



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

August 30, 2006

William C. Noll, Commissioner
Alaska Department of Commerce,
Community and Economic Development
550 W. 7th Avenue, Suite 1770
Anchorage, Alaska 99501-3510

Dear Commissioner Noll:

This letter responds to your August 3, 2006, letters about two proposed substantial amendments to Norton Sound Economic Development Corporation's (NSEDC's) Community Development Plan (CDP). Specifically, you recommended that we approve NSEDC's proposed substantial amendment 06-07NS to hire and support an Alaska Sea Grant Marine Advisory Program agent in Nome, and proposed substantial amendment 06-08NS to invest in a Consolidated Bulk Fuel Program. In addition, in each letter, you stated that it was unclear whether approval of substantial amendments is still required after recent amendments to the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and you asked the National Marine Fisheries Service (NMFS) to make a determination about that question.

On July 11, 2006, the President signed the Coast Guard and Maritime Transportation Act of 2006 (the Coast Guard Act). Section 416(a) of the Coast Guard Act revises section 305(i)(1) of the MSA by replacing all of the existing language in this section with new language. These MSA amendments address allocations of groundfish, halibut, and crab to the CDQ Program; allocations of quota among the CDQ groups; management of the CDQ fisheries; eligible communities; limits on allowable investments; the creation of a CDQ administrative panel; compliance with State of Alaska (State) reporting requirements; and other aspects of program administration and oversight by the State and NMFS, on behalf of the Secretary of Commerce. Most of these MSA amendments will require revisions to Federal regulations that will be implemented through proposed and final rulemaking. Amendments also will need to be made by the North Pacific Fishery Management Council (Council) to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs. A more thorough report about implementation of these MSA amendments will be provided to the Council at its October 2006 meeting.

In the meantime, however, questions such as yours about the continued applicability of CDQ Program regulations have arisen. How must we manage and administer the CDQ Program in situations where certain regulations at 50 CFR part 679 are now in conflict with the MSA? For reasons described in more detail in the attachment to this letter, I have determined that regulations in §679.30 related to submission, review, and approval or disapproval by NMFS of



Community Development Plans (CDPs), amendments to CDPs, the annual budget report, and the annual budget reconciliation report are inconsistent with section 305(i)(1)(I) of the MSA. We intend to revise these regulations through rulemaking. However, these revisions will be complicated because they are related to determining the role of the CDP in future adjustments to allocations among the CDQ groups under section 305(i)(1)(H) and to determining what, if any, regulations will be needed to implement requirements related to limits on investments by the CDQ groups in section 305(i)(1)(E)(iii) through (v). It may take a year or more to prepare the analysis necessary to support this rulemaking, to consult with the Council on proposed regulatory and fishery management plan amendments, to consider any recommendations submitted by the CDQ administrative panel, to publish a proposed rule, to respond to public comments on the proposed rule, and to implement a final rule revising 50 CFR part 679.

Until current regulations can be revised to be consistent with the MSA, NMFS is suspending enforcement of the following regulations because they are not consistent with the new section 305(i)(1)(I) of the MSA: (1) regulations at §679.30(a) and §679.30(d) that require submission, review, and approval of proposed CDPs; (2) regulations at §679.30(g)(2) that require submission and approval of the annual budget report; (3) regulations at §679.30(g)(3) that require submission of the annual budget reconciliation report; and (4) regulations at §679.30(g)(4) and (5) that require submission, review, and approval of substantial and technical amendments. The result of this action is that enforcement of all of the regulations at 50 CFR part 679 that formerly provided Federal government oversight of how the CDQ groups used the CDQ allocations to provide benefits to the eligible communities have been suspended. New regulations defining the role of the Federal government in oversight of the CDQ Program, consistent with the requirements of the MSA, will have to be developed and implemented in the future.

I also have determined that, as of July 11, 2006, the CDQ groups are not required to submit requests for approval of substantial amendments. If a CDQ group submits proposed substantial amendments, as NSEDC has done in the case of amendments 06-07NS and 06-08NS, it would be inconsistent with the MSA for NMFS to approve or disapprove these proposed amendments. Therefore, we cannot act on the State's recommendation to review and approve these two proposed substantial amendments and we cannot make any revisions to our copy of NSEDC's CDP to reflect the changes proposed in these amendments.

Under the MSA, as amended by the Coast Guard Act, the CDQ groups must now monitor their expenditures and comply with section 305(i)(1)(E)(iii) through (v) of the MSA related to allowable investments. NMFS does not yet have regulations interpreting or governing this new section of the MSA. Therefore, we could not review the proposed expenditures described in amendments 06-07NS and 06-08NS to assess compliance with these new requirements of the MSA.

