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Recusal examination for the June 2017 North Pacific Fishery Management Council decision concerning the potential for shortage of Lead Level 2 observers for deployment on freezer longline and pot catcher/processor vessels

Summary

At its June 2017 meeting, the North Pacific Fishery Management Council (Council) is scheduled to take final action on whether to address the potential shortage of lead level 2 (LL2) observers by allowing regulatory exceptions, creating additional opportunities for observers to gain necessary experience, or by creating alternative observer coverage requirements that would allow a vessel to conduct fishing activity without an LL2 observer on board. This action would modify circumstances under which an LL2 observer is required on vessels using fixed gear, specifically freezer longliners catcher/processors (C/Ps) participating in the Bering Sea and Aleutian Islands (BSAI) and Gulf of Alaska (GOA) groundfish fisheries and pot C/Ps participating in the groundfish Community Development Quota (CDQ) fisheries.

This document examines whether any of the seven Council members appointed by the Secretary of Commerce are recused from voting on this action under 50 CFR 600.235 or recused from participating in this action under 50 CFR 600.225(b)(9)(ii). For reasons explained below, Council member Down is recused from voting on this action under 50 CFR 600.235. The remaining members (Council members Cross, Hull, Kinneen, Laukitis, Mezirow, and Peterson) are not recused from voting on this action under 50 CFR 600.235, and none of the seven Council members are recused from participating in this action under 50 CFR 600.225(b)(9)(ii).

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, all harvesting, processing, and marketing activity of a wholly- or partially-owned company, including subsidiary companies, is attributed to the affected individual. For Council decisions affecting fisheries in which IFQs are assigned, all IFQs assigned to wholly- or partially-owned companies, including subsidiary companies, are attributed to the affected individual. The NOAA Office of General Counsel has determined that this interpretation of the 10% thresholds is consistent with the provisions of the MSA 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.

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

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

This action is 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 the Council’s April 9, 2017, motion on initial review, the Council may choose –in addition to taking no action-- to either create a regulatory exception to the requirement to carry a LL2 observer if one is not available, or modify the LL 2 coverage requirement by either allowing substitution of two observers for one LL2 observer or modify the LL2 endorsement to allow trawl C/P observer experience to count toward a nontrawl LL2 endorsement. Thus, Council action on whether to allow a regulatory exception to the LL2 requirement or modify LL2 endorsement regulatory requirements is a “Council decision” because it could result in a regulatory amendment.

The “fishery or sector of the fishery” affected by the action

The fishery or sector of the fishery is determined by the action before the Council. We have considered the stated purpose and need for the action, the alternatives and options under consideration, and the information in the June 2017 Public Review Draft Regulatory Impact Review (RIR). For the reasons provided below, we have determined that the fishery or sector of the fishery affected by the Council decision are the Bering Sea and Aleutian Islands (BSAI) and the Gulf of Alaska (GOA) groundfish fisheries and the BSAI CDQ groundfish fisheries in which freezer longline vessels participate and the BSAI Western Alaska Community Development Quota (CDQ) Program groundfish fisheries in which pot C/P vessels participate.

The Council’s April 2017 purpose and need statement for this action describes the affected vessels, sectors, and fisheries:

Under monitoring and enforcement regulations in place since October 2012, owners of freezer longline vessels named on License Limitation Program (LLP) licenses endorsed to catch and process Pacific cod in the BSAI are required to select between two monitoring options: carry two observers so that all catch can be sampled, or use a motion-compensated flow scale to weigh Pacific cod before it is processed and carry one observer. Under both monitoring options, at least one of the observers must be endorsed as a lead level 2 observer for vessels using fixed-gear. In addition to freezer longline vessels, pot catcher/processors participating in the groundfish CDQ fisheries also are required to carry a nontrawl LL2 observer.

