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Recusal Examination for the April 2017 North Pacific Fishery Management Council decision concerning CDQ Ownership Attribution

Summary

At its April 2017 meeting, the North Pacific Fishery Management Council (Council) is scheduled to make a final decision on a proposed action to modify the methods used by NMFS to attribute ownership and use of harvesting and processing privileges by Community Development Quota (CDQ) groups under the American Fisheries Act (AFA) and the Crab Rationalization (CR) Programs. This proposed action is referred to as the CDQ ownership attribution action. This document examines whether any of the seven affected individuals on the Council are recused from voting on the CDQ ownership attribution action under the regulations at 50 CFR 600.235. For reasons explained below, Council member Kinneen is recused from voting on this Council decision. The remaining affected individuals (Council members Cross, Down, Hull, Laukitis, Mezirow, and Peterson) are not recused from voting on this Council decision.

Statutory and Regulatory Background

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) and regulations at 50 CFR 600.225 and 600.235 govern the ability of a Council member to participate in and/or vote on a Council decision.

Regulations at 50 CFR 600.225 include the rules of conduct for Council members and employees. Section 600.225(b) states: "Councils are responsible for maintaining high standards of ethical conduct among themselves, their staffs, and their advisory groups. In addition to abiding by the applicable Federal conflict of interest statutes, both members and employees of the Councils must comply with the following standards of conduct." Nine standards are listed. Section 600.225(b)(9)(ii) states: "No Council member may participate personally and substantially as a member through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a particular matter primarily of individual concern, such as a contract, in which he or she has a financial interest, even if the interest has been disclosed in accordance with § 600.235."

Under section 302(j)(7)(A) of the MSA and 50 CFR 600.235(c)(1), "No affected individual may vote on any Council decision that would have a significant and predictable effect on a financial interest disclosed in his/her report filed under paragraph (b) of this section."

A Council decision will be considered to have a "significant and predictable effect on a financial interest" if there is a close causal link between the decision and an expected and substantially disproportionate benefit to the financial interest in harvesting, processing, lobbying, advocacy, or marketing of any affected individual or the affected individual's spouse, minor child, partner, or any organization (other than the Council) in which that individual is serving as an officer, director, trustee, partner, or employee, relative to the financial interests of other participants in the same gear type or sector of the fishery. MSA § 302(j)(7)(A); 50 CFR 600.235(c)(2). For

fisheries in which individual fishing quotas (IFQs) are assigned, the determining factor is “the percentage of IFQs assigned to the affected individual.” *Id.*

“Expected and substantially disproportionate benefit” is defined at 50 CFR 600.235(c)(3) as “a quantifiable positive or negative impact with regard to a matter likely to affect a fishery or sector of the fishery in which the affected individual has a significant interest, as indicated by:

- (i) A greater than 10-percent interest in the total harvest of the fishery or sector of the fishery in question;
- (ii) A greater than 10-percent interest in the marketing or processing of the total harvest of the fishery or sector of the fishery in question; or
- (iii) Full or partial ownership of more than 10 percent of the vessels using the same gear type within the fishery or sector of the fishery in question.”

In calculating an affected individual’s financial interest in the fishery or sector of the fishery in question, we attribute all harvesting, processing, and marketing activity of a wholly- or partially-owned company, including subsidiary companies, to the affected individual. For Council decisions affecting fisheries in which IFQs are assigned, we attribute all IFQs assigned to wholly- or partially-owned companies, including subsidiary companies, to the affected individual. We have determined that this interpretation of the 10% thresholds is consistent with the provisions of the Magnuson-Stevens Act and the regulations at 50 CFR 600.235(c)(3).¹

Under 50 CFR 600.235(e), an affected individual who is recused from voting may participate in Council deliberations relating to the decision, after notifying the Council of the voting recusal and identifying the financial interest that would be affected. The affected individual also may state for the record how he or she would have voted. 50 CFR 600.235(f)(4).

An affected individual who is not recused from voting but who believes that a Council decision would have a significant and predictable effect on his or her financial interests may, at any time before a vote is taken, voluntarily recuse himself or herself by announcing to the Council an intent not to vote on the decision and identifying the financial interest that he or she believes is affected. 50 CFR 600.235(d).

Determination of affected individuals

Of the 11 voting Council members, **seven members** (Cross, Down, Hull, Kinneen, Laukitis, Mezirow, and Peterson) **are affected individuals** in that they were appointed by the Secretary of Commerce to serve as voting members of the Council in accordance with section 302(b)(2) of the MSA.

