Draft for Council Review

Regulatory Impact Review

Amendment 87 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area

Amendment 21 to the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crab

and

Regulatory Amendments to Revise Community Eligibility Criteria and Clarify Community Eligibility Status for the Western Alaska Community Development Quota Program

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Abstract: This Regulatory Impact Review evaluates the costs and benefits of proposed fishery management plan amendments and regulatory amendments that would clarify the eligibility criteria and status of communities participating in the Western Alaska Community Development Quota Program. This action is necessary to make community eligibility criteria and community eligibility status in the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area, the Fishery Management Plan for Bering Sea/ Aleutian Islands King and Tanner Crabs, and 50 CFR part 679 consistent with the Magnuson-Stevens Fishery Conservation and Management Act and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users.

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EXECUTIVE SUMMARY

This Regulatory Impact Review (RIR) was prepared to meet the requirements of Presidential Executive Order 12866 for an evaluation of the benefits and costs, and of the significance, of a proposed regulatory action. A categorical exclusion under the National Environmental Policy Act (NEPA) has been prepared for the proposed action. In addition, analysts have drafted a memorandum certifying that the proposed action would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis under the Regulatory Flexibility Act has not been prepared.

The proposed action would clarify the community eligibility criteria and community eligibility status for communities participating in the Western Alaska Community Development Quota (CDQ) Program. This action is necessary to make community eligibility criteria and community eligibility status in the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (the BSAI groundfish FMP), the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (the BSAI crab FMP), and 50 CFR part 679 consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).

The BSAI groundfish FMP and Federal regulations contain community eligibility criteria for the CDQ Program that differ, and neither exactly coincides with the community eligibility requirements that were added to the MSA in 1996, through the Sustainable Fisheries Act. The proposed action would make the eligibility criteria in the BSAI groundfish FMP and 50 CFR part 679 consistent with the eligibility criteria in the MSA and would add reference to these criteria in the BSAI crab FMP.

There currently are 65 communities that NMFS has determined are eligible to participate in the CDQ Program. Table 7 to 50 CFR part 679 includes only 57 total communities: 56 communities that were determined eligible when the program was originally implemented in 1992, and one community (Akutan) that was added in 1996 through rulemaking. Eight additional communities were determined to be eligible by NMFS on April 19, 1999, through an agency administrative determination that was not formalized through rulemaking, due to emerging legal questions about community eligibility. In a legal opinion issued on August 15, 2003, NOAA General Counsel (NOAA GC) identified inconsistencies between the eligibility criteria in the MSA and 50 CFR part 679, and recommended that NMFS amend the regulations to conform with the MSA. In addition, NOAA GC advised that the eligibility status of all 65 participating communities would need to be re-evaluated "to determine whether each community meets all of the statutory eligibility criteria." In a discussion paper presented to the Council at its October 2003 meeting, Council and NMFS staff concluded that, if such a re-evaluation were done, some of the 65 communities currently participating in the CDQ Program would likely not meet all of the CDQ Program eligibility criteria.

Upon release of the legal opinion and discussion paper, the CDQ groups and the State of Alaska asked Congress to clarify its intent with respect to the eligibility status of the 65 communities participating in the CDQ Program. Congress provided this clarification through passage of the SAFETEA-LU, in August 2005. This statute confirmed the eligibility status of the 65 communities currently participating in the CDQ Program, which are those listed in Table 7 and those determined eligible by NMFS on April 19, 1999. This legislation provides the authority to add the following eight communities to Table 7: Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.

NOAA GC examined the eligibility criteria in the MSA and the SAFETEA-LU and concluded that the SAFETEA-LU did not repeal the community eligibility criteria in section 305(i)(1)(B) of the MSA. The language in the SAFETEA-LU does not expressly state that it amends or repeals the MSA community

eligibility criteria. Additionally, the eligibility criteria in the MSA and the provisions of the SAFETEA-LU are not in conflict and are not irreconcilable. The SAFETEA-LU addresses specific communities that are eligible for the CDQ Program, and the MSA includes eligibility criteria for future entrants. Analysts have identified nine currently unpopulated or seasonally populated communities that meet some of the MSA community eligibility criteria. Therefore, a potential exists for additional applications for community eligibility under the MSA criteria if any of these communities were to become populated in the future.

The proposed action does not, on its own, result in economic impacts on the CDQ groups or the 65 participating communities that are different from the economic impacts that already exist as a result of their current participation in the CDQ Program. The proposed action would confirm their eligibility under the SAFETEA-LU. The six CDQ groups and 65 communities that have been participating in the CDQ Program and receiving economic development benefits as a result of their participation will continue to participate, and the amount or nature of the economic benefits they will receive in the future will not be affected by the proposed action.

The SAFETEA-LU had a significant positive impact on the CDQ groups and CDQ communities by confirming the eligibility status of the 65 participating communities and eliminating the need for NMFS to re-evaluate the eligibility status of the participating communities. This legislation provided stability and assurances to the CDQ communities that they could continue to participate in the CDQ Program and benefit from the economic development projects provided to their residents through the CDQ Program. In addition, the Congressional action prevented the CDQ groups, communities, State, and NMFS from incurring the costs associated with a re-evaluation of all 65 participating communities. Therefore, the positive economic impacts for the CDQ groups and communities are as a result of the Congressional action under the SAFETEA-LU, and not as a result of the proposed regulatory amendments. The proposed action would only clarify and correct the regulations to conform to the MSA and SAFETEA-LU. No CDQ communities that have been participating in the CDQ Program would be removed from eligibility and no communities would be added to the program.

Neither SAFETEA-LU, nor the proposed action has any economic impact on the status of the nine communities that may be eligible to apply for the CDQ Program in the future, because neither of these actions makes any change to the opportunity for these communities to apply for CDQ Program eligibility under the eligibility criteria in the MSA. For these reasons, the proposed action would not impose any adverse economic impacts on the CDQ groups, CDQ communities, or any community that may apply for eligibility in the future.

1.0 Introduction

This Regulatory Impact Review (RIR) evaluates the costs and benefits of proposed fishery management plan amendments and regulatory amendments that would clarify the eligibility criteria and status for communities participating in the Western Alaska Community Development Quota (CDQ) Program. This action is necessary to make community eligibility criteria and status in the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI groundfish FMP), the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (BSAI crab FMP), and 50 CFR part 679 consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU: Public Law 109-59, 2005).

2.0 Requirements for a Regulatory Impact Review

A RIR is required under Presidential Executive Order (E.O.) 12866 (58 *FR* 51735; October 4, 1993). The requirements for all regulatory actions specified in E.O. 12866 are summarized in the following statement from the order:

> *"In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."*

E.O. 12866 requires that the Office of Management and Budget review proposed regulatory programs that are considered to be "significant." A "significant regulatory action" is one that is likely to:

- Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

3.0 Statutory Authority

The National Marine Fisheries Service (NMFS) manages the CDQ fisheries under the BSAI groundfish FMP and the BSAI crab FMP. The North Pacific Fishery Management Council (Council) prepared these FMPs under the authority of the MSA. Regulations implementing the BSAI groundfish FMP are at 50 CFR part 679. Regulations implementing the BSAI crab FMP are at 50 CFR part 679 and 50 CFR part 680. General regulations that also apply to United States fisheries appear at subpart H of 50 CFR part

600. Statutory authority related to eligible communities for the CDQ Program also is provided by the SAFETEA-LU.

4.0 Purpose and Need for the Action

The BSAI groundfish FMP (Section 13.7.4) and Federal regulations at 50 CFR 679.2 contain community eligibility criteria for the CDQ Program that differ, and neither exactly coincides with the community eligibility requirements that were added to the MSA in 1996 through the Sustainable Fisheries Act (SFA).[1] In addition, there currently are 65 communities that NMFS has determined are eligible to participate in the CDQ Program. Table 7 to 50 CFR part 679 includes only 57 total communities: 56 communities that were determined to be eligible when the program was originally implemented in 1992, and one community (Akutan) that was added in 1996 through rulemaking. Eight additional communities were determined to be eligible by NMFS on April 19, 1999, through an agency administrative determination that was not formalized through rulemaking, due to emerging legal questions about community eligibility. In a legal opinion issued on August 15, 2003, NOAA General Counsel (NOAA GC) identified inconsistencies between the eligibility criteria in the MSA and 50 CFR part 679, and recommended that NMFS amend the regulations to conform with the MSA. In addition, NOAA GC advised that the eligibility status of all 65 participating communities would need to be re-evaluated "to determine whether each community meets all of the statutory eligibility criteria." In a discussion paper presented to the Council at its October 2003 meeting, Council and NMFS staff concluded that, if such a re-evaluation were done, some of the 65 communities currently participating in the CDQ Program would likely not meet all of the CDQ Program eligibility criteria.

Upon release of the legal opinion and discussion paper, the CDQ groups and the State of Alaska (State) asked Congress to clarify its intent with respect to the eligibility status of the 65 communities participating in the CDQ Program. Congress provided this clarification through passage of the SAFETEA-LU in August 2005. This statute confirmed the eligibility status of the 65 communities currently participating in the CDQ Program, which are those listed in Table 7 and those determined eligible by NMFS on April 19, 1999. This legislation provides the authority to maintain the communities currently listed as eligible and to add the following eight communities to Table 7: Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.

FMP amendments and regulatory amendments are needed to make the BSAI groundfish FMP, the BSAI crab FMP, and 50 CFR part 679 consistent with the MSA and the SAFETEA-LU.

5.0 Background and History

Overview of the CDQ Program

The CDQ Program was designed to improve the social and economic conditions in western Alaska communities by facilitating their economic participation in the Bering Sea and Aleutian Island fisheries. Residents of rural western Alaska have historically had limited economic opportunities. At the same time, some of the world's largest and most economically valuable commercial fisheries have developed in the adjacent waters of the Eastern Bering Sea and off the Aleutian Islands. But, because participation in BSAI fisheries is capital intensive, requiring large investments in vessels and specialized gear (and increasingly, acquisition of limited access privileges), the benefits from the development of these resources has largely accrued to populations outside of rural western Alaska. The CDQ Program was developed to redistribute some of these economic benefits, by directly vesting eligible communities with

[1] Community eligibility criteria are in Section 305(i)(1)(B) of the MSA.

fixed shares (i.e., quotas) of the harvestable surplus of commercially important species. The program provides the managing organizations representing eligible communities ("CDQ groups") with allocations of BSAI groundfish, halibut, and crab, as well as allocations of prohibited species bycatch (salmon, halibut, and crab). These allocations, in turn, provide an opportunity for residents of these communities to participate in the BSAI fisheries.

Currently, 65 communities are considered by NMFS to be eligible to participate in the CDQ Program. The CDQ communities must be located within 50 nautical miles of the Bering Sea coast, or on an island in the Bering Sea. Approximately 27,000 people live in the CDQ communities, which are small communities populated predominantly by Alaska Native people. These 65 communities have formed the following six CDQ groups to manage and administer their CDQ allocations, investments, and economic development projects:

Aleutian Pribilof Island Community Development Association (APICDA)
Bristol Bay Economic Development Corporation (BBEDC)
Central Bering Sea Fishermen's Association (CBSFA)
Coastal Villages Region Fund (CVRF)
Norton Sound Economic Development Corporation (NSEDC)
Yukon Delta Fisheries Development Association (YDFDA)

The annual CDQ reserves for groundfish, prohibited species, halibut, and crab are determined by the total annual catch limit for each species and the percentage of each catch limit allocated to the CDQ Program. The total annual catch limits are established by NMFS for groundfish and prohibited species, by the International Pacific Halibut Commission (IPHC) for halibut, and by the State for crab. The percentage of each catch limit allocated to the CDQ Program is determined by the American Fisheries Act for pollock (10%), the Consolidated Appropriations Act of 2005 and the MSA for crab (10% for all crab species, except 7.5% for Norton Sound red king crab), the BSAI groundfish FMP for all other groundfish and prohibited species (7.5%, except 20% for fixed gear sablefish), and 50 CFR 679 for halibut (20% to 100%). The CDQ allocations are divided, annually, among the six CDQ groups.

In 2005, approximately 188,000 metric tons of groundfish, 2.3 million pounds of halibut, and 3.3 million pounds of crab were allocated to the CDQ Program. The six CDQ groups had total revenues in 2004 of approximately $133 million, including $55 million in royalties from the lease of CDQ allocations. Royalties from pollock were $46 million (or 84% of total royalties from the CDQ allocations). Since 1992, the CDQ groups have accumulated assets worth approximately $343 million, including ownership of small local processing plants, catcher vessels, and catcher/processors that participate in the groundfish, crab, salmon, and halibut fisheries. The CDQ groups have used their CDQ allocations to develop local fisheries, invest in a wide range of fishing businesses outside the communities, and provide residents with education, training, and job opportunities in the fishing industry.