If you have any further questions, please contact Sally Bibb at (907) 586-7389.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Mecum". The signature is fluid and cursive, with a long horizontal stroke at the end.

Robert D. Mecum
Acting Administrator, Alaska Region

Attachment

cc: Jeff Passer, NMFS Enforcement
Greg Cashen, ADCED
CDQ groups
NPFMC

I. Current Federal Regulations Governing Community Development Plans and Amendments to Community Development Plans

Following is a description of the regulations at 50 CFR part 679 that address the Community Development Plans (CDPs) and amendments to the CDPs.

The Community Development Plan: The Community Development Plan is defined in Federal regulations at 50 CFR part 679 (§679.2), as follows:

Community Development Plan (CDP) means a business plan for the economic and social development of a specific Western Alaska community or group of communities under the CDQ program at §679.30.

Section 679.30(a) requires that qualified applicants (CDQ groups)¹ submit a proposed CDP to the State of Alaska (State) as an application for allocations of groundfish, crab, halibut, and prohibited species quota. The information that must be contained in a proposed CDP is listed in §679.30(a)(1). The required information includes a description of all CDQ projects, project schedules and milestones, and employment information; a list of the communities participating in the CDP; information about the managing organization, the board of directors, business relationships, investments, and budgets; audited annual financial statements; an organizational chart; a description of how the group intends to harvest and process its allocations; and a request for percentage allocations.

Section 679.30(d) requires the State to transmit the proposed CDP and its recommendations for approval of each of the proposed CDPs to NMFS, along with the findings and rationale supporting the State's recommended percentage allocations of quota to each of the CDQ groups. Under these regulations, and prior to the recent MSA amendments, NMFS reviewed the State's recommendations and the proposed CDPs. NMFS approved the proposed CDPs that complied with the information requirements in §679.30, approved the State's recommended allocations among the CDQ groups if the State's findings and rationale support its recommendations, and disapproved the State's recommendations if the State's findings and rationale did not support its recommendations.

Since 1992, the State has specified the years over which the CDPs and allocations among the CDQ groups will be effective. These allocation cycles have ranged from one year to three years. Section 679.30(a) states that "[A]llocations of CDQ and PSQ are harvest privileges that expire upon the expiration of the CDP. When a CDP expires, further CDQ allocations are not implied

¹ A qualified applicant is defined at §679.2 and means a local fishermen's organization or a local economic development organization that represents a community or group of communities eligible for the CDQ Program; is incorporated under the laws of the State of Alaska or under Federal law; and has a board of directors composed of at least 75 percent resident fishermen of the community (or group of communities). The six CDQ groups have been determined to be qualified applicants for purposes of the CDQ Program regulations in 50 CFR part 679.

or guaranteed, and a qualified applicant must re-apply for further allocations on a competitive basis with other qualified applicants.” Once NMFS approves a proposed CDP, §679.30(g)(4) defines the CDP as a working business plan and requires that it be kept up to date through substantial amendments, described at §679.30(g)(4), and technical amendments, described at §679.30(g)(5).

The six CDPs in effect today were originally submitted to NMFS for review by the State on October 15, 2002. On January 17, 2003, NMFS approved these CDPs and associated percentage allocations of groundfish, crab, halibut, and prohibited species, with an expiration date of December 31, 2005. On August 8, 2005, NMFS issued an initial administrative determination to remove the December 31, 2005, expiration date from the CDPs and the associated percentage allocations among the CDQ groups until a future final agency action replaced the CDPs and associated allocations. This decision was effective on September 8, 2005. The six CDPs originally approved by NMFS on January 17, 2003, remain in effect today.

Substantial amendments to the CDP: §679.30(g)(4)(i) states that “[S]ubstantial amendments to a CDP require a written request by the CDQ group to the State and NMFS for approval of the amendment. The State must forward the amendment to NMFS with a recommendation as to whether it should be approved.” Sections 679.30(g)(4)(ii) and (iii) address approval or disapproval of the proposed substantial amendment. Section 679.30(g)(4)(iv) contains a list of changes to a CDP that require the submission of a request for approval of a substantial amendment. Section 679.30(g)(4)(v) contains the information that must be submitted in the request for approval of a substantial amendment. The six CDPs in effect today have been amended through substantial amendments approved by NMFS numerous times since the CDPs originally were approved on January 17, 2003.

Technical amendments to the CDP: §679.30(g)(5) states that “Any change to a CDP that is not considered a substantial amendment under paragraph (g)(4)(iv) of this section is a technical amendment.” These regulations require the CDQ groups to notify the State of any technical amendments, require the State to “forward the technical amendment to NMFS with its recommendations for approval or disapproval of the amendment.” NMFS reviews the proposed amendment and, if it complies with all applicable requirements, NMFS approves the proposed amendment and notifies the State and the CDQ group.

