

BSAI Amendment 71 – Community Development Quota (CDQ) Program

December 2005 Staff discussion paper

October 2005 Council motion

In October, the Council received a report from the Blue Ribbon Panel (panel) established by Governor Murkowski in May 2005 to evaluate the CDQ Program. The panel conducted its review over the summer and submitted its final report to the Governor on September 14, 2005. The primary recommendations of the panel were related to the duration of the allocation cycle; government oversight; approval of the Community Development Plans; use of CDQ funds; and the allocation process. The Governor accepted the recommendations of the panel on October 4.

Upon review of the panel's recommendations, the Council requested staff to provide a proposed structure for alternatives and options for a revised BSAI Amendment 71 analysis, which incorporates the recommendations of the Blue Ribbon Panel, for consideration at the December 2005 Council meeting.

Background

Amendment 71 originally contained recommendations on eight issues related to the purpose of the CDQ Program, the process for allocating quota among the CDQ groups, and oversight of the economic development aspects of the program. The Council approved Amendment 71 at its June 2002 meeting. Since then, NMFS has been developing a proposed rule that would implement the Council's recommendations, in order to submit the amendment package to the Secretary of Commerce. However, a number of significant legal and policy issues have arisen that have delayed the submittal of the proposed rule to the Secretary. These issues include:

1. advice from NOAA GC that NMFS must revise regulations governing its informal administrative adjudication process to include an administrative appeals process for decisions about the approval of allocations among the CDQ groups, Community Development Plans (CDPs), and amendments to CDPs;
2. advice from NOAA GC that NMFS's administrative adjudications to approve CDQ projects are likely Federal actions subject to NEPA, the Endangered Species Act, and other Federal laws;
3. the need for NMFS to establish the confidentiality status of information submitted by the State on behalf of the CDQ groups;
4. the NMFS Office of Administrative Appeals (OAA) determination that NMFS regulations do not specifically require that each CDQ project must be fisheries related, but that the purpose of the CDQ Program at 50 CFR 679.1(c) can only be applied to the CDP as a whole (result of OAA appeal No. 03-0022; 11/26/04).

The administrative and economic implications of the above issues were not included in the analysis reviewed by the Council in June 2002 when it took final action on Am. 71. In April 2004, NMFS advised the Council that issues #1 – 3 were significant enough to require revisions to the analysis for Am. 71 and additional review by the Council. The Council was also notified of the Regional Administrator's affirmation of the OAA's decision (#4 above) that NMFS must only consider whether the CDP as a *whole* is consistent with the goals and purpose of the CDQ Program. The June 2002 analysis for Amendment 