitted by NSEDC. The IADs did not include any determinations that NSEDC or their substantial amendments failed to meet the requirements of §679.30, or that if these amendments were approved, NSEDC’s CDP would no longer meet the requirements of §679.30.<sup>31</sup> The record in this case includes no evidence of violations of §679.30. Therefore, I conclude that the standard for disapproving a substantial amendment in §679.30(g)(4)(iii) has not been met in this case, and that amendments 03-05NS and 03-06NS should be approved.

#### FINDINGS OF FACT

1. The analytical approach used by the NMFS Alaska Region CDQ Program Coordinator, including a consideration of the significance, directness, and definiteness of the fisheries-related purposes of CDQ projects, was a reasonable way of determining whether the multipurpose building projects proposed by NSEDC’s substantial amendments start or support commercial fisheries business activities was reasonable.
2. In the IADs, the CDQ Program Coordinator used rational and appropriate criteria, and

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<sup>31</sup>Except, of course, for the statement that “NMFS believes that approval of [the amendments] would cause NSEDC’s CDP to be inconsistent with the goals and purpose of the program . . .” IADs at 3.



thoughtfully articulated the reasoning that resulted in the determinations that NSEDC's substantial amendments do not start or support commercial fisheries business activities.

3. NMFS in practice does not require every CDQ project to be "fisheries-related."
4. Since early in the CDQ program, NMFS has consistently approved non-fisheries-related CDQ projects for all six CDQ groups.
5. NMFS has approved non-fisheries-related CDQ projects on an ad hoc, case-by-case basis, not in accordance with any regulations or written policy.
6. NMFS has not clearly delineated the boundaries or described the characteristics of the types of non-fisheries-related projects that it will approve, nor has NMFS provided notice or guidance to the CDQ groups of which kinds of projects will and won't be approved.
7. NMFS has not articulated any rational basis for distinguishing those non-fisheries-related projects that it has approved from these non-fisheries-related projects that it has disapproved in this case.
8. NMFS does not, in fact, interpret the regulations to require CDQ projects to be fisheries-related.
9. The IADs did not include any determinations that NSEDC or their substantial amendments failed to meet the requirements of §679.30, or that if these amendments were approved, NSEDC's CDP would no longer meet the requirements of §679.30.

#### CONCLUSIONS OF LAW

1. NMFS properly determined that the projects proposed in substantial amendments 03-05NS and 03-06NS do not start or support commercial fisheries business activities.
2. The language of 50 C.F.R. §679.1(e) does not logically suggest that it should be read as a substantive requirement that each CDQ project in itself must be intended to achieve the goals and purpose of the program.
3. The general CDQ regulations of §679.30 should be construed in light of the goals and purpose of the CDQ program stated in §679.1(e).
4. NMFS may not disapprove substantial amendments 03-05NS and 03-06NS on the grounds that they are inconsistent with 50 C.F.R. §679.1(e).
5. The standard for disapproving a substantial amendment in §679.30(g)(4)(iii) has not been met in this case, and amendments 03-05NS and 03-06NS should be approved.

## DISPOSITION AND ORDER

The IADs that disapproved substantial amendments 03-05NS and 03-06NS are REVERSED and the amendments are approved. This Decision takes effect December 27, 2004, unless by that date the Regional Administrator orders review of this Decision.

The Appellant or the NMFS Alaska Region CDQ Program Coordinator may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska time, on the tenth day after this Decision, December 6, 2004. A Motion for Reconsideration must be in writing, must specify one or more material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement in support of the motion.

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Edward H. Hein  
Chief Appeals Officer