The annual budget report: §679.30(g)(2) requires each CDQ group to submit an annual budget report to NMFS by December 15 of the year preceding the year for which the annual budget applies. The annual budget report provides an update to the annual budgets in the CDP for each year the CDP is effective. NMFS replaces the annual budget for a specific year in the original CDP with the updated annual budget report submitted each year. Therefore, the updated budgets submitted through the annual budget report are considered amendments to the CDP. Regulations at §679.30(g)(2)(iii) states that an “annual budget report is approved upon receipt by NMFS, unless disapproved by NMFS in writing by December 31. If disapproved, the annual budget report will be returned to the CDQ group for revision and resubmittal to NMFS.”

The annual budget reconciliation report: §679.30(g)(3) requires each CDQ group to “reconcile its annual budget by May 30 of the year following the year for which the annual budget applied.”

The annual budget reconciliation report is required to compare, or reconcile, the actual income and expenditures for each CDQ project described in a CDP with the estimated income and expenditures that were projected for each CDQ project in the annual budget contained in the CDP. The CDQ groups prepare the annual budget report as a schedule included in the annual audited financial statements that are submitted to the State. The State then submits these reports to NMFS as part of the State's annual report on the CDQ Program.

II. Magnuson-Stevens Fishery Conservation and Management Act Amendments that are Related to CDPs and Amendments

The Coast Guard and Maritime Transportation Act of 2006 (Public Law 109-241) includes the following four subparagraphs that specifically address CDPs and amendments to CDPs:

Approval of CDPs and Amendments: Section 305(i)(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) states the following:

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

We interpret this paragraph to prohibit NMFS from requiring that proposed CDPs and amendments to CDPs be approved by NMFS, on behalf of the Secretary of Commerce, before a CDQ group may receive an allocation of quota or undertake the activities described in a proposed CDP or a proposed amendment.

State Regulations Governing CDPs and Amendments: Section 305(i)(1)(F) of the MSA states the following:

(F) ENTITY STATUS, LIMITATIONS, AND REGULATION.—The entity—

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

The paragraph exempts the CDQ groups from State laws requiring approval of financial transactions, community development plans, or amendments to CDPs. This exemption for compliance with specific State laws does not cause an inconsistency between any Federal regulations and the MSA. However, this subparagraph provides additional confirmation for our interpretation of section 305(i)(1)(I), which does apply directly to NMFS regulations. In addition, §679.30(d), §679.30(g)(4)(i), and §679.30(g)(5)(ii) require the State to forward to NMFS proposed CDPs and proposed amendments along with the State's recommendations for approval or disapproval of the proposed CDPs and proposed amendments. If the MSA exempts CDQ groups from the State's laws or regulations related to approval of CDPs and amendments, the State may be unable to obtain the information necessary to satisfy Federal regulations related to the State's review and approval of CDPs and amendments.

Use of the Community Development Plan in the Future: Sections 305(i)(1)(H) and (J) of the MSA provide information about the use of the CDPs in the future.

Section 305(i)(1)(H) follows:

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

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

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

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

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

(III) Employment, scholarships, and training supported by the entity.

*(IV) Achieving of the goals of the entity's **community development plan** [Emphasis added].*

In addition, section 305(i)(1)(J) defines a CDP, as follows:

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

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

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

We interpret that reference to the “entity’s community development plan” in one of the four criteria that will be used to evaluate the CDQ groups during the decennial review process means that a CDP of some form will continue to be prepared by the CDQ groups. In addition, the inclusion of such a specific definition of a CDP in section 305(i)(1)(J) of the MSA further supports the interpretation that CDPs will continue to be required to be prepared by the CDQ groups. However, the future role of the CDPs must be addressed through analysis and rulemaking to implement the amendments to section 305(i)(1) of the MSA. For example, the analysis and rulemaking should address the following questions: what would the CDP be used for and by whom; must a CDP be submitted to the State or NMFS; if so, what information would be required to be contained in a CDP; and when would a CDP be required to be submitted?

The MSA also includes a new subparagraph that affects the use of a CDP as an application for CDQ allocations among the CDQ groups. Section 305(i)(1)(C) states the following:

(C) ALLOCATIONS TO ENTITIES.—Each entity eligible to participate in the program shall be authorized under the program to harvest annually the same percentage of each species allocated to the program under subparagraph (B) that it was authorized by the Secretary to harvest of such species annually as of March 1, 2006, except to the extent that its allocation is adjusted under subparagraph (H). Such allocation shall include all processing rights and any other rights and privileges associated with such allocations as of March 1, 2006.