Background

In October 2000, NMFS received a letter challenging the 2001-2002 CDQ allocations recommended by the State. This letter posed questions about the regulatory language pertaining to CDQ community eligibility and, more specifically, about the eligibility status of a few communities currently participating in the program. Currently, community eligibility criteria for participating in the CDQ Program are included in the MSA, the BSAI groundfish FMP, and in Federal regulations[2]. The exact wording of the criteria differs among the three documents, which creates difficulty in interpreting the standard for an

[2] Regulations governing community eligibility are found at 50 CFR 679.2, and a list of eligible communities is found in Table 7 to part 679.

eligible community. The letter prompted NMFS to examine the consistency of Federal regulations at 50 CFR part 679, relative to the CDQ Program eligibility criteria established in the MSA.

Upon identification of issues associated with community eligibility, NMFS staff requested a legal opinion (see Appendix 1) from NOAA GC on how to interpret and apply the criteria for community eligibility in the MSA. This legal opinion was issued August 15, 2003. The document provides legal guidance for interpreting the MSA criteria, and the analytical approach recommended to mitigate any inconsistencies between these criteria and those in 50 CFR part 679. The legal opinion also provides a comprehensive statutory and regulatory history of the development of the community eligibility criteria for the CDQ Program. Because the legal opinion is provided as Appendix 1, only a brief history is included here.

On November 23, 1992, NMFS published the final rule in the *Federal Register* to implement the CDQ Program (57 CFR 54936). The final rule included a list of eligibility criteria, as well as a list of eligible communities that appeared to meet the criteria. The regulatory language required that the Secretary of Commerce (Secretary) review the State's findings, to determine that each community either met the eligibility criteria *or* was listed on the table of eligible communities. This language is significant in that it did not require that the State and NMFS substantively determine a community's eligibility status using the criteria every CDQ quota allocation cycle. The language in the final rule implied that if a community was listed in Table 7, it was automatically considered an eligible community for the purposes of the CDQ Program and CDQ allocations (Appendix 1, page 3). No further determination of the community's eligibility status would be necessary in the future.

In June 1996, NMFS published a final rule in the *Federal Register* that consolidated CDQ Program regulations in part 679. This action combined the pollock and halibut/sablefish CDQ Programs into one subpart, Subpart C, which contained a section with the criteria for community eligibility. The new language included the four eligibility criteria used in the original CDQ Program with regard to pollock programs. Later that year, NMFS published a final rule that added the community of Akutan as an eligible community to Table 7 and removed language in the eligibility criteria that explicitly excluded Akutan. When the pollock CDQ Program was originally implemented, the community eligibility criteria excluded Akutan from the CDQ Program because there was a large processing plant within city limits. However, APICDA provided the Council and NMFS with information showing the community gained little economic benefit from the processing plant and, thus, met the eligibility criteria. The addition of

Akutan to the CDQ Program resulted in 57 communities being deemed eligible to participate in the CDQ Program.

In October 1996, the SFA amended the MSA, adding statutory language that established the western Alaska CDQ Program (Section 305(i)). The Senate report accompanying the bill noted that the SFA "would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ Programs" (S. REP. No. 104-276, at 26 (1996)). The statute language includes a list of eligibility criteria, which differ slightly from that published in Federal regulations, and does not include a list of eligible communities. The community eligibility criteria in the MSA are provided below:

ALASKA AND WESTERN PACIFIC COMMUNITY DEVELOPMENT PROGRAMS.

(1)(A) The North Pacific Council and the Secretary shall establish a western Alaska community development quota program under which a percentage of the total allowable catch of any Bering Sea fishery is allocated to the program.

(B) To be eligible to participate in the western Alaska community development quota program under subparagraph (A) a community shall--

> *(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;*
>
> *(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean;*
>
> *(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register;*
>
> *(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;*
>
> *(v) consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands; and*
>
> *(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.*

Subsequently, with the expansion of the CDQ Program to include a portion of all BSAI groundfish TACs, NMFS published two final rules implementing the multi-species CDQ allocations in 1998. At that time, no substantive changes were made to the wording of the eligibility criteria and no changes were made to Table 7. Thus, the current definition of eligible community is that which was included in the final rule for the multispecies CDQ Program. The current regulatory text at 50 CFR 679.2 is in Appendix 2.

In April 1999, NMFS made a determination that an additional eight communities were eligible for the CDQ Program, based on a recommendation and supporting documentation from the State. These additional eight communities are Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek. The determination that these communities were eligible for the CDQ Program was initially based on the realization that all eight were within 50 nautical miles of the Bering Sea coast, but had not been identified as such in the original review of eligible communities, conducted in 1991 and 1992. The State reviewed the other eligibility criteria and recommended to NMFS that these eight communities met all of the eligibility criteria. NMFS issued a decision, dated April 19, 1999, accepting the State's recommendation. These eight communities have been considered eligible for the program since that time. NMFS did not formalize this decision through rulemaking, nor did it amend Table 7, due to emerging questions about community eligibility. Thus, Table 7 still includes only the 57 communities previously determined to be eligible, through rulemaking in 1992 and 1996.

Legal Opinion on Consistency between the MSA and Federal Regulations

In the legal opinion, NOAA GC identifies where inconsistencies exist between the criteria listed in Federal regulations and those listed in the MSA. A side-by-side comparison is presented in Appendix 1. The opinion states that "under the rules of statutory construction, the language of the statute is controlling and takes precedence over the language of an existing regulation if the regulation is not consistent with the statutory language." In addition, while an administrative agency has authority to interpret a statute,

the deference afforded to an agency's interpretation does not apply when the agency's interpretation is in conflict with a legislative mandate. Thus, the opinion states the following:

> *"In October 1996, when the MSA was amended, Congress spoke to the issue of community eligibility and provided definable boundaries for community participation in the CDQ Program. And although Congress stated in the legislative history that the SFA would establish community eligibility criteria that are based upon those previously developed by the Council and NMFS, Congress did not use language that is identical to the regulatory eligibility criteria. Based on the rules of statutory construction outlined above, the eligibility criteria set forth in the MSA control and take precedence over the regulatory criteria set forth in 50 CFR §679.2 to the extent there is any conflict between the statutory and regulatory language. Additionally, because Congress has now specifically addressed the issue of community eligibility for the CDQ Program, NMFS's previous interpretation of the MSA as providing the Council and agency the ability to implement eligibility criteria consistent with the general provisions of the MSA cannot be maintained to the extent that the regulatory criteria are in conflict with the statutory language of the MSA."*

NOAA GC found that most of the eligibility criteria in the MSA are substantively identical to the eligibility criteria in regulation, but that the eligibility criterion at MSA section 305(i)(1)(B)(v) requires two points of interpretation by NMFS. This criterion requires eligible communities to "*consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands.*" NOAA GC advised that NMFS should clarify its interpretation of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" and the term "current."

Interpretation of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"

The legal opinion recommends revising regulations at 50 CFR part 679 to be consistent with the MSA language regarding this criterion. The regulations at §679.2 refer to fishing effort "in the waters of the BSAI." The term "BSAI" is defined elsewhere in §679.2 as including only waters in the Exclusive Economic Zone (EEZ) three to 200 miles from the coast, and excluding State waters between zero and three miles from the coast. The MSA criterion, on the other hand, refers to "waters of the Bering Sea or waters surrounding the Aleutian Islands." NOAA GC concluded that Congress intended that both commercial harvests and subsistence harvests should be used to satisfy criterion (v). However, for reasons explained in more detail in the legal opinion, subsistence fishing, by definition, cannot come from the EEZ and must come from State waters. Therefore, the MSA criterion related to the location of fishing effort must be interpreted to include fishing effort in State waters. Use of the term "BSAI" in the CDQ community eligibility criteria in 50 CFR part 679 is more restrictive than the eligibility criteria in the MSA. Therefore, NMFS must revise the related eligibility criterion in its regulations to be consistent with the MSA.

Interpretation of the term "current"

The second point of interpretation recommended by NOAA GC relates to application of the word "current" when referring to fishing effort. NMFS has interpreted and applied the word "current" to mean the level of a community's commercial or subsistence harvests at the time of initial evaluation for eligibility. If the community's harvests satisfied the criterion at the time they were initially evaluated for eligibility, then the community was determined to have satisfied the criterion in perpetuity, and no further consideration was required by NMFS (Appendix 1, page 15). NOAA GC concluded that, because the

statutory language is ambiguous on this point, NMFS was permitted to develop a reasonable interpretation of the term, and did so. Thus, with the deference afforded to the agency to interpret the term, and the way the agency has applied the criterion in the past, it follows that NMFS will continue to interpret the term as meaning fishing effort during the time the community was or is initially considered for eligibility. Once determined to have met the criterion, it would satisfy the criterion thereafter. This means that a community that may apply for eligibility in the future would be evaluated on the basis of its fishing effort at the time of its evaluation, and not as of the date the MSA criteria were published, or any other point in time. NOAA GC recommended that NMFS clarify this interpretation of the term "current", in its regulations.

SAFETEA-LU

Upon release of the legal opinion and discussion paper, the CDQ groups and the State of Alaska asked Congress to clarify its intent with respect to the eligibility status of the 65 communities participating in the CDQ Program. In a letter dated November 26, 2003, Alaska Senator Lisa Murkowski notified NMFS of her intent that Congress would clarify the eligibility status of the 65 participating communities, and she asked NMFS to refrain from any further action on the CDQ Program community eligibility issue until Congress could act. In the Consolidated Appropriations Act for 2005, the Congress directed that, in fiscal year 2005, no funds appropriated under the Act could be used to disqualify any community participating in the CDQ Program from receiving allocations (Public Law No. 108-447, §220, 118 Stat. 2891 (2004).

On August 10, 2005, the President signed the SAFETEA-LU. Section 10206 of this legislation directed that the 65 communities currently participating in the CDQ Program are eligible to continue to participate in the program. This action eliminated the need for NMFS to re-evaluate the eligibility status of the 65 participating communities relative to the eligibility criteria in the MSA. The SAFETEA-LU addressed CDQ Program community eligibility as follows:

> "*A community shall be eligible to participate in the western Alaska community development quota program established under section 305(i) of the Magnuson-Stevens Fishery Conservation and Management Act if the community-*
>
> *(1) is listed in table 7 to part 679 title 50, Code of Federal Regulations, as in effect on March 8, 2004; or*
>
> *(2) was determined to be eligible to participate in such program by the National Marine Fisheries Service on April 19, 1999."*

NOAA GC examined the eligibility criteria in the MSA and the SAFETEA-LU and concluded that the SAFETEA-LU did not repeal the language in section 305(i)(1)(B) of the MSA. The language in section 10206 of the SAFETEA-LU does not expressly state that it amends or repeals the MSA criteria. Additionally, the two provisions are not in conflict and are not irreconcilable. The SAFETEA-LU addresses specific communities that are eligible for the CDQ Program, and the MSA includes eligibility criteria for future entrants.

The potential for additional eligible communities is discussed in more detail in Section 6.2.

6.0 Alternatives Considered and Impacts of the Alternatives

Two alternatives are considered in this analysis:

Alternative 1: No Action. Do not revise CDQ community eligibility requirements in the BSAI groundfish FMP and 50 CFR part 679; do not add reference to the eligibility criteria in the BSAI crab FMP; and do not update Table 7 at 50 CFR part 679.

Alternative 2: Revise the CDQ community eligibility requirements in the BSAI groundfish FMP and 50 CFR part 679; add reference to the eligibility criteria in the BSAI crab FMP; and update Table 7 at 50 CFR part 679 to be consistent with Federal statutes.

6.1 *Alternative 1: No action*

Under Alternative 1, the BSAI groundfish FMP and 50 CFR part 679 would not be amended to make the CDQ community eligibility requirements consistent with the MSA, and the BSAI crab FMP would not be amended to add reference to these eligibility criteria. In addition, Table 7 of 50 CFR part 679 would not be revised to include all of the 65 communities currently participating in the CDQ Program and determined to be eligible under the SAFETEA-LU. The BSAI groundfish FMP and 50 CFR 679.2 would continue to define community eligibility criteria that are not consistent with Section 305(i)(1)(B) of the MSA, and would not recognize eligible communities authorized by the SAFETEA-LU. It is not legally permissible for the FMPs and Federal regulations to be inconsistent with statute. In addition, having FMPs and regulations that are inconsistent with statutory mandates creates confusion for representatives of the CDQ communities, the CDQ groups, and members of the public. Therefore, Alternative 1 cannot be selected as the preferred alternative.

6.2 *Alternative 2: Amend the BSAI FMPs and Federal regulations*

Under Alternative 2, the CDQ community eligibility criteria in the BSAI groundfish FMP and 50 CFR part 679, including Table 7, would be amended to be consistent with the MSA; reference to the community eligibility criteria would be added to the BSAI crab FMP; and Table 7 of 50 CFR part 679 would be revised to be consistent with the SAFETEA-LU. Alternative 2 is recommended as the preferred alternative.