All freezer longline vessels except one have chosen the flow scales with a single LL2 observer option. This, combined with current observer deployment model that places most fixed-gear catcher vessels in the partial observer coverage category, means that there are few fixed-gear vessels in the full observer coverage category which do not require a LL2 observer. Therefore, observers employed by four of the five full coverage

observer providers have few opportunities to gain the necessary experience to obtain the LL2 endorsement for vessels using fixed-gear.

NMFS, observer providers, and industry undertook a series of non-regulatory actions designed to build and retain a pool of available LL2 endorsed observers. This included industry voluntarily deploying second observers on some freezer longline vessels, at a cost to the industry, in order to allow them the experience to earn the LL2 endorsement.

The Council is concerned about the potential for a shortage of LL2 observers for deployment on freezer longline vessels and the resulting costs that could be incurred. This action is intended to address the need to maintain a high standard of observer data quality, and the need to minimize the potential for shortages of LL2 observers and additional costs to industry.

Consistent with the purpose and need statement, the RIR examines alternatives that potentially reduce a shortage of LL2 observers for deployment on freezer longline vessels in the groundfish fisheries of the BSAI and GOA and freezer longline and pot C/Ps participating in CDQ Program fisheries.² According to the RIR, there are 36 LLP licenses potentially affected. The LLP licenses are associated with 31 freezer longline vessels, 29 of which have participated in the BSAI longline Pacific cod or CDQ groundfish fisheries each year since 2013 and have been subject to the choice of monitoring requirements to carry two observers or flow scales and the LL2 observer.³ With respect to pot catcher/processors, the action would affect four CP vessels that use pot gear in the groundfish fisheries off Alaska. Of these, only two participate in the CDQ groundfish fishery and would be subject to the LL2 observer requirement.⁴

The Council will look at three alternatives. Alternative 1 is no action-status quo. Alternative 2 would create a regulatory exception allowing a freezer longline or pot C/P vessel to carry a substitute observer if a nontrawl LL2 observer is unavailable. The substitute observer must have a LL2 endorsement for a catcher/processor using trawl gear. Alternative 3 would modify the nontrawl LL2 observer coverage requirement and require vessel owners to participate in a pre-cruise meeting if requested to do so by NMFS. In the first of two options under Alternative 3, the regulations would allow two observers to deploy as an alternate observer coverage option to the single LL2 observer on a freezer longline or pot C/P vessel selecting the scales option. Both substitute observers must have a Level 2 endorsement. The second of the options would modify the nontrawl LL2 endorsement to allow sampling experience aboard a trawl C/P to count toward a nontrawl LL2 endorsement with an additional training requirement.

Whether the action is a particular matter primarily of individual concern for any Council member under 50 CFR 600.225

Council actions that would affect only a Council member's financial interest and a few other fishery participants have been found to be particular matters primarily of individual concern.⁵

² RIR, p.6

³ RIR, p. 25.

⁴ RIR, p. 64.

⁵ The proposed rule preamble for the original recusal regulations at 50 CFR 600.235 identified "contracts with the member's employer, grants to the member's academic institution, and management measures that affect only the

The Analysis demonstrates that there are more than a few vessels participating in the BSAI and GOA groundfish and BSAI CDQ groundfish fisheries and more than a few vessels that could be affected by this action. Therefore, we have determined that the action to modify LL2 observer requirements for nontrawl catcher-processors is not a particular matter primarily of individual concern for any affected individual.

Recusal Thresholds

Individual determinations as to whether any Council member's financial interests exceed the recusal thresholds under 50 CFR 600.235

Mr. Hull, Mr. Laukitis, Mr. Mezirow, Ms. Peterson, Mr. Kinneen, and Mr. Cross

Using the most recent fishing year for which information is available, the regulations at 50 CFR 600.235(c) require the voting recusal of a Council member with financial interests that: (1) harvest, process, or market more than ten percent of the total harvest of the fishery or sector of the fishery in question; or (2) fully or partially own more than ten percent of the vessels using the same gear type within the fishery or sector of the fishery in question.