In accordance with section 302(j)(2) of the MSA and 50 CFR 600.235(b)(1) and (b)(2), these seven members have disclosed and reported their financial interests in harvesting, processing,

¹ Letter from Lois J. Schiffer, General Counsel, NOAA Office of General Counsel, to Simon Kinneen, dated April 8, 2015.

marketing, lobbying, or advocacy activity by filing with the Executive Director of the Council their annual, updated NOAA Form 88-195, Statement of Financial Interests.

Is the action before the Council a “Council decision”?

Among other things, a “Council decision” includes Council actions that could result in the approval of “a fishery management plan (FMP) or FMP amendment” or a Council “request for amendment to regulations implementing an FMP,” commonly referred to as a regulatory amendment. 50 CFR 600.235(a). According to Section 2.1 of the February 2017 Initial Review Draft Regulatory Impact Review for CDQ Program Ownership Attribution (Analysis), a decision on the CDQ ownership attribution action would not require an amendment to the BSAI Groundfish FMP, but could require an amendment to the Crab FMP and modification of certain regulations at 50 CFR Part 679 and Part 680. Therefore, Council final action on the CDQ ownership attribution action is a “Council decision” because it could result in an FMP amendment and a regulatory amendment.

Determination of the “fishery or sector of the fishery” affected by a Council decision on CDQ ownership attribution

The fishery or sector of the fishery is determined by the action before the Council. Section 2.2 of the Analysis describes the purpose and need for the action as follows:

This action would revise the AFA Program and the CR Program ownership attribution regulations and the Crab FMP to provide for the different requirements for the CDQ groups, as distinguished from other program participants, which is mandated by the Magnuson-Stevens Act (as amended by the Coast Guard Act). Specifically, this action would remove the application of the “10-percent” rule for the CDQ groups and replace it with the proportional “individual and collective” rule. ... Since the 2006 amendment to the Magnuson-Stevens Act mandating the use of the individual and collective rule for CDQ groups, NMFS implemented this modification in practice by using the individual and collective rule but has not revised the AFA or CR Program regulations or the Crab FMP. This action would revise the regulations and the Crab FMP to make them consistent with the Magnuson-Stevens Act and current practice.

The Council is considering two alternatives:

Alternative 1: No action. No change to the regulations governing the ownership attribution method for CDQ groups for excessive share limitations under the AFA Program; no change to the regulations and the Crab FMP governing the ownership attribution model for CDQ groups for the PQS ownership and IPQ use caps under the CR Program.

Alternative 2: Revise the regulations governing the ownership attribution model for CDQ groups for excessive share limitations under the AFA Program; revise the regulations and the Crab FMP governing the ownership attribution model for CDQ groups for the PQS ownership and IPQ use

caps under the CR Program to provide as directed in the Magnuson-Stevens Act.

As explained in Section 1 of the Analysis, “In addition to their groundfish, crab, and halibut allocations under the CDQ Program, CDQ groups participate in other [limited access privilege] programs by purchasing quota shares or through ownership of vessels or processors that participate in the fisheries.” CDQ groups participate in the AFA Program through their ownership of vessels and companies eligible to participate in the AFA directed pollock fishery. The directed pollock fishery is comprised of the pollock directed fishing allowances to the inshore, catcher/processor, and mothership sectors. The AFA Program has harvesting and processing caps, or limits, for participants in the directed pollock fishery. Similarly, CDQ groups participate in the CR Program through their ownership and use of harvesting quota share (QS), processing quota share (PQS), individual fishing quota (IFQ), and individual processing quota (IPQ). The CR Program has ownership and use caps for QS, PQS, IFQ and IPQ.

In order to calculate a person’s level of ownership and use in the directed pollock fishery and CR Program crab fisheries relative to the caps, NMFS used the attribution methods specified in regulations for the AFA and CR Programs. These attribution methods applied to all persons in these fisheries, including CDQ groups. However, in 2006, Congress revised section 305(i)(1)(F)(i) of the MSA to require that NMFS apply a specific attribution method, referred to as the individual and collective rule, when calculating a CDQ group’s level of ownership and use in limited access privilege programs. Section 305(i)(1)(F)(i) also states that CDQ Program allocations to a CDQ group are to be excluded from the calculation.