There are five elements to Alternative 2, as follows:

1. Revise the BSAI groundfish FMP so that the eligibility criteria are the same as those listed in the MSA. Proposed text of the FMP amendment is in Appendix 3;

2. Revise the BSAI crab FMP to reference the community eligibility criteria in the BSAI groundfish FMP. Proposed text of the FMP amendment is in Appendix 4;

3. Revise NMFS regulations (50 CFR 679.2) so that the eligibility criteria are the same as the criteria listed in the MSA. Proposed revisions to the regulations are in Appendix 5;

4. Revise Table 7 to 50 CFR 679 to list the 65 communities eligible for the CDQ Program under the SAFETEA-LU. The proposed revised Table 7 is in Appendix 6;

5. Establish a process in Federal regulations by which communities not listed on Table 7 could apply and be evaluated for eligibility for the CDQ Program. Clarify that rulemaking would be necessary to amend Table 7 in the future. Proposed revisions to the regulations are in Appendix 5.

Revisions to the BSAI FMPs and Federal Regulations (Elements 1-3)

The community eligibility criteria in the BSAI groundfish FMP and Federal regulations must be revised to be consistent with the eligibility criteria in the MSA. The NOAA GC legal opinion concluded that not all of the criteria in §679.2 differ substantively from that in the MSA, thus not all of the criteria need to be modified. However, in order to provide clarity for current and future use of the criteria, the eligibility criteria in the BSAI groundfish FMP and §679.2 would be revised to be identical to the MSA criteria, with one exception. The MSA criterion that states that a community must "*meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register"* would not be added to the BSAI groundfish FMP or Federal regulations, because it is not a unique eligibility criterion and appears to just restate the requirement that communities applying for the CDQ Program meet the eligibility criteria. Even without significant differences in the interpretation of the wording of the various criteria, having the same exact criteria in each document will improve clarity and consistency in understanding and applying the criteria for participation in the CDQ Program.

The proposed amendments to the BSAI groundfish FMP are in Appendix 3. These revisions would affect Section 3.7.4 of the BSAI groundfish FMP, which addresses the CDQ Program. A paragraph that describes the respective role of the Governor of Alaska, the Council, and the Secretary of Commerce in designating communities eligible for the CDQ Program, would be removed. Text identifying the MSA and the SAFETEA-LU as the legal authority for the CDQ Program eligibility criteria and status of the 65 currently participating communities would be added. In addition, the eligibility criteria currently in the FMP would be revised to use the same words as the MSA, and specific reference to Akutan as an eligible CDQ community would be removed from the FMP.

The BSAI crab FMP currently has very little text related to the CDQ Program. The first paragraph of section 8.1.4.2 references the allocation of crab to the CDQ Program that was effective on March 23, 1998, and states that "*The crab CDQ program established the crab CDQ reserve and authorizes the State of Alaska to allocate the crab CDQ reserve among CDQ groups and to manage crab harvesting activity of the BS/AI CDQ groups."* The last paragraph of Section 8.1.4.2 states the following:

> *CDQ Allocation*
>
> *CDQs will be issued for 3.5% in 1998; 5% in 1999; and 7.5% in 2000 of all BSAI crab fisheries that have a Guidelines Harvest Level set by the State of Alaska. The program will be patterned after the pollock CDQ program (defined in section 14.4.11.6 of the BSAI groundfish FMP), but will not contain a sunset provision. Also, Akutan will be included in the list of eligibile CDQ communities.*

Chapter 11 was added to the BSAI crab FMP with approval of the crab rationalization program under Amendments 18 and 19. These amendments were approved by NMFS on November 19, 2004. Under the crab rationalization program, 10 percent of the annual allocations of all crab species, except Norton Sound red king crab, are allocated to the CDQ Program.

The BSAI crab FMP would be amended to remove the last two sentences of the first paragraph of section 8.1.4.2 and the last paragraph of Section 8.1.4.2 (both reproduced above), and two sections of Chapter 11. The provisions of the removed text would be incorporated into a new Section 8.1.4.3 title "Western Alaska Community Development Quota Program." The current title of Section 8.1.4.2 is "Vessel License Limitation." Although allocations of crab to the CDQ Program were initially established as part of the groundfish and crab license limitation program, the crab CDQ allocations and the CDQ Program are separate from the license limitation program and, therefore, warrant a separate section of the BSAI crab FMP.

In the new Section 8.1.4.3, reference would be made to the correct section of the BSAI groundfish FMP that contains a more thorough description of the CDQ Program, including the revised community eligibility criteria described above. In addition, the allocations of all of the crab species to the CDQ Program that were implemented under crab rationalization would be listed in this new section, as would the continuing allocation of 7.5% of the Norton Sound red king crab annual guideline harvest level. The requirement under crab rationalization that 25 percent of the total CDQ allocations of crab be delivered on shore also would be moved from Chapter 11 to the new section 8.1.4.3.

Possible revisions to Federal regulations at 50 CFR part 679 are shown in Appendix 5. The community eligibility criteria in the definition of an eligible community at §679.2 would be revised to use the exact words of the MSA. In the criterion related to the location of fishing effort, the "BSAI" would no longer be used and the MSA phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" would be used. NMFS regulations would clarify that, for purposes of evaluating the eligibility criteria, the phrase "current commercial or subsistence fishing effort" means fishing effort by residents of the community at the time the community applies for eligibility for the CDQ Program. The regulations also would clarify that the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" means the waters of the Bering Sea and Aleutian Islands Area (the Exclusive Economic Zone from 3 to 200 miles), and Alaska State waters (0 to 3 miles) adjacent to the waters of the Bering Sea and Aleutian Islands Area. Both of these areas are defined at § 679.2.

The information requirements for the Community Development Plan (CDP) at §679.30(a)(1)(iv) related to community eligibility would be revised to state that each community that participated in a CDP must be listed on Table 7 to 50 CFR part 679. This revision would remove the statement that a participating community must either be listed on Table 7 *or* meet the eligibility criteria in §679.2, and clarify that only communities listed on Table 7 would be allowed to participate in the CDQ Program. Inclusion in a CDP is the means through which communities participate in the CDQ Program and benefit from the CDQ allocations. As described in the two following sections, all of the 65 communities currently eligible for the CDQ Program would be included in Table 7, and a process for evaluating future applications for community eligibility and placement on Table 7 would be added to the regulations.

Revisions to Table 7 (Element 4)

Alternative 2 would amend Table 7 of 50 CFR part 679 to list all of the 65 communities currently participating in the CDQ Program and identified as eligible in the SAFETEA-LU. The proposed revisions are shown in Appendix 6. These revisions would add to Table 7 the following eight communities that NMFS determined were eligible for the program on April 19, 1999: Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek. These additions would bring the total number of communities listed in Table 7 to 65. In addition, the proposed action also would list the communities of Pilot Point and Ugashik separately. In the original list of eligible communities approved in 1992, these two communities were listed as "Pilot Point/Ugashik." However, these are two separate communities, not two names for the same community, as is the case with "Port Heiden/Meschick."[3] The community of Sheldon's Point is now called Nunam Iqua. This change also will be reflected in the revisions to Table 7.

Future applications for community eligibility (Element 5)

[3] Additional information about these communities is in Appendix 1, page 3. Table 7 to 50 CFR 679 also lists "Sovonoski/King Salmon." Sovonoski or Savonaski and King Salmon also are not the same communities, however, this combined listing was made because King Salmon is not an ANSCA-certified Native village. More information about King Salmon and Savonoski is in the NOAA GC legal opinion in Appendix 1, page 4.

As explained earlier, any community that meets the eligibility criteria in the MSA is eligible to participate in the CDQ Program. There are nine previously populated, Alaska Native Claims Settlement Act (ANCSA) certified Native villages that are located within 50 nautical miles of the Bering Sea coast. These communities are Bill Moore's Slough, Chuloonawick, Council, Hamilton, King Island, Mary's Igloo, Paimiut, Solomon, and Umkumiute. The existence of communities that meet two of the eligibility criteria (ANSCA-certified Native villages and location) provide the potential that these communities could apply for CDQ Program eligibility in the future. Therefore, under Alternative 2, NMFS regulations would be revised to provide the procedures that would be required to be followed by any person who applies for CDQ Program eligibility on behalf of one of these communities, in the future.

The State's community database and community information summaries describe these communities as unpopulated or seasonal-use areas.[4] These communities would have to become populated in the future and meet other requirements for eligibility in order for someone to successfully apply for CDQ Program eligibility on their behalf. Table 1 provides some descriptive information about each of these nine ANSCA-certified Native villages from the State's community database and community information summaries. The table includes the name of the community, the State's estimate of the current population of the community, the population reported in the 2000 Census, the location of the community, a description of the community, and the nature of its historical and current use.

Under Alternative 2, NMFS regulations would be revised to add requirements for any future applications for community eligibility, including the information that would have to be submitted to NMFS to support such an application. The applicant would be required to provide NMFS with a written description and supporting documentation demonstrating that the community meets each of the eligibility criteria in NMFS regulations.

A future application for community eligibility would be considered a "petition for rulemaking," because, if NMFS determined that a community did meet the MSA eligibility criteria, the community would be added to Table 7 through proposed and final rulemaking. In addition, a community would not be allowed to participate in the CDQ Program until its addition to Table 7 was effective.

7.0 Qualitative Assessment of Benefits and Costs

Alternative 2 (the recommended preferred alternative) could affect the six CDQ groups that currently participate in the CDQ Program, the 65 communities currently participating in the CDQ Program and determined eligible to continue to participate by the SAFETEA-LU; and up to nine additional communities that may apply for CDQ Program eligibility in the future. The CDQ groups are non-profit corporations, incorporated under the laws of the State of Alaska, for the purpose of representing one or more member communities eligible for the CDQ Program, receiving and using quota allocations on behalf of their member communities, and using the proceeds from those allocations for the benefit of those communities. The CDQ groups are: Aleutian Pribilof Island Community Development Association, Bristol Bay Economic Development Corporation, Central Bering Sea Fishermen's Association, Coastal Villages Region Fund, Norton Sound Economic Development Corporation, and Yukon Delta Fisheries Development Association. Each of the 65 eligible communities is uniquely affiliated with a single CDQ group.

[4] The State of Alaska's community database and community information summaries are available on the State of Alaska, Department of Commerce, Community, and Economic Development's website at http://www.commerce.state.ak.us/dca/commdb/CF_COMDB.htm.

Table 1. Descriptive information about nine unpopulated or seasonally populated ANSCA-certified native villages located within 50 nautical miles of the Bering Sea coast.

Name of Community	Population		Location	Description
	State Current	2000 Census		
Bill Moore's Slough	0	0	Yukon Delta, southwest of Kotlik	Yupik summer subsistence-use camp, traditional villagers live permanently in Kotlik.
Chuloonawick	0	0	Yukon-Kuksokwim Delta	Also known as Kwikpak. "Historical Eskimo village," now abandoned. Summer fish camp for Emmonak residents.
Council	0	0	60 miles northeast of Nome	Historic fish camp site and later a gold rush town. Currently not occupied year-round. Primarily a summer fish camp site for Nome residents.
Hamilton			Yukon Delta, southwest of Kotlik	Yupik summer subsistence-use camp; villagers live permanently in Kotlik.
King Island	0	0	40 miles west of Cape Douglas in the Bering Sea, south of Wales	Historically occupied by Inupiat Eskimos. King Islanders are now year-round residents of Nome.
Mary's Igloo	0	0	40 miles southeast of Teller on the Seward Peninsula, northeast of Nome.	Historically occupied by Inupiat Eskimos. Now a summer fish camp, many traditional villagers live in Teller.
Paimiut	2	0	On the Bering Sea coast south of Scammon Bay.	Now a summer fish camp used seasonally for subsistence activities. Villagers live in Hooper Bay during the winter months.
Solomon	8	4	30 miles east of Nome.	Historically an Eskimo village, then later a gold rush town. Used for subsistence activities by Nome residents. 2000 census noted 2 occupied houses with 4 residents.
Umkumiute	0	0	On Nelson Island in the Yukon-Kuskokwim Delta, adjacent to Toksook Bay.	Summer fish camp for Toksook Bay residents.

State of Alaska, Department of Commerce, Community, and Economic Development's website at http://www.commerce.state.ak.us/dca/commdb/CF_COMDB.htm.

Alternative 2 does not, on its own, impose benefits or costs on the CDQ groups or the 65 participating communities that are different from the economic impacts that already exist as a result of their current participation in the CDQ Program and the confirmation of their eligibility under the SAFETEA-LU. The six CDQ groups and 65 communities that have been participating in the CDQ Program and receiving economic development benefits as a result of their participation will continue to participate, and the amount or nature of the economic benefits they will receive in the future would not be affected by the proposed action.