The most recent fishing year for which an entire year of information is available is 2016. Based on our examination of target and other catch in the fisheries in which the affected vessels participate,⁶ none of these Council members have financial interests that exceed more than ten percent of the total harvesting, processing or marketing of the fisheries or sectors in question.

Although Mr. Kinneen and Mr. Cross do have financial interests that own freezer longline C/P vessels that participate in the subject fisheries, the number of vessels owned by their financial interests do not exceed the ten percent vessel ownership threshold, and their financial interests do not exceed any of the applicable thresholds found at 50 CFR 600.235.

Because the Council's decision will not result in an expected and substantially disproportionate benefit to any of these Council members' listed financial interests, no significant and predictable effect from a Council decision on LL2 observer requirements exists for any of their disclosed financial interests. Therefore, none of these Council members are required to recuse themselves from voting on the action under 50 CFR 600.235.

Mr. Down

According to Mr. Down's financial disclosure statement, he is a partial owner of New Blue North LLC, which owns the *Blue North*, a freezer longline C/P that would be subject to the LL2 action. Mr. Down also is employed by Blue North Fisheries, Inc., a vessel management company.⁷ Blue North Fisheries, Inc. manages, but does not own, several freezer longline C/P

member's business and a few other fishery participants" as examples of particular matters primarily of individual concern. 62 Fed. Reg. 42474, 42475 (August 7, 1997).

⁶ Pacific Cod, halibut, rockfish, sablefish, Greenland turbot, arrowtooth flounder, other species.

⁷ Mr. Down has explained that Blue North Fisheries Inc. hires crew for the vessels it manages, purchases parts for the vessels, makes sure the vessels are in compliance with regulatory requirements, etc., and that the vessel owners pay Blue North Fisheries Inc. a fee for these management services.

vessels that would be subject to the LL2 action.⁸ Finally, Mr. Down holds a financial interest that vests over time to five percent of the fair market value of a number of companies, several of which own some of the freezer longline C/Ps that are managed by Blue North Fisheries Inc. and that would be subject to the LL2 action.⁹ Mr. Down has described this interest as a “phantom interest” because it currently is not, and will never result in, actual ownership by him of these companies.¹⁰

The harvesting, processing, and marketing activity of the *Blue North* is clearly attributable to Mr. Down through his partial ownership interest in New Blue North LLC, the company that owns the *Blue North*. We also have determined that for purposes of conflict of interest and recusal analysis under the MSA and 50 CFR 600.235, the harvesting, processing, and marketing activity of the *Blue Attu*, the *Blue Ballard*, the *Blue Gadus*, and the *Blue Pacific* is attributable to Mr. Down through his phantom interest in the companies that own these vessels.¹¹ The U.S. Office of Government Ethics has issued guidance on public financial disclosure of certain financial instruments and how to treat them in conflict of interest analyses.¹² The guidance identifies phantom stock as a financial instrument that must be disclosed if valued over \$1,000 or with income over \$200. The guidance describes phantom stock as:

... a contract between an employer and an employee that grants the employee the right to receive a payment based on the value of the employer’s stock. When granting phantom stock, the employer does not grant the employee any shares of the employer’s stock. Instead, the employer grants the employee a right that tracks the value of a specified number of shares of the stock. The employee will have a right to receive a payout equivalent to the value of these tracked shares. Depending on the terms of the employer’s phantom stock plan regarding the vesting of phantom stock, the payout may occur on a specified date or upon the occurrence of a certain event, such as retirement, disability or death. If the employee’s employment is terminated before the phantom stock vests, the employee normally forfeits the phantom stock.¹³

⁸ These vessels are: the *Blue Attu*, the *Blue Ballard*, the *Blue Gadus*, the *Blue Pacific*, the *Blue North*, the *Prowler*, the *Bering Prowler*, the *Arctic Prowler*, and the *Ocean Prowler*.