As explained in Section 2.3 and Table 2-1 of the Analysis, the individual and collective rule was the attribution method being used for most of the limited access privilege programs in 2006. However, the 10-percent rule was the attribution method being used for harvesting and processing levels in the AFA directed pollock fishery and for PQS and IPQ ownership and use levels in the CR Program crab fisheries. Although NMFS has been using the individual and collective rule for CDQ groups in the AFA directed pollock fishery and for PQS and IPQ in the CR Program crab fisheries since 2006, the BSAI Crab FMP and the regulations for the directed pollock fishery and for PQS and IPQ ownership and use caps continue to stipulate that all persons are subject to the 10-percent rule. The CDQ Ownership Attribution action would amend the BSAI Crab FMP and modify the regulations to bring them into conformance with the requirements of section 305(i)(1)(F)(i).

Given the above, we have determined that the fishery or sector of the fishery affected by the CDQ ownership attribution action is the AFA directed pollock fishery and the PQS and IPQ issued in CR Program crab fisheries. The most recent fishing year for which pollock harvesting and processing data are available is 2016. The total amount of pollock available for harvest in the directed pollock fishery in 2016 was 1,170,759 mt. The amount of IPQ issued for the 2015/2016² crab fishing year totals to a combined amount of 54,935,489 pounds (24,919 mt) of

² We also examined the amount of IPQ issued for the 2016/2017 crab fishing year. For 2016/2017, NMFS issued IPQ that totaled to a combined amount of 25,166,011 pounds (11,415 mt) of crab for the BBR, BSS, EAG, and WAG crab fisheries. The amount of IPQ issued in 2016/2017 is significantly less than the amount of IPQ issued in 2015/2016. However, the recusal determinations for the affected individuals remained the same whether we used IPQ for 2016/2017 or IPQ for 2015/2016.

IPQ crab for the BBR, BSS, EAG, WAG, EBT, WBT, and SMB crab fisheries. Adding these pollock and crab amounts, the combined total in the affected fisheries is 1,195,678 mt of pollock and IPQ crab. This amount results in a 10% harvesting, processing and marketing recusal threshold of 119,567.8 mt.

Determination as to whether the CDQ ownership attribution action is a particular matter primarily of individual concern for any Council member under 50 CFR 600.225

We have determined that the CDQ ownership attribution action is not a particular matter primarily of individual concern for any affected individual. Although the action would adjust the attribution method applied to the six CDQ groups, the action would modify regulations that currently apply to all participants in the affected fisheries and has effects on more participants than just CDQ groups. CDQ groups compete in the affected fisheries the same as non-CDQ participants in those fisheries. The caps for the affected fisheries are applicable to all participants and the way in which NMFS calculates CDQ holdings relative to those caps will have effects on other non-CDQ participants. Because the CDQ ownership attribution action would affect more than a few fishery participants, it is not a particular matter primarily of individual concern.³

Individual determinations as to whether there is an expected and substantially disproportionate benefit from a Council decision on CDQ ownership attribution for any affected individual under 50 CFR 600.235

Mr. Cross

According to Mr. Cross' financial disclosure statement dated January 5, 2017, Mr. Cross is employed with Aleutian Spray Fisheries, Inc. (ASF). None of Mr. Cross' financial interests hold or use PQS or IPQ in any CR Program crab fisheries. ASF has financial interests that own vessels that participate in the directed pollock fishery. These vessels are the *Golden Dawn*, the *Nordic Star*, and the *Starbound*. These three vessels had a combined total catch of [REDACTED] from the directed pollock fishery in 2016. This total amount does not exceed the 10% harvesting, processing and marketing recusal thresholds of 119,567.8 mt. Additionally, the number of vessels owned by Mr. Cross' financial interests and participating in the 2016 directed pollock fishery do not exceed the 10% vessel ownership recusal threshold.⁴ Because the Council's decision on CDQ ownership attribution will not result in an expected and substantially disproportionate benefit to Mr. Cross' listed financial interests, no significant and predictable effect from a Council decision on CDQ ownership attribution exists for any of Mr. Cross'

³ The proposed rule preamble for the original recusal regulations at 50 CFR 600.235 identified "management measures that affect only the [Council] member's business and a few other fishery participants" as an example of a particular matter primarily of individual concern. 62 Fed. Reg. 42474, 42475 (August 7, 1997).

⁴ In 2016, 102 vessels participated in the directed pollock fishery. Given this amount, the ten percent recusal threshold for vessel ownership is 10 vessels. The three vessels owned by Mr. Cross' financial interests do not exceed the 10% vessel ownership recusal threshold of 10 vessels.

disclosed financial interests. Therefore, Mr. Cross is not required to recuse himself from voting on the CDQ ownership attribution action under 50 CFR § 600.235.