The SAFETEA-LU had a significant positive impact on the CDQ groups and CDQ communities by confirming the eligibility status of the 65 participating communities and eliminating the need for NMFS to re-evaluate the eligibility status of the participating communities. This legislation provided stability and assurances to the CDQ communities that they could continue to participate in the CDQ Program and benefit from the economic development projects provided to their residents through the CDQ Program. In addition, the Congressional action saved the CDQ groups, communities, State, and NMFS the cost of re-evaluation the eligibility of all 65 participating communities. These benefits accrue from the Congressional action taken under the SAFETEA-LU, and not as a result of the proposed regulatory amendments. Alternative 2 would only clarify and correct the regulations to conform to the MSA and SAFETEA-LU. No CDQ communities that have been participating in the CDQ Program would be removed from eligibility, and no communities would be added to the program under the proposed action.

Neither SAFETEA-LU, nor Alternative 2 has any economic impact on the status of the nine communities that may be eligible to apply for the CDQ Program in the future, because neither of these actions makes any change to the opportunity for these communities to apply for CDQ Program eligibility under the eligibility criteria in the MSA. Therefore, Alternative 2 would not impose any adverse economic impacts, or costs, on the CDQ groups, CDQ communities, or any community that may apply for eligibility in the future.

A quantitative estimate of the benefits and costs of Alternative 2 is infeasible, given the available data. However, the qualitative analysis suggests that the net benefit to the Nation of the proposed action is likely positive, because it clarifies or corrects the FMPs and Federal regulations, thus reducing the risk of misinterpretation, conflict, and litigation, while imposing no additional costs on the CDQ groups and communities, or on State or Federal government.

Based upon the best available information, and the benefit/cost framework analysis presented above, the proposed action would be expected to result in a net benefit to the Nation, if approved and implemented.

8.0 Preparers

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Appendix 1 - Legal Opinion

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

August 15, 2003

MEMORANDUM FOR: Dr. James W. Balsiger
Administrator, Alaska Region

THROUGH: Lisa L. Lindeman
Alaska Regional Attorney

FROM: Lauren M. Smoker
Attorney, Alaska Region

SUBJECT: Interpretation of Magnuson-Stevens Fishery Conservation and Management Act (MSA) language concerning community eligibility in the Western Alaska Community Development Quota (CDQ) Program

By memorandum dated June 13, 2003, you requested "written legal advice about how to interpret and apply the criteria for community eligibility in the MSA." *See* Attachment 1. The following memorandum provides our legal opinion on the various questions you posed as well as an opinion on your preferred interpretation.

This memorandum initially presents a review of the regulatory and statutory development of the eligibility criteria used in the CDQ program. It then presents a brief summary of the applicable legal standards to be applied when interpreting statutory and regulatory language. These standards are then applied on a paragraph-by-paragraph basis to the statutory language and a legal interpretation of the statutory eligibility criteria is presented, followed by a comparison of the statutory language to the regulatory language to determine whether there are inconsistencies between the two such that some action on the part of NMFS is necessary to correct an identified inconsistency. A final section summarizing the findings of this legal analysis is provided at the end of this memorandum.

Statutory and Regulatory History of the Community Eligibility Criteria for the CDQ Program

In March 1992, the Secretary of Commerce approved Amendment 18 to the Bering Sea and Aleutian Islands Area (BSAI) Fishery Management Plan (FMP) that, among other things, allocated one half of the BSAI pollock reserve, or 7.5% of the total allowable catch (TAC) of pollock, to eligible communities in western Alaska.[1] NMFS proposed regulations to implement the western Alaska CDQ program in October 1992 (57 *Fed. Reg.* 46139; October 7, 1992). The proposed rule stated the following concerning eligible communities:

> The CDQ program was proposed to help develop commercial fisheries in western Alaska communities. These communities are isolated and have few natural resources with which to develop their economies. Unemployment rates are high, resulting in substantial social problems. However, these communities are geographically located near the fisheries resources of the Bering Sea, and have the possibility of developing a commercial fishing industry. Although fisheries resources exist adjacent to these communities, the ability to participate in these fisheries is difficult without start-up support. This CDQ program is intended to provide the means to start regional commercial fishing projects that could develop into ongoing commercial fishing industries.

Id., at 46139. In order to identify eligible communities, four eligibility criteria were proposed which had been developed by the Governor of the State of Alaska (Governor), in consultation with the North Pacific Fishery Management Council (Council):[2]

> Prior to approval of a [Community Development Plan] recommended by the Governor, the Secretary will review the Governor's findings as to how each community(ies) meet [sic] the following criteria for an eligible community:
>
> (i) For a community to be eligible, it must be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the Gulf of Alaska coast of the North Pacific Ocean even if it is within 50 nautical miles of the baseline of the Bering Sea.
>
> (ii) The community must be certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
>
> (iii) The residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea.
>
> (iv) The community must not have previously developed harvesting or processing

[1] *See generally*, Final Rule implementing Amendment 18 to the BSAI FMP, 57 *Fed. Reg.* 23321, June 3, 1992. Amendment 18 was effective through December 31, 1995.
[2] 57 *Fed. Reg.* 46139, 46140, Oct. 7, 1992.

> capability sufficient to support substantial fisheries participation in the BSAI, except if the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision.

Id., at 46144 (proposed section 675.27(d)(2)). Under the proposed rule, prior to approval of the Governor's recommendations for approval of Community Development Plans (CDPs) and CDQ allocations of pollock, the Secretary was required to review the Governor's findings to determine if the eligibility criteria had been met by the communities submitting CDPs. *Id.* The proposed rule also included a table that listed the communities that were determined by the Secretary to have met the proposed criteria.[3] *Id.*, at 46145. Finally, the preamble of the proposed rule made it clear that the communities eligible to apply for CDQ allocations of pollock were not limited to those communities listed in the table. *Id.*, at 46140.

A final rule implementing the CDQ Program was published on November 23, 1992.[4] (57 *Fed. Reg.* 54936) Based on public comment, four changes were made to the proposed eligibility criteria in the final rule, two of which are important for this analysis.[5] First, the proposed regulation at 675.27(d)(2) and the heading for Table 1 were changed to require the Governor and Secretary to make findings on the eligibility of a community only if it is not listed on Table 1 (emphasis added). *Id.*, at 54938. The preamble states that this change was made because the

[3] The following 56 communities were listed in proposed Table 1:

> Atka, False Pass, Nelson Lagoon, Nikolski, St. George, St. Paul, Brevig Mission, Diomede/Inalik, Elim, Gambell, Golovin, Koyuk, Nome, Savoonga, Shaktoolik, St. Michael, Stebbins, Teller, Unalakleet, Wales, White Mountain, Alegnagik, Clark's Point, Dillingham, Egegik, Ekuk, Manokotak, Naknek, Pilot Point/Ugashik, Port Heiden/Meschick, South Naknek, Sovonoski/King Salmon, Togiak, Twin Hills, Alakanuk, Chefornak, Chevak, Eek, Emmonak, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kotlik, Kwigillingok, Mekoryuk, Newtok, Nightmute, Platinum, Quinhagak, Scammon Bay, Sheldon's Point, Toksook Bay, Tununak, Tuntutuliak.

There are four instances where communities are listed with two names separated by a slash. In one instance, the entry represents two separate communities (Pilot Point and Ugashik are separate, ANCSA-certified native villages). For Diomede/Inalik and Port Heiden/Meschick, NMFS has treated these entries to be one community with alternate names. The status of the Savonoski/King Salmon entry is discussed in detail within this memorandum.

[4] This final rule implemented the CDQ program for 1992 and 1993. A subsequent regulatory amendment implemented the CDQ program for 1994 and 1995 (58 *Fed. Reg.* 32874, June 14, 1993). The subsequent regulatory amendment made no changes to the criteria for community eligibility.

[5] The following two changes are somewhat less relevant for the purposes of this analysis: (1) language in proposed section 675.27(d)(2)(iv) was changed from "substantial fisheries participation" to "substantial groundfish fisheries participation" to precisely reflect the intent of the Council (*see* Comment 4 and Response, 57 *Fed. Reg.* 54936, 54938), and (2) in response to a comment requesting inclusion of Akutan, King Cove, and Sand Point as eligible communities, NMFS responded that the Council intended the benefits of the CDQ program to be limited to communities within a specific geographical area of western Alaska and that do not have substantial groundfish harvesting or processing capability – because Akutan has a large groundfish processing plant, and King Cove and Sand Point are located on the Gulf of Alaska, these communities were not included as eligible communities (*see* Comment 12 and Response, *Id.*, at 54939).

State submitted an evaluation of the list of communities in Table 1 against the community eligibility criteria at 675.27(d)(2) that concluded that the communities listed in Table 1 met the criteria. *Id.*

This change has great importance for this analysis for two reasons. First, it removed the requirement that the State and NMFS substantively determine a community's eligibility status using the four eligibility criteria every CDQ allocation cycle. Under the final regulation, if a community was listed on Table 1, it was automatically considered an eligible community for purposes of the CDQ program and CDQ allocations. Second, this change made King Salmon an eligible community even though King Salmon was not a community that was certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. 1601 et seq.) to be a native village.[6] During Council deliberations on the CDQ program, the ANCSA certification status of King Salmon was discussed. The Council recognized that King Salmon was not an ANCSA-certified village, but that King Salmon was pursuing certification as a native village with the Department of the Interior. The Council meeting transcript reflects that on April 22, 1992, the Council decided that when it received notification of King Salmon's certification, Table 1 would be amended to include King Salmon. However, the following day, that condition for the village's participation in the program was not reflected in the final motion passed by the Council, which simply read "...that King Salmon be added to Savonoski." Transcript of Council deliberations on April 23, 1992; North Pacific Fishery Management Council Minutes for the 101st Plenary Session, April 22-26, 1992, page 10. Paired with Savonoski, King Salmon was added to the list of CDQ eligible communities on Table 1 in the regulations.

The second important change was to proposed section 675.27(d)(2)(iii). The preamble of the final rule states that this criterion was to be revised to change the language "waters of the Bering Sea" to "waters of the Bering Sea and Aleutian Islands management area and adjacent waters." Comment 7 and Response, 57 *Fed. Reg.* 54936, 54938, Nov. 32, 1992. NMFS determined that this change was appropriate in order to more accurately describe the applicable area using an already defined term at 675.2 in order to eliminate confusion about the meaning of this criterion. *Id.*, at 54938. Although the preamble stated that this change would be made to the final regulatory text, the stated change was not completely made – the portion of the phrase "and adjacent waters" was omitted in the final regulatory text. Section 675.27(d)(2)(iii) in the final rule references only "the Bering Sea and Aleutian Islands management area" and does not include the reference to adjacent waters. *Id.*, at 54944. The omission could be interpreted as a decision to permit only harvests from the EEZ to count towards satisfying this criterion. However, the preamble language evidences an intent that commercial and subsistence harvests

[6] Although the preambles of the proposed and final rules state that the communities listed in Table 1 met the eligibility criteria (*see* 57 *Fed. Reg.* 46139, 46140 (Oct. 7, 1992); and 57 *Fed. Reg.* 54936, 54938 (Nov. 23, 1992)), King Salmon was not an ANCSA-certified native village at the time of the rulemaking. Through letter and email, the Department of Interior recently confirmed that King Salmon has not received ANCSA certification. Letter to Sally Bibb, NMFS, from Joe Labay, U.S. Department of Interior, Bureau of Land Management, dated June 8, 1999; and email to Sally Bibb from Joe Labay, dated July 22, 2003.

from the EEZ as well as adjacent waters, which could be interpreted to include State waters to three nautical miles, would be considered in determining whether a community met this criterion.

In November 1993, NMFS issued a final rule implementing a CDQ program for halibut and sablefish harvested with fixed gear.[7] The preamble of the proposed rule states that the communities that were eligible to apply for the pollock CDQ program are the same communities that would be eligible to apply for sablefish and halibut CDQs.[8] As for the community eligibility criteria, there were no meaningful differences between the halibut/sablefish and pollock CDQ programs except for the language of the first and third criteria. The first criterion for the halibut/sablefish CDQ program specifically stated that communities on the Chukchi Sea coast (in addition to the Gulf of Alaska) were ineligible.[9] The third eligibility criterion for the halibut/sablefish CDQ program stated that the residents of the community must conduct more than one-half of their current commercial or subsistence fishing effort in the waters "surrounding the community," rather than in "waters of the BSAI management area," the language used in the pollock CDQ program.[10] The list of eligible communities on Table 1 for the halibut/sablefish CDQ program remained the same as those listed on Table 1 for the pollock CDQ program.[11]

In December 1995, Amendment 38 to the BSAI FMP was implemented.[12] Amendment 38 continued the western Alaska pollock CDQ program, extending it to December 31, 1998. Amendment 38 contained no changes to the criteria for community eligibility.