⁹ These companies are: Blue Ballard LLC, which owns the *Blue Ballard*; Seldovia Fisheries, Inc., which owns the *Blue Pacific*; Blue Gadus LLC, which owns the *Blue Gadus*; and Blue Attu LLC, which owns the *Blue Attu*.

¹⁰ Although the phantom interest does not create actual equity in, or ownership of, the companies in which his phantom interest applies, Mr. Down has properly disclosed this phantom interest on his financial disclosure form. The phantom interest is a financial interest held by Mr. Down in companies that own vessels that participate in fisheries under the jurisdiction of the Council. Therefore, its disclosure is consistent with MSA section 302(j)(2) and 50 CFR 600.235.

¹¹ We have not yet resolved the question of whether we should attribute the activity of the *Blue Attu*, the *Blue Ballard*, the *Blue Gadus*, and the *Blue Pacific* to Mr. Down given the connections between the companies that own these vessels and Mr. Down’s employer, Blue North Fisheries, Inc. Starting with a recusal determination prepared for the June 2015 Council meeting, we have been examining whether Mr. Down exceeds any of the recusal thresholds if the activity of these vessels is attributed to him and also if it is not attributed to him.

¹² See United States Office of Government Ethics, Public Financial Disclosure, A Guide to Reporting Selected Financial Instruments, pp. 23-24, located at: [https://www.oge.gov/web/oge.nsf/All%20Documents/88F06375C0FD24CA85257E96006B95BC/\\$FILE/0c1c2518c96040759af1638896e0e13d2.pdf?open](https://www.oge.gov/web/oge.nsf/All%20Documents/88F06375C0FD24CA85257E96006B95BC/$FILE/0c1c2518c96040759af1638896e0e13d2.pdf?open). This guidance was provided to NOAA GC by the Department of Commerce Office of General Counsel Ethics Law and Programs Division.

¹³ *Id.*, at 23.

The guidance also states:

The conflicts analysis for phantom stock is the same as it would be for a direct stock interest. The conflict arises when the filer first receives a grant of phantom stock, even if the filer has not yet received a payment based on that phantom stock.¹⁴

Mr. Down does not have phantom stock, but his phantom interest operates in a manner that is substantially similar to phantom stock. Like phantom stock, the phantom interest creates incentives similar to the incentives actual owners have in their fishing companies. Therefore, we have determined that Mr. Down's phantom interest in the companies that own the *Blue Attu*, the *Blue Ballard*, the *Blue Gadus*, and the *Blue Pacific* should be treated the same as a direct ownership interest in these companies and vessels for purposes of conflict of interest and recusal analysis under the MSA and regulations at 50 CFR 600.235.

Mr. Down's financial interests fully or partially own more than ten percent of the vessels using the same gear type within the fishery or sector of the fishery in question. There are 29 freezer longline vessels that participated in the fisheries included in this action in 2016.¹⁵ Mr. Down, attributed with partial ownership of five of these 29 vessels, has a financial interest in more than 10 percent of the vessels using the same gear type within the fishery or sector of the fishery in question. Regulations at 50 CFR 600.235(c) prohibit a Council member from voting on any Council decision that would have a significant and predictable effect on a financial interest disclosed in his financial disclosure report. 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 of any affected individual. 50 CFR 600.235(c)(2). An "expected and substantially disproportionate benefit," according to 50 CFR 600.235(c)(3)(iii), includes 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. Thus, the regulations require that Mr. Down be recused from voting on the LL2 action.¹⁶

Although Mr. Down 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. Down also may state for the record how he would have voted on the action.

¹⁴ *Id.*, at 24.

¹⁵ There are two pot C/P vessels participating in the 2016 fisheries that would be subject to this action, as well. However, adding these two vessels to the 29 longline vessels would not change the result; Mr. Down would continue to have an interest in more than 10 percent of the vessels within the fishery or sector of the fishery in question.

¹⁶ Because Mr. Down's financial interests exceed the vessel ownership threshold, we do not need to determine whether his financial interests exceed the harvesting, processing and marketing thresholds.