The subparagraph established the percentage allocations of groundfish, halibut, and crab among the CDQ groups at the percentage allocations in effect on March 1, 2006. A portion of these percentage allocations may be adjusted every ten years starting in 2012 under the provisions of section 305(i)(1)(H). This amendment to the MSA requires revisions to NMFS regulations in §679.30(a) through (d) about the CDQ allocation process, including regulations that define the CDP as an application for CDQ percentage allocations.

III. Conclusions

Approval of CDPs: As described above, it would be inconsistent with section 305(i)(1)(I) of the MSA for NMFS to continue to enforce requirements for approval of a CDP. Therefore, if NMFS receives a proposed CDP from the CDQ groups or the State, NMFS would be unable to apply the regulations at §679.30(d) that require NMFS to either approve or disapprove the proposed CDP. CDPs are submitted as applications for CDQ allocations among the CDQ groups. The MSA now requires that the percentage allocations of groundfish, crab, and halibut among the CDQ groups are established at those percentage allocations in effect on March 1, 2006, until at least 2012. Therefore, it is unlikely that NMFS will receive any proposed CDPs from the CDQ groups or the State before NMFS revises its regulations to be consistent with the recent MSA amendments.

Submission and Approval of Amendments to CDPs: Regulations related to the submission, review, and approval or disapproval of substantial and technical amendments apply on an on-going basis, as demonstrated by the State's recent submission of two substantial amendments for NMFS's review. However, regulations at §679.30(g)(4)(ii) and §679.30(g)(5)(ii) that require NMFS to approve proposed substantial and technical amendments to CDPs are no longer consistent with section 305(i)(1)(I) of the MSA. Therefore, NMFS can no longer enforce regulations that require the CDQ groups to obtain approval by NMFS for substantial and technical amendments. In addition, because the submission of information required for a proposed substantial amendment is defined at §679.30(g)(4)(i) as a request by the CDQ group for approval of the amendment, it is inconsistent with the MSA for NMFS to continue to enforce the requirement that CDQ groups submit requests for approval of substantial amendments or any of the information required to be submitted in such requests for approval.

NMFS regulations do not require the CDQ groups to submit requests for approval of technical amendments. Section 679.30(g)(5)(i) refers to the CDQ groups notifying the State about technical amendments. However, the results of our determination that NMFS may no longer

enforce requirements that the CDQ groups submit requests for approval of substantial amendments makes it unreasonable for NMFS to continue to enforce requirements that the CDQ group submit the information required for technical amendments. Both substantial and technical amendments are required to keep a CDP up to date. If the CDQ groups are no longer required to update their CDPs through substantial amendments, the CDPs will become out of date quickly and will no longer reflect the working business plan of the CDQ group, as envisioned by NMFS's current regulations. It is not reasonable to suspend enforcement of regulations related to substantial amendments and continue to require the submission of information for technical amendments. Technical amendments alone will not accomplish the objective of maintaining a CDP as a working business plan for a CDQ group. Therefore, NMFS also is suspending enforcement of regulations at §679.30(g)(5) requiring the submission of technical amendments to CDPs.

These interpretations are consistent with the legislative intent of the new section 305(i)(1)(I) of the MSA, which states:

The Conference substitute eliminates the requirement that the CDQ groups seek either the review or approval by the Secretary of community development plans or amendments to community development plans. The Conference agreement does not require the State of Alaska to approve community development plans and amendments. (Congressional Record, p H1661, April 6, 2006.)

Submission and Approval of the Annual Budget Report: As described in section I of this attachment, NMFS considers the revised budgets submitted in the annual budget report as amendments to the CDPs. Therefore, requirements in §679.30(g)(2)(iii) related to approval or disapproval of the annual budget report are now inconsistent with the requirement in section 305(i)(1)(I) of the MSA that approval by NMFS of amendments to CDPs is not required. Based on the rationale described above for substantial and technical amendments to CDPs, it is inconsistent with the MSA for NMFS to continue to enforce requirements at §679.30(g)(2) for the submission and approval of the annual budget report by December 15 of each year.

Submission of the Annual Budget Reconciliation Report: The annual budget reconciliation report requires a comparison, or reconciliation, between actual and estimated annual income and expenses for each CDQ project listed in the annual budget in the CDP. Compliance with the requirements for the annual budget reconciliation report assumes that the annual budgets and list of CDQ projects in the CDP are being kept up to date. However, as described above, it is inconsistent with section 305(i)(1)(J) of the MSA to require the CDQ groups to update the list of CDQ projects in their CDPs through amendments or to submit revised annual budgets prior to the beginning of each year. Therefore, it also would be inconsistent with the MSA to continue to require the CDQ groups to prepare the annual budget reconciliation report. If the list of CDQ projects and the annual budgets in the CDPs are no longer being kept up to date, then the CDP would not contain the information that is required to be reconciled in the annual budget reconciliation report.