In February 1996, a final rule was published that moved Table 1 in Part 675 (the list of eligible communities for the pollock CDQ program) to Part 672 and renumbered it as Table 7.[13]

On June 19, 1996, NMFS issued a final rule that consolidated CDQ program regulations found at Parts 672, 675 and 676 into Part 679.[14] The consolidation combined the pollock and the

[7] 58 *Fed. Reg.* 59375, Nov. 9, 1993. The halibut/sablefish fixed gear CDQ program was codified at 50 CFR Part 676.
[8] 57 *Fed. Reg.* 57130, 57142, Dec. 3, 1992.
[9] 58 *Fed. Reg.* 59375, 59411, Nov. 9, 1993
[10] *Id*
[11] *Id.*, at 59413.
[12] A proposed rule was published on September 18, 1995 (60 *Fed. Reg*. 48087) and the final rule was published on December 12, 1995 (60 *Fed. Reg.* 63654).
[13] 61 *Fed. Reg.* 5608, February 13, 1996.
[14] 61 *Fed. Reg.* 31228, June 19, 1996. The preamble of the final rule states that the rule does not make any substantive changes to the existing regulations but rather "reorganizes the management measures into a more logical and cohesive order, removes duplicative and outdated provisions, and makes editorial changes for readability, clarity and to achieve uniformity in regulatory language" in response to President Clinton's Regulatory Reform Initiative. *Id.* Because the rule made only non-substantive changes to existing regulations originally issued after prior notice and opportunity for comment, NMFS waived prior notice and delayed effectiveness under 5 U.S.C. 553(b)(B) and (d). *Id.*, at 31229

halibut/sablefish CDQ regulations into one subpart, Subpart C, which included one section with the criteria for community eligibility, section 679.30(d)(2). In doing so, some of the language that was unique to the halibut/sablefish eligibility criteria was replaced with language used in the pollock eligibility criteria. The new language, with references to changes from the halibut/sablefish eligibility criteria in brackets and bold, read as follows:

> Prior to approval of a CDP recommended by the Governor, NMFS will review the Governor's findings to determine that each community that is part of a CDP is listed in Table 7 of this part or meets the following criteria for an eligible community:
>
> (i) The community is located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nautical miles of the baseline of the Bering Sea. [**The halibut/sablefish CDQ program reference to the exclusion of Chukchi Sea coastal communities was removed**.]
>
> (ii) The community is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.
>
> (iii) The residents of the community conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI. [**Note that the halibut/sablefish CDQ program language of "waters surrounding the community" was not incorporated into this criterion and only the language from the pollock CDQ program remained**.]
>
> (iv) The community has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The communities of Unalaska and Akutan are excluded under this provision.

61 *Fed. Reg.* 31228, 31265-66, June 19, 1996. No changes were made to Table 7 and the list of eligible communities with this rulemaking.

On August 12, 1996, NMFS published a final rule adding the community of Akutan to Table 7 as an eligible community and removing the language in the fourth criterion that explicitly excluded Akutan as an eligible community.[15] 61 *Fed. Reg.* 41744. The proposed rule noted that when the

[15] An additional minor change made by this rulemaking moved the statement "Other Communities That Do Not Appear on This Table May Also Be Eligible" that was within the Table into the heading for Table 7. 61 *Fed. Reg.* 41744, 41745, Aug. 12, 1996.

pollock CDQ program was implemented in 1992, NMFS determined that Akutan met the first three eligibility criteria but failed to meet the fourth because a large groundfish processing plant was located within Akutan's city limits.[16] However, the Aleutian Pribilof Island Community Development Association, a CDQ group, provided the Council and NMFS with information showing that despite the presence of the processing plant, the city of Akutan gained little benefit from it and in fact met the fourth criterion for community eligibility in the CDQ program.[17] The addition of Akutan to Table 7 resulted in 57 communities being listed as eligible to participate in the CDQ program.

On October 11, 1996, the Sustainable Fisheries Act (SFA), Pub. L. 104-297, was signed into law. Among other things, section 111 of the SFA amended the MSA at section 305(i)(1) to include specific provisions for a western Alaska CDQ Program.[18] Briefly, section 111 established a western Alaska CDQ program under which a percentage of the total allowable catch of each Bering Sea fishery is allocated to the program, set forth community eligibility criteria for participation in the CDQ program, and placed some temporary restrictions on the species and amounts that could be allocated to the CDQ program. While the MSA community eligibility criteria are similar in many respects to the regulatory criteria, they differ in some significant ways that are discussed in more detail below.

Both the House of Representatives and the Senate prepared bills to amend the MSA in the 104th Congress and both bills included provisions for the establishment of a western Alaska CDQ program. The House of Representatives' version was the Fishery Conservation and Management Amendments of 1995 (H.R. 39). The House Report (H.R REP. NO. 104-171 (1995)) that accompanied H.R. 39 explains that H.R. 39 would have codified the existing CDQ system for the Bering Sea and the existing criteria for approval as a qualified CDQ community. The House Report acknowledges that 56 communities were eligible to participate in the CDQ program at that time. The House Report also states that because of the benefits generated by the Council's and NMFS's CDQ program starting in 1992, the House Resources Committee determined that it was important to continue the CDQ program and that, in addition to pollock, sablefish and halibut, the program should be expanded to allow communities participating in the program the opportunity to harvest a percentage of the total allowable catch of each Bering Sea fishery.

The Senate bill, S. 39, was the Sustainable Fisheries Act, and the Senate bill ultimately was passed in lieu of the House bill.[19] The Senate Report (S. REP. NO. 104-276, at 26 (1996)) that accompanied S. 39 states that "New subsection (i) is intended to ensure that western Alaska and

[16] 61 *Fed. Reg.* 24475, May 15, 1996.
[17] *Id.*, at 24475-76.
[18] The statutory language in the MSA for community eligibility is presented later in this memorandum in comparison form to the current regulatory text
[19] Sustainable Fisheries Act, Pub. L. No. 104-297, 1996 U.S.C.C.A.N. (110 Stat. 3559) 4073.

western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." The most direct reference in the Senate Report to the eligibility criteria states that the SFA "would establish community eligibility criteria that are based upon those previously developed by the North Pacific Council and Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs." *Id.*, at 28.

In 1998, shortly after the passage of the SFA, NMFS expanded the CDQ program into a multispecies program that allocated 7.5 percent of all BSAI groundfish TACs not already covered by a CDQ program along with a pro-rata share of the prohibited species catch limit, and a graduated percentage of BSAI crab to the CDQ program.[20] While many changes were made to the CDQ program with the multispecies amendment, the community eligibility criteria continued as it had been published in the consolidation rule with the subsequent change to include Akutan – no substantive changes were made to the wording of the eligibility criteria and no changes were proposed to Table 7.[21] Neither the proposed nor the final rules included an explanation as to how the regulatory definition of eligible community compared to the MSA language at section 305(i)(1)(B) or whether the regulatory and the statutory eligibility criteria were consistent with each other. The definition of eligible community that was included in the final rule for the multispecies CDQ program is the current definition of eligible community.[22]

By letter dated March 8, 1999, the State recommended to NMFS that eight additional communities be deemed eligible for participation in the CDQ Program.[23] After reviewing the State's recommendation and supporting documentation, NMFS, by letter dated April 19, 1999, agreed with the State's recommendations and determined that the eight communities were eligible for the CDQ Program, bringing the total number of eligible communities to 65. In August 2001, NMFS proposed to add these eight communities to Table 7,[24] but withdrew the change in the final rule, stating that revisions to Table 7 would be considered by NMFS in a future rulemaking that would address a wider range of CDQ issues.[25] Despite their not being

[20] 62 *Fed. Reg.* 43866, 43872, Aug. 15, 1997 (proposed rule); 63 *Fed. Reg.* 8356, Feb. 19, 1998; 63 *Fed. Reg.* 30381, 30398, June 4, 1998; and 63 *Fed. Reg.* , Oct. 1, 1998 (three final rules).
[21] With this rulemaking, the eligibility criteria in section 679.30(d)(2) were moved to the definitions section of Part 679, section 679.2, to define the term "eligible community."
[22] The regulatory language in the final rule for the Multispecies CDQ Program (i.e. the current regulatory definition of eligible community) is presented later in this memorandum in comparison form to the statutory language of the MSA.
[23] The eight additional communities are Ekwok, Grayling, Levelock, Mountain Village, Napakiak, Napaskiak, Oscarville, and Portage Creek.
[24] 66 *Fed. Reg.* 41664, August 8, 2001.
[25] 67 *Fed. Reg.* 4100, January 28, 2002.

listed on Table 7, these eight communities have been considered eligible for the CDQ program since April 19, 1999.[26]

Applicable Legal Standards for Statutory Construction

Under the rules of statutory construction, the language of a statute is controlling and takes precedence over the language of an existing regulation if the regulation is not consistent with the statutory language. A statute is the charter for the administrative agency charged with implementing it.[27] A regulation issued by an agency under the authority of a particular statute therefore must be authorized by and consistent with the statute and administrative action in excess of the authority conferred by the statute is *ultra vires*.[28] Because Congress is the source of a federal administrative agency's powers, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation implementing that statute.[29] Additionally, because the legislative process culminates in an official, authoritative expression of legal

[26] Under the current regulations, NMFS must make determinations as to whether the communities represented by the CDPs meet the eligibility criteria in 50 C.F.R. 679.2. During the application process for the 2001-2002 CDQ allocation cycle, a challenge was raised by one of the CDQ groups, questioning whether some of the communities considered eligible by the State and NMFS actually met the eligibility criteria, particularly the criterion requiring one half of a community's current commercial and subsistence fishing effort be conducted in the waters of the BSAI. For the 2001-2002 allocation cycle, NMFS stated in its decision memorandum that all 65 communities were considered eligible for the 2001-2002 allocation cycle because NMFS previously approved the State's recommendations that the communities were eligible to participate in the CDQ program and no new information was presented that demonstrates ineligibility. Decision Memorandum from James W. Balsiger to Penelope D. Dalton, dated January 17, 2001.

Although none of the CDQ groups challenged the eligibility status of any of the 65 communities during the application process for the 2003-2005 CDQ allocation cycle, in accordance with its regulations, NMFS made determinations as to whether the communities represented by the CDPs met the eligibility criteria in section 679.2. During its review, NMFS concluded that 57 of the communities listed in the CDPs were eligible communities and met the requirements of 679.30(a)(1)(iv) and 679.2 by virtue of the fact that they were listed on Table 7. Letter to Jeffery W. Bush, Deputy Commissioner, Alaska Department of Community and Economic Development, From James W. Balsiger, dated January 17, 2003, Attachment 2, at 13-15. As for the eight remaining communities (those communities deemed eligible in April 1999), NMFS re-reviewed the information submitted by the State in 1999 and found that the State had applied a much broader scope than was set forth in the fishing effort criterion and had submitted information that appeared to indicate that some of the communities probably do not meet that criterion. *Id.*, at 15-16. As a result, NMFS stated that several of these eight communities may not meet all of the eligibility criteria and therefore may not be eligible to participate in the CDQ program. *Id.*, at 16. However, because NMFS lacked all of the information necessary to conclude definitively that these communities were ineligible to participate, NMFS determined that, until it can thoroughly examine all of the relevant information regarding eligibility for all communities currently listed in the CDPs, all 65 communities represented by the CDPs were deemed eligible to participate in the 2003-2005 allocation cycle. *Id.*

[27] Singer, Norman J., Sutherland Statutory Construction § 31.02 (5th ed. 1992).

[28] *Id.*

[29] *Id.*

standards and directives,[30] the deference typically afforded to an agency interpretation of a statute will not apply when the agency's interpretation is in conflict with a subsequently enacted legislative mandate.[31]

Prior to the SFA, the Council and NMFS interpreted the MSA as providing the authority to develop and implement the western Alaska CDQ Program, including the criteria that would be considered for community participation. Congress acknowledged the existence of this authority in the legislative history for the SFA. S. REP. NO. 104-276, at 27. In October 1996, when the MSA was amended, Congress spoke to the issue of community eligibility and provided definable boundaries for community participation in the CDQ program. And although Congress stated in the legislative history that the SFA would establish community eligibility criteria that are based upon those previously developed by the Council and NMFS, Congress did not use language that is identical to the regulatory eligibility criteria. Based on the rules of statutory construction outlined above, the eligibility criteria set forth in the MSA control and take precedence over the regulatory criteria set forth in 50 C.F.R. § 679.2 to the extent there is any conflict between the statutory and regulatory language. Additionally, because Congress has now specifically addressed the issue of community eligibility for the CDQ Program, NMFS's previous interpretation of the MSA as providing the Council and agency the ability to implement eligibility criteria consistent with the general provisions of the MSA cannot be maintained to the extent that the regulatory criteria are in conflict with the statutory language of the MSA.

When there is a question concerning the interpretation of a statute, several principles of law are applied and considered in order to interpret the statute's meaning. These principles are known as the rules of statutory construction. One of the guiding principles of statutory interpretation is that when the language of the statute is clear and unambiguous and not unreasonable or illogical in its operation, a court may not go outside the statute to give it meaning.[32] This is known as the plain meaning rule. Only statutes that are ambiguous are subject to the process of statutory interpretation.[33] Ambiguity exists when a statute is capable of being understood by reasonably well informed persons in two or more different senses.[34] Even if a specific provision is clearly worded, ambiguity can exist if some other section of the statutory program expands or restricts the provision's meaning, if the plain meaning of the provision is repugnant to the general purview of the act, or if the provision when considered in conjunction with other provisions of

[30] *Id.*, at § 27.01.
[31] *Id.*, at § 31.06.
[32] Singer, Norman J., Sutherland Statutory Construction § 46:01(6th ed. 2000).
[33] *Id.*
[34] *Id.*, at § 46:04.

the statutory program, or with the legislative history of the subject matter, import a different meaning.[35]

Interpretation of the MSA eligibility criteria and determinations as to whether the regulatory language is inconsistent or in conflict with the statutory language

This section of the memorandum provides a legal interpretation of the MSA eligibility criteria as well as a comparison of the statutory and regulatory language to determine whether inconsistencies or conflicts exist between the two texts. This is presented in a paragraph-by-paragraph format.

The following is a side-by-side comparison of the regulatory[36] and statutory text:

Regulatory text at 50 C.F.R. 679.2	Statutory text at 16 U.S.C. 1855 (i)(1)(B)
Eligible community means a community that is listed in Table 7 to this part or that meets all of the following requirements:	To be eligible to participate in the western Alaska community development quota program under subparagraph (A) a community shall – **[this introductory text makes no reference to or incorporation of Table 7 or the communities listed on it; each community must meet all of the following eligibility criteria in order to participate in the CDQ Program];**
(1) The community is located within 50 nm from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the most western of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nm of the baseline of the Bering Sea.	(i) be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea [**substantively identical to the regulatory language**];
	(ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean **[substantively identical to the regulatory language at 679.2 although it omits the regulatory clarification that even if a community is within 50 nm of the baseline of the Bering Sea, it is not eligible if it is located on the GOA coast of the North Pacific Ocean];**

[35] *Id.*, at § 46:01.

[36] The regulatory text displayed in this comparison is the current regulatory language. It is also substantively identical to the regulatory language that existed at the time of passage of the SFA.

Regulatory text at 50 C.F.R. 679.2 (con't)	Statutory text at 16 U.S.C. 1855 (i)(1)(B) (con't)
	(iii) meet criteria developed by the Governor of Alaska, approved by the Secretary, and published in the Federal Register **[criterion not within the regulatory language];**
(2) That is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village	(iv) be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village **[substantively identical to the regulatory language];**
(3) Whose residents conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI.	(v) consist of resident who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands **[statutory language does not use the term BSAI but instead used the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"];** and
(4) That has not previously developed harvesting or processing capability sufficient to support substantial groundfish participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The community of Unalaska is excluded under this provision.	(vi) not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investment **[statutory language does not use the BSAI but instead uses the term Bering Sea; also omits the specific exclusion of Unalaska from the CDQ program].**

Statutory criteria addressing geographical location, ANCSA certification, and consistency with regulatory provisions

The statutory language used in paragraphs 305(i)(1)(B)(i) and (ii) (dealing with geographical location), and paragraph (iv) (requiring ANCSA certification) is clear and unambiguous and there is no need for interpretation. Furthermore, the language used in these paragraphs is substantively identical to the first and second eligibility criteria within the regulatory definition of eligible community at 679.2. Paragraph 305(i)(1)(B)(iii) is not included in the regulatory definition but contains clear and unambiguous language and merely requires communities to meet the regulatory criteria. Based on this comparison, no inconsistencies or conflicts between the statutory and the regulatory language appear to exist for these paragraphs and therefore no changes to the regulatory language are required to make it consistent with the statutory language.

Mandatory nature of statutory criteria and lack of statutory reference to Table 7

Under the rules of statutory construction, use of the word "shall" (except in its future tense) typically indicates a mandatory intent.[37] The introductory language of section 305(i)(1)(B) clearly and unambiguously indicates that a community shall satisfy all of the criteria in order to be eligible. There is no permissive language within the section that would allow the waiver of one or more of the criteria, nor is there language that would recognize some other form of eligibility, such as a grandfather clause. Because the Council and NMFS may only develop regulations that are authorized by and consistent with the statute, the Council and NMFS do not have any discretion to implement or maintain regulations that omit, add, or modify any of the MSA community eligibility requirements. Therefore, only communities that meet all of the MSA eligibility criteria can participate in the CDQ program.

As explained earlier, the ability to be determined an eligible community under the regulations creates an either/or situation – a community can be eligible because it meets all of the regulatory eligibility criteria or it can be eligible by virtue of its listing on Table 7. In other words, under NMFS regulations, a community can participate in the CDQ program even if the community does not meet all of the regulatory eligibility criteria as long as it is listed on Table 7. Because the statute mandates consistency with each eligibility criterion and does not provide an alternative, the lack of statutory reference to Table 7 creates a discrepancy between the statute and the regulations. However, the discrepancy is problematic only if there are communities listed on Table 7 that do not meet all of the statutory criteria. At this time, there is at least one community, King Salmon, that does not meet all of the statutory eligibility criteria. Because Table 7 lists at least one community that does not meet all of the statutory eligibility criteria, NMFS regulations with respect to eligibility through listing on Table 7 are *ultra vires* and Table 7 must be amended to include only those communities that meet all of the MSA eligibility criteria.

Statutory criterion addressing commercial or subsistence fishing effort

MSA section 305(i)(1)(B)(v) requires eligible communities to "consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands." There are two points of interpretation necessary with this criterion. The first point deals with determining from where must commercial or subsistence fishing effort have come in order to satisfy the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands." The second point deals with when must commercial or subsistence fishing effort have occurred in order to satisfy the word "current."

[37] Singer, Norman J., Sutherland Statutory Construction § 25.04 (5th ed. 1992).

1. Interpretation of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands"

Although the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" is not defined within the MSA, a plain reading of the phrase indicates that the area encompasses all State and Federal waters of the Bering Sea or waters surrounding the Aleutian Islands. While the MSA is focused on the regulation of fishing activities conducted in the exclusive economic zone (EEZ), which, in the case of Alaska, begins at 3 nautical miles from the baseline of the territorial sea and extends seaward to 200 nautical miles, Congress did not include the term "EEZ" in the statutory text of this criterion.[38] Congress is well aware of and familiar with the term "EEZ" and its meaning, and uses the term elsewhere in the MSA. Its omission in this criterion coupled with the plain language reading of the phrase argues in favor of an inclusive reading of the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" as meaning State as well as Federal waters.[39]

Furthermore, Congress clearly intended both subsistence harvests and commercial harvests to qualify in satisfying this criterion.[40] As explained below, because subsistence harvests cannot come from the EEZ, in order to give meaning to all of the words in this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must include harvests from both State and Federal waters.

Subsistence rights can exist under common law through the establishment of exclusive aboriginal title or non-exclusive aboriginal rights, or they can be conferred by statute. In order for fishing or hunting to be considered a subsistence activity, aboriginal title to an area or non-exclusive aboriginal rights over an area must be established, or a statute must recognize the activity as subsistence. Several court cases have ruled on the question of whether native villages can assert exclusive aboriginal title or non-exclusive aboriginal rights under common law or statutory rights in the fishery resources of the EEZ off Alaska. The first of these is *Amoco Production Co. v.*

[38] The legislative history includes a reference to harvests within the EEZ for this criterion. In the Senate Report, there is the following sentence: "New subsection (i) is intended to ensure that western Alaska and western Pacific fishermen who historically fished in the U.S. EEZ are treated fairly and equitably as intended under the Magnuson Act." (Emphasis added.) S. REP. NO. 104-276, at 26 (1996). Although Congress references historic harvests from the EEZ, it is unlikely that Congress meant only harvests from the EEZ. This is based on the discussion above and also other references in the legislative history that indicate the CDQ program is to be administered as it has been by the Council and NMFS, which means historic harvests from State as well as Federal waters would be considered in satisfying this criterion

[39] "While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000).

[40] It is important to note that fishing effort in this criterion is not limited to groundfish fishing and includes other species of fish, such as halibut and salmon.

Village of Gambell, 480 U.S. 531, 546-48 (1987).[41] In *Amoco*, the Supreme Court held that Title 8 of the Alaska National Interest Lands Conservation Act (ANILCA), which statutorily recognized Alaska natives' use of public lands for subsistence hunting and fishing, did not apply to the Outer Continental Shelf (OCS) because ANILCA defines public lands to mean federal lands situated "in Alaska" which includes coastal waters to a point three miles from the coastline, where the OCS commences, but does not include waters seaward of that point.[42] In *Native Village of Eyak v. Trawler Diane Marie* (*Eyak I*), 154 F.3d 1090, 1092 (9th Cir. 1998), the court held that federal paramountcy precluded aboriginal title in the OCS.[43] And finally, in *Native Village of Eyak v. Evans (Eyak II)*, No. A98-0365-CV (HRH) (D. Alaska, September 25, 2002), the court held that non-exclusive aboriginal rights could not exist in the OCS due to federal paramountcy and the holding in the *Eyak I* case.[44]

As a result of these holdings, subsistence harvest cannot be considered to come from the EEZ. Because commercial or subsistence harvests can be used to qualify a community for the CDQ

[41] In this case, the Alaska native villages of Gambell and Stebbins challenged an OCS lease sale, claiming that under ANILCA the OCS was public land within Alaska, the sale would have adversely affected their aboriginal rights to hunt and fish on the OCS, and that the Secretary of the Interior had failed to comply with section 810(a) of ANILCA which provides protection for natural resources used for subsistence in Alaska. *Amoco*, at 534-35. An earlier decision by the Ninth Circuit had held that the phrase "in Alaska" in section 810(a) was ambiguous and interpreted it to include the OCS. People of Gambell v. Clark, 746 F. 2d 572, 575 (1984).

[42] The MSA defines "EEZ" as "the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line coterminous with the seaward boundary of each of the coastal States." 16 U.S.C. 1802(11). In *Amoco*, the Supreme Court found that the Submerged Lands Act, 43 U.S.C. § 1312, was made applicable to the State of Alaska under the Alaska Statehood Act and that under section 4 of the Submerged Lands Act, the seaward boundary of a coastal State extends to a line three miles from its coastline and at that line, the OCS commences. *Amoco*, at 547. Therefore, the seaward boundary of the State of Alaska is three nautical miles from its coastline. As such, both the EEZ and OCS start at the same point off the coast of Alaska and for purposes of this discussion, the conclusions reached in these cases regarding the OCS are applicable to the EEZ.

[43] In this case, several Alaska native villages challenged the halibut and sablefish IFQ regulations promulgated by the Secretary of Commerce as violating their rights to the exclusive use and occupancy of the Outer Continental Shelf (OCS). The villages claimed that for more than 7,000 years their members have hunted sea mammals and harvested the fishery resources of the OCS and argued that they are entitled to exclusive use and occupancy of their respective areas of the OCS, including exclusive hunting and fishing rights, based upon unextinguished aboriginal title.

[44] *Eyak II* considered whether non-exclusive hunting and fishing rights on the OCS are legally different from exclusive hunting and fishing rights based on aboriginal title which were precluded by the court in *Eyak I*. Finding that there is no difference between an exclusive claim to hunt and fish in the OSC and a non-exclusive claim when it comes to the doctrine of federal paramountcy, the *Eyak II* court held that since the MSA's passage in 1976, the United States has asserted sovereign rights and exclusive fishery management authority over all fish and continental shelf fishery resources within the EEZ and that the plaintiffs' claims of non-exclusive aboriginal rights in the OCS conflicted with the U.S. assertion and were inconsistent with the paramount rights of the federal government in areas of the ocean beyond the three-mile limit of state jurisdiction. 12-13, 36. The district court decision in *Eyak II* currently is on appeal to the Ninth Circuit.

program, to interpret the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" as only applying to the EEZ would make ineligible any subsistence harvests by the communities. Such an interpretation would ignore or fail to give meaning to all the words used in the criterion and would be contrary to the rules of statutory construction.[45] Therefore, in order to give full meaning to the language of this criterion, the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" must be interpreted to mean State or Federal waters of the Bering Sea or Aleutian Islands.

Given this interpretation, is the regulatory language consistent with this statutory criterion regarding the location of qualifying harvests? There are two regulatory definitions of "BSAI," one for purposes of the commercial king and Tanner crab fisheries, the other for purposes of the groundfish fisheries. 50 C.F.R. 679.2. Both refer only to waters of the EEZ.[46] Given the statutory interpretation above, an inconsistency exists between the statutory and regulatory texts and the regulatory text should be amended to conform with the statutory language. Although this discrepancy exists between the two texts, in practice, NMFS may have applied this criterion as mandated by the MSA language. Recall that earlier in this memorandum it was noted that for both the original pollock CDQ final rule in November 1992 and the halibut/sablefish CDQ final rule in November 1993, commercial or subsistence harvests from Federal or State waters may have been used to determine community eligibility. *See* discussion *infra* on pages 4-5. In order to determine whether all appropriate Federal and State waters commercial or subsistence harvests were considered in a community's eligibility evaluation, NMFS should re-examine the information submitted for currently eligible communities for consistency with this MSA criterion.[47]

2. Interpretation of the term "current"

The second point of interpretation with this criterion deals with when must commercial or subsistence harvests have occurred in order to satisfy the criterion given the use of the word "current." The term "current" appeared in the original language for the pollock CDQ program in 1992 and has been interpreted by NMFS to mean the level of a community's commercial or subsistence harvests at the time of initial evaluation for eligibility. If a community's harvests

[45] "No clause, sentence or word shall be construed as superfluous, void or insignificant if the construction can be found that will give force to and preserve all the words of the statute." Singer, Norman J., Sutherland Statutory Construction § 46:06 (6th ed. 2000

[46] For King and Tanner crab, "BSAI Area" is defined as "those waters of the EEZ off the west coast of Alaska lying south of Point Hope (68 degrees 21' N. lat.), and extending south of the Aleutian Islands for 200 nm west of Scotch Cap Light (164 degrees 44'36" W. long). For groundfish fisheries, "BSAI management area" is defined as "the Bering Sea and Aleutian Islands subareas . . . ." Both subareas are defined as those portions of the EEZ contained within identified statistical areas. 50 C.F.R. § 679.2

[47] It is important to note that a community's commercial or subsistence fishing effort in State or Federal waters south of the Aleutian Islands would also qualify under this criterion given the statutory reference to waters surrounding the Aleutian Islands.

satisfied this criterion at the time of initial evaluation, then the community was determined to have satisfied this criterion and no subsequent consideration of a community's harvests was required by NMFS.

The statutory language at 305(i)(1)(B)(v) also uses the term "current" to describe commercial or subsistence harvests. The term is not defined in the MSA and it is subject to several different interpretations. Three possible interpretations are:

> (1) harvests as of the date the SFA was enacted – *i.e.*, on October 11, 1996, more than half of a community's commercial or subsistence harvests must have been from the waters of the Bering Sea or waters surrounding the Aleutian Islands;
> (2) harvests at any given time – *i.e.*, a community must have harvests that would satisfy this criterion at every evaluation period in order to remain an eligible community; or
> (3) harvests that, at the time of initial evaluation for eligibility, satisfy this criterion – *i.e.*, a community would only have to satisfy this criterion at the time it was or is initially considered for eligibility and, once determined to be an eligible community, would thereinafter satisfy this criterion.

In this situation, agencies are permitted to develop a reasonable interpretation of a term.[48] Because the term is ambiguous, the rules of statutory construction permit the use of intrinsic and extrinsic aids in developing an interpretation.[49] For this particular term, there are no intrinsic aids that help illuminate the word's meaning. As for the legislative history, there is nothing that directly assists with an interpretation of the term "current," although there are statements within the legislative history that describe the section as codifying the existing regulatory eligibility criteria, acknowledge that there were 56 communities eligible to participate in the CDQ program at the time of passage of the SFA, and that indicate Congress wanted the communities currently participating in the CDQ Program to continue to be participating communities.[50]

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[48] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (holding that if statute is silent or ambiguous with respect to specific issue, agency's interpretation of statute must be upheld if agency's construction of statute is permissible and not arbitrary, capricious, or "manifestly contrary to the statute").

[49] Intrinsic aids are found within the text of the statute such as the use of context, definition sections, punctuation, etc. Singer, Norman J., Sutherland Statutory Construction § 47:01(6th ed. 2000). Extrinsic aids are sources outside the text of the statute and include the legislative history of a statute, such as committee reports, floor statements, etc. *Id.*, at § 48:01.

[50] H.R. REP. NO. 104-171, at section 14 (1995); S. REP. NO. 104-276, at 28 (1996). Representative Young stated that "The enactment of section 111(a) of S. 39 will provide the North Pacific Fishery Management Council and the Secretary of Commerce the statutory tools required to improve the efficiency of their implementation of the western Alaska community development quota program. And the enactment of section 111(a) will codify Congress strong support for the council and the Secretary's innovative effort to provide fishermen and other residents of Native villages on the coast of the Bering Sea a fair and equitable opportunity to participate in Bering Sea fisheries that prior to the creation of the western Alaska community development quota program was long overdue." CONG. REC. H11418, H11438 (daily ed. Sept. 27, 1996) (statement of Rep. Young).

Since the addition of eligibility criteria to the MSA in October 1996, NMFS appears to have continued its interpretation of the regulatory definition of the term "current" and applied that interpretation to the statutory term with its implementation of the multispecies CDQ program in 1998 and its approval of the eight additional communities in April 1999. As described earlier, the multispecies CDQ program did not change the regulatory eligibility criteria or the communities listed on Table 7. NMFS did not re-evaluate the eligibility of each community for consistency with the current harvests criterion but rather continued with its pre-SFA interpretation that current harvests meant harvests at the time of a community's initial evaluation for eligibility. Similarly, with NMFS's approval of the eight additional communities in 1999, NMFS evaluated a community's harvests as of the time of initial evaluation for eligibility (*i.e.*, 1999) and did not just look at harvests as of October 1996. Also, during the last two CDQ allocation cycles, NMFS has not evaluated a community's commercial or subsistence harvests to determine the community's continuing eligibility. NMFS's continuation of its pre-SFA interpretation of the term "current" since the passage of section 305(i)(1)(B)(v) implies an interpretation of the statutory word "current" that eliminates the first and second possible interpretations of the term.

Because the statutory language is ambiguous with regards to the meaning of the term "current" in 305(i)(1)(B)(v), NMFS was permitted to develop a reasonable interpretation of the term. It appears from actions taken by NMFS subsequent to the passage of section 305(i)(1)(B)(v) that NMFS has applied its past regulatory interpretation. Because the interpretation is within the agency's authority under the MSA, is a logical way to define the term, and appears consistent with the few Congressional statements included within the legislative history regarding this aspect of the criteria, NMFS's interpretation is a reasonable interpretation of the term "current." Because the regulatory language is similar to the statutory language and because the agency's interpretation is reasonable, the regulation is consistent with the statutory provision regarding the term "current" in 305(i)(1)(B)(v) and no changes to the regulations are needed.

Statutory criterion prohibiting previously developed harvesting or processing capability

MSA section 305(i)(1)(B)(vi) excludes communities from the CDQ program that have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries of the Bering Sea. The language of this criterion is almost identical to that in the regulations, two differences being that (1) the statutory language references Bering Sea whereas the regulatory language references groundfish fisheries participation in the BSAI, and (2) the regulatory language specifically excludes Unalaska from participation in the CDQ program under this criterion.

The statutory language is relatively clear and unambiguous[51] and includes State and Federal waters that are considered within the Bering Sea. Aside from the non-substantive discrepancy regarding the specific exclusion of Unalaska, the only discrepancy between the statutory and regulatory texts is the lack of identical language regarding the geographical reference. However, the visual discrepancy does not amount to a substantive difference between the two texts because the statutory term "Bering Sea" includes waters directly north of the Aleutian Islands. Due to the FMP management area divisions between the Bering Sea and the Aleutian Islands, the regulatory text must reference both areas in order to encompass the same area. Therefore, there are no inconsistencies between the statutory and regulatory text and no changes to the regulatory text are necessary.

Status of the eight communities deemed eligible in 1999

As described above, upon recommendation of the State, NMFS determined in April 1999 that eight additional communities were eligible to participate in the CDQ program. Although the language of section 305(i)(1)(B) makes no reference to limiting the number of eligible communities to those that were participating at the time the MSA was enacted, there is a reference in the legislative history to this effect. In the Senate Report accompanying the SFA, there is the following sentence: "The subsection also would establish community eligibility criteria that are based upon those previously developed by the North Pacific Fishery Management Council and the Secretary, limiting such eligibility to those villages, including Akutan, that presently participate in the pollock and halibut/sablefish CDQ programs. (Emphasis added)"[52]

You have specifically asked whether this language in the Senate Report must be interpreted as limiting the opportunity to participate in the CDQ program to only those communities that participated in October 1996, thus excluding the eight additional communities that were not deemed eligible until 1999. We are of the opinion that such an interpretation would be contrary to the plain language of the statute. The language at section 305(i)(1)(B) clearly states that any community that meets the eligibility criteria set forth in subparagraphs (i) through (vi) is an eligible community for purposes of the western Alaska CDQ program. Furthermore, the section includes no words that could be construed as limiting participation to only a subgroup of communities that meet those criteria. Therefore, the eight communities determined to be eligible in April 1999 may continue to participate in the western Alaska CDQ program as long as they meet the eligibility criteria set forth in section 305(i)(1)(B). Given the concerns previously expressed by NMFS as to whether these communities do in fact meet the criteria, the eligibility

[51] The term "substantial" in this criterion could be considered ambiguous. However, aside from the geographic reference discrepancy, there are no meaningful differences between the statutory and regulatory language and no statements in the legislative history to indicate that the statutory language is meant to be interpreted or applied in a manner different from the State's and NMFS's previous interpretation and application.
[52] S. REP NO. 104-297, at 28.

of these eight communities should be re-examined in light of the MSA criteria and the legal interpretations provided above.

Conclusions

In your memorandum, you state that NMFS prefers an interpretation of the MSA that would allow the agency to revise the regulations to be consistent with the MSA, but would not require the agency to re-evaluate the eligibility status of the 57 communities determined to be eligible through rulemaking approved and implemented prior to the MSA amendments. Such an interpretation would require the determination that the MSA criteria for community eligibility in the CDQ program are not substantively different from the regulatory criteria contained within the definition of eligible community at 50 C.F.R. 679.2. Based on the foregoing legal analysis, such an approach is not supported.

To summarize the foregoing legal opinions:

– no regulatory change is necessary to the introductory text of the definition of eligible community; however, all communities listed on Table 7 must be communities that have been determined to satisfy all the statutory eligibility criteria.

– no regulatory changes are needed to paragraphs 1 or 2 of the definition of eligible community.

– the regulatory language in paragraph 3 of the definition of eligible community should be amended to clarify that commercial or subsistence fishing effort from State or Federal waters of the Bering Sea or waters surrounding the Aleutian Islands will be considered under this criterion. No other regulatory changes to this paragraph are needed although it is recommended that NMFS clarify its interpretation of the term "current" in this paragraph.

– no regulatory change is needed to paragraph 4 of the definition of eligible community.

– regulatory changes are needed to Table 7 such that only communities that meet all of the statutory criteria are listed in Table 7.

– the eligibility status of all 65 communities currently eligible to participate in the CDQ program should be re-examined in light of this legal opinion to determine whether each community meets all of the statutory eligibility criteria.

– under the MSA, there is no date by which a community must be deemed eligible in order to participate in the CDQ program, and any community that meets the statutory eligibility criteria is eligible to participate in the western Alaska CDQ program.

cc: Jane Chalmers
GCF
Sally Bibb

Appendix 2 – The Definition of "eligible communities" in 50 CFR 679.2

Eligible community means:

(1) for purposes of the CDQ program, a community that is listed in Table 7 to this part or that meets all of the following requirements:

i. The community is located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea. A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nautical miles of the baseline of the Bering Sea.

ii. That is certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (Pub. L. 92-203) to be a native village.

iii. Whose residents conduct more than half of their current commercial or subsistence fishing effort in the waters of the BSAI.

iv. That has not previously developed harvesting or processing capability sufficient to support substantial groundfish fisheries participation in the BSAI, unless the community can show that benefits from an approved CDP would be the only way to realize a return from previous investments. The community of Unalaska is excluded under this provision.

Appendix 3 – Proposed Amendment to the BSAI Groundfish FMP

Amendment 87 to
Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area

Amend Section 3.7.4 of the BSAI groundfish FMP by adding the text in bold and deleting the text in strikeout below:

3.7.4 Community Development Quota Multispecies Fishery

The western Alaska Community Development Quota (CDQ) Program (hereinafter the CDQ Program) was established to provide fishermen who reside in western Alaska communities a fair and reasonable opportunity to participate in the Bering Sea and Aleutian Islands groundfish fisheries; to expand their participation in salmon, herring, and other nearshore fisheries; and to help alleviate the growing social and economic crisis within these communities. Residents of western Alaska communities are predominantly Alaska Natives who have traditionally depended upon the marine resources of the Bering Sea for their economic and cultural well-being. The CDQ program is a joint program of the Secretary and the Governor of the State of Alaska. Through the creation and implementation of community development plans, western Alaska communities will be able to diversify their local economies, provide community residents with new opportunities to obtain stable, long-term employment, and participate in the BSAI fisheries which have been foreclosed to them because of the high capital investment needed to enter the fishery.

The NMFS Regional Administrator shall hold the designated percent of the annual total allowable catch of groundfish for each management subarea in the BSAI for the western Alaska community quota as noted below. These amounts shall be released to eligible Alaska communities who submit a plan, approved by the Governor of Alaska, for their wise and appropriate use.

~~The CDQ program is structured such that the Governor of Alaska is authorized to recommend to the Secretary that a Bering Sea rim community be designated as an eligible fishing community to receive a portion of the reserve. To be eligible a community must meet specified criteria and have developed a fisheries development plan approved by the Governor of Alaska. The Governor shall develop such recommendations in consultation with the Council. The Governor shall forward any such recommendations to the Secretary, following consultation with the Council. Upon receipt of such recommendations, the Secretary may designate a community as an eligible fishing community and, under the plan, may release appropriate portions of the reserve.~~

Not more than 33 percent of the total western Alaska community quota for any single species category may be designated for a single CDQ applicant, except that if portions of the total quota are not designated by the end of the second quarter, applicants may apply for any portion of the remaining quota for the remainder of that year only.

3.7.4.1 Eligible Western Alaska Communities

In August 2005, Congress confirmed the eligibility of 65 communities to participate in the CDQ Program (Public Law 109-59). In addition, section 305(i)(1)(B) of the Magnuson-Stevens Act contains eligibility criteria for the CDQ Program. Any community that meets the Magnuson-Stevens Act eligibility criteria may apply to the Secretary following the procedure described in Federal regulations at 50 CFR part 679. To be eligible to participate in the CDQ Program, a community shall:

1. be located within 50 nautical miles from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands, or on an island within the Bering Sea;

2. not be located on the Gulf of Alaska coast of the north Pacific Ocean;

3. be certified by the Secretary of the Interior pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) to be a Native village;

4. consist of residents who conduct more than one-half of their current commercial or subsistence fishing effort in the waters of the Bering Sea or waters surrounding the Aleutian Islands; and

5. not have previously developed harvesting or processing capability sufficient to support substantial participation in the groundfish fisheries in the Bering Sea, unless the community can show that the benefits from an approved Community Development Plan would be the only way for the community to realize a return from previous investments.

All communities eligible for the CDQ Program are listed in Federal regulations at 50 CFR part 679.

~~The Governor of Alaska is authorized to recommend to the Secretary that a community within western Alaska which meets all of the following criteria be eligible for the CDQ program:~~

~~1. be located on or proximate to the Bering Sea coast from the Bering Strait to the western most of the Aleutian Islands or a community located on an island within the Bering Sea, which the Secretary of the Interior has certified pursuant to section 11(b)(2) or (3) of Pub. L. No. 92-203 as Native villages are defined in section 3(c) of Pub. L. No. 92-203;~~

~~2. be unlikely to be able to attract and develop economic activity other than commercial fishing that would provide a substantial source of employment;~~

~~3. its residents have traditionally engaged in and depended upon fishing in the waters of the Bering Sea coast;~~

~~4. has not previously developed harvesting or processing capability sufficient to support substantial participation in the commercial groundfish fisheries of the BSAI because of a lack of sufficient funds for investing in harvesting or processing equipment; and~~

~~5. has developed a community development plan approved by the Governor, after consultation with theCouncil.~~

~~Also, Akutan is included in the list of eligible CDQ communities.~~

3.7.4.2 Fixed Gear Sablefish Allocation

The NMFS Regional Administrator shall hold 20 percent of the annual fixed-gear total allowable catch of sablefish for each management subarea in the BSAI for the western Alaska sablefish community quota. The portions of fixed-gear sablefish TACs for each management area not designated to CDQ fisheries will be allocated as quota share and IFQs and shall be used pursuant to the program outlined in Section 3.7.1.

3.7.4.3 Pollock Allocation

Ten percent of the pollock TAC in the BSAI management area shall be allocated as a directed fishing allowance to the CDQ program. This quota shall be released to communities on the Bering Sea coast which submit a plan, approved by the Governor of Alaska, for the wise and appropriate use of the quota.

3.7.4.4 Multispecies Groundfish and Prohibited Species Allocations

In addition to the CDQ allocations authorized in Section 3.7.4.2 and Section 3.7.4.3, 7.5 percent of the TAC for all BSAI groundfish species or species groups, except squid, will be issued as a CDQ allocation from the groundfish reserve. A pro-rata share of PSC species also will be issued. PSC will be allocated before the trawl/non-trawl splits. The program is patterned after the pollock CDQ program.

Appendix 4 – Proposed Amendment to the BSAI Crab FMP

Amendment 21 to
Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs

1) Remove the following paragraphs:

Chapter 8, Section 8.1.4.2 (Vessel License Limitation):

[The last two sentences of the first paragraph that read] The crab CDQ portion of Amendment 5 became effective March 23, 1998. The crab CDQ program established the crab CDQ reserve and authorizes the State of Alaska to allocate the crab CDQ reserve among CDQ groups and to manage crab harvesting activity of the BS/AI CDQ groups.

***** ***** *****

CDQ Allocation.

CDQs will be issued for 3.5% in 1998; 5% in 1999; and 7.5% in 2000 of all BSAI crab fisheries that have a Guideline Harvest Level set by the State of Alaska. The program will be patterned after the pollock CDQ program (defined in section 14.4.11.6 of the BSAI groundfish FMP), but will not contain a sunset provision.

Also, Akutan will be included in the list of eligible CDQ communities.

Chapter 11, *Section 4, Community Development Allocation (based on existing CDQ program):*

Option 2. Expand existing program to all crab fisheries approved under the rationalization program with the exception of the Western AI brown king crab.

Option 3. Increase for all species of crab to 10%. A minimum of 25% of the total CDQ allocation must be delivered on shore.

Chapter 11, *Clarifications and expressions of Council Intent.*
* * *
3. Norton Sound red king crab fishery CDQ allocation – The Council clarified that the increase of CDQ allocations does not apply to the Norton Sound red king crab fishery. The Norton Sound fishery was excluded from the CDQ allocation increase because its currently regulated under a superexclusive permit program that prohibits its participants from participating in any of the other BSAI crab fisheries. The Norton Sound permit rules are for the benefit local, small vessel participants in that fishery.

2) Add a new sub-section 8.1.4.3, under the sections 8.1 (Category 1 – Federal Management Measures Fixed By The FMP), and sub-section 8.1.4 (Limited Access) to read as follows:

8.1.4.3 Western Alaska Community Development Quota Program.

A percentage of the annual guideline harvest levels of the crab species managed under this FMP are allocated to the Western Alaska Community Development Quota (CDQ) Program. The purpose of the CDQ Program, and additional information and requirements for the program, are described in section 3.7.4 of the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (BSAI groundfish FMP). Eligibility criteria for the CDQ Program are described in section 3.7.4.1 of the BSAI groundfish FMP.

Ten percent of the TAC for each of the following crab fisheries is allocated to the CDQ program: Bristol Bay red king crab, Eastern Aleutian Islands golden king crab, Adak red king crab (west of 179°W.), Pribilof Islands blue and red king crab, St. Matthew blue king crab, Bering Sea snow crab, and Bering Sea Tanner crab. CDQ groups receiving a CDQ allocation for these species are required to deliver at least 25 percent of the total CDQ allocation to shore-based processors. Seven and a half percent of the GHL for the Norton Sound red king crab fishery is allocated to the CDQ program. The State of Alaska is authorized to manage the crab CDQ fisheries.

Appendix 5 – Proposed Revisions to 50 CFR part 679

[**Bold** indicates text that would be added to the regulations and ~~strikeout~~ indicates text that will be removed from the regulations.]

In §679.2, the definition of "eligible communities" would be revised to read as follows:

Eligible community means:

(1) For purposes of the CDQ program, a community that is listed in Table 7 to this part. ~~or that meets all of the following requirements:~~ A community that is not listed on Table 7 must meet the following eligibility criteria:

(i) ~~The community is~~ **be** located within 50 ~~nm~~ **nautical miles** from the baseline from which the breadth of the territorial sea is measured along the Bering Sea coast from the Bering Strait to the most western of the Aleutian Islands, or on an island within the Bering Sea. ~~A community is not eligible if it is located on the GOA coast of the North Pacific Ocean, even if it is within 50 nm of the baseline of the Bering Sea;~~

***(*ii) not be located on the Gulf of Alaska coast of the north Pacific Ocean;**

(**iii**) ~~That is~~ **be** certified by the Secretary of the Interior pursuant to the Native Claims Settlement Act (~~P.L. 92-203~~) **(43 U.S.C. 1601 et seq**.) to be a ~~n~~**N**ative village;

(**iv**) ~~Whose~~ **consist of** residents **who** conduct more than **one-**half of their current commercial or subsistence fishing effort in the waters of the ~~BSAI~~ **Bering Sea or waters surrounding the Aleutian Islands**; and

(iv) ~~That has~~ not **have** previously developed ~~deployed~~ harvesting or processing capability sufficient to support substantial **participation in the** groundfish fisheries ~~participation~~ in the ~~BSAI~~ **Bering Sea**, unless the community can show that **the** benefits from an approved ~~CDP~~ **Community Development Plan** would be the only way **for a community** to realize a return from previous investment**s**. ~~The community of Unalaska is excluded under this provision.~~

In §679.30, paragraph (a)(1)(iv) would be revised to read as follows:

§ 679.30 ***General CDQ regulations***.

(a) Application procedure.

* * *

(1) Community development information.

* * *

(iv) Community eligibility. A list of the participating communities. Each participating community must be listed in Table 7 to this part. ~~or meet the criteria for an eligible community under § 679.2~~. **Communities that are not listed in Table 7, but meet the criteria for an eligible community under § 679.2 may apply for eligibility following the procedures in paragraph (i) of this section.**

In §679.30, a new paragraph (i) would be added to read as follows:

(i) Application for community eligibility for the CDQ Program. Communities that meet the criteria for an eligible community under §679.2 but are not listed on Table 7 to this part, may apply for eligibility by submitting a petition for rulemaking containing the information in paragraph (A) to:

Regional Administrator
NMFS Alaska Region
P.O. Box 21668
Juneau, Alaska 99801

(A) Information required in a petition for rulemaking for CDQ Program community eligibility:

(1) Name of the community.

(2) Name, address, and telephone number of the person making the application on behalf of the community.

(3) If the community is represented by a governing body, provide the name, address, and telephone number of a person who represents the governing body.

(4) A written description and supporting documentation demonstrating that the community meets each of the community eligibility criteria in § 679.2.

(B) Evaluation of the petition for rulemaking.

(i) NMFS will evaluate the petition for rulemaking and, if the application is complete and demonstrates that the community meets all of the eligibility requirements in § 679.2, NMFS will initiate rulemaking to add the community to Table 7. A community may not participate in the CDQ Program until a final rule adding the community to Table 7 is effective.

(ii) For purposes of evaluating the eligibility criteria in paragraph (iv) of the definition of "eligible community" in § 679.2, the phrase "current commercial or subsistence fishing effort" means the commercial or subsistence fishing effort by residents of the community at the time the community applies for eligibility for the CDQ Program, and the phrase "waters of the Bering Sea or waters surrounding the Aleutian Islands" means the waters of the Bering Sea and Aleutian Islands Area, and Alaska State waters adjacent to the waters of the Bering Sea and Aleutian Islands Area, as defined at § 679.2.

(iii) If NMFS determines that the community does not meet the eligibility requirements in § 679.2, NMFS will publish a notice in the *Federal Register* providing the reasons for this determination.

Appendix 6 – Proposed Revisions to Table 7

A Strike through indicates regulatory text that would be removed from Table 7. Text in bold would be added to Table 7.

Table 7 to Part 679- Communities ~~Determined to Be~~ Eligible
~~to Apply~~ for **the Western Alaska** Community Development Quota~~s~~ **Program**
~~(Other communities may be eligible, but do not appear on this table)~~

Aleutian Area 1. Akutan 2. Atka 3. False Pass 4. Nelson Lagoon 5. Nikolski 6. St. George 7. St. Paul	Bristol Bay 1. Alegnagik 2. Clark's Point 3. Dillingham 4. Egegik 5. Ekuk 6. Manokotak 7. Naknek ~~8. Pilot Point/Ugashik~~ **8. Pilot Point** **9. Ugashik** 10. Port Heiden/Meschick 11. South Naknek 12. Sovonoski/King Salmon 13. Togiak 14. Twin Hills **15. Ekwok** **16. Portage Creek** **17. Levelock**
Bering Strait 1. Brevig Mission 2. Diomede/Inalik 3. Elim 4. Gambell 5. Golovin 6. Koyuk 7. Nome 8. Savoonga 9. Shaktoolik 10. St. Michael 11. Stebbins 12. Teller 13. Unalakleet 14. Wales 15. White Mountain **16. Grayling** **17. Mountain Village**	Southwest Coastal Lowlands 1. Alakanuk 2. Chefornak 3. Chevak 4. Eek 5. Emmonok 6. Goodnews Bay 7. Hooper Bay 8. Kipnuk 9. Kongiganak 10. Kotlik 11. Kwigillingok 12. Mekoryuk 13. Newtok 14. Nightmute 15. Platinum 16. Quinhagak 17. Scammon Bay ~~18. Sheldon's Point~~ **Nunam Iqua** 19. Toksook Bay 20. Tununak 21. Tuntutuliak **22. Napaskiak** **23. Napakiak** **24. Oscarville**