Mr. Down

According to Mr. Down's financial disclosure statement dated January 6, 2017, Mr. Down's financial interests do not participate in the directed pollock fishery or hold or use PQS or IPQ in the CR Program crab fisheries. Because the Council's decision on CDQ ownership attribution will not result in an expected and substantially disproportionate benefit to Mr. Down's listed financial interests, no significant and predictable effect from a Council decision on CDQ ownership attribution exists for any of Mr. Down's disclosed financial interests. Therefore, Mr. Down is not required to recuse himself from voting on the CDQ ownership attribution action under 50 CFR § 600.235.

Mr. Hull

According to Mr. Hull's financial disclosure statement dated January 5, 2017, Mr. Hull's financial interests do not participate in the directed pollock fishery or hold or use PQS or IPQ in the CR Program crab fisheries. Because the Council's decision on CDQ ownership attribution will not result in an expected and substantially disproportionate benefit to Mr. Hull's listed financial interests, no significant and predictable effect from a Council decision on CDQ ownership attribution exists for any of Mr. Hull's disclosed financial interests. Therefore, Mr. Hull is not required to recuse himself from voting on the CDQ ownership attribution action under 50 CFR § 600.235.

Mr. Kinneen

According to Mr. Kinneen's financial disclosure statement dated January 20, 2017, Mr. Kinneen is employed with Norton Sound Economic Development Corporation (NSEDC), a Community Development Quota (CDQ) group. None of Mr. Kinneen's financial interests hold or use PQS or IPQ in the CR Program crab fisheries. NSEDC has financial interests that own vessels that participate in the directed pollock fishery. These are the *Alaska Rose*, the *Bering Rose*, the *Destination*, the *Great Pacific*, the *Sea Wolf*, the *Alaska Ocean*, and the *Pacific Glacier*. These seven vessels had a combined total catch of [REDACTED] from the directed pollock fishery in 2016. This total amount exceeds the 10% harvesting recusal threshold of 119,567.8 mt.⁵ Exceedance of a recusal threshold indicates that the Council's decision on CDQ ownership attribution will have a significant and predictable effect on Mr. Kinneen's financial interests. Therefore, Mr. Kinneen is required to recuse himself from voting on the CDQ ownership attribution action under 50 CFR § 600.235.

Although Mr. Kinneen is required to recuse himself from voting, he may participate in all aspects of the Council's deliberations relating to the action after he notifies the Council of the voting recusal and identifies the financial interests that are affected. Mr. Kinneen also may state for the record how he would have voted on the action.

⁵ The number of vessels owned by Mr. Kinneen's financial interests does not exceed the 10% vessel ownership recusal threshold of 10 vessels.

Mr. Laukitis

According to Mr. Laukitis' financial disclosure statement dated January 4, 2017, Mr. Laukitis' financial interests do not participate in the directed pollock fishery or hold or use PQS or IPQ in the CR Program crab fisheries. Because the Council's decision on CDQ ownership attribution will not result in an expected and substantially disproportionate benefit to Mr. Laukitis' listed financial interests, no significant and predictable effect from a Council decision on CDQ ownership attribution exists for any of Mr. Laukitis' disclosed financial interests. Therefore, Mr. Laukitis is not required to recuse himself from voting on the CDQ ownership attribution action under 50 CFR § 600.235

Mr. Mezirow

According to Mr. Mezirow's financial disclosure statement dated January 20, 2017, Mr. Mezirow's financial interests do not participate in the directed pollock fishery or hold or use PQS or IPQ in the CR Program crab fisheries. Because the Council's decision on CDQ ownership attribution will not result in an expected and substantially disproportionate benefit to Mr. Mezirow's listed financial interests, no significant and predictable effect from a Council decision on CDQ ownership attribution exists for any of Mr. Mezirow's disclosed financial interests. Therefore, Mr. Mezirow is not required to recuse himself from voting on the CDQ ownership attribution action under 50 CFR § 600.235.

Ms. Peterson

According to Ms. Peterson's financial disclosure statement dated January 6, 2017, Ms. Peterson's financial interests do not participate in the directed pollock fishery or hold or use PQS or IPQ in the CR Program crab fisheries. Because the Council's decision on CDQ ownership attribution will not result in an expected and substantially disproportionate benefit to Ms. Peterson's listed financial interests, no significant and predictable effect from a Council decision on CDQ ownership attribution exists for any of Ms. Peterson's disclosed financial interests. Therefore, Ms. Peterson is not required to recuse herself from voting on the CDQ ownership attribution action under 50 CFR § 600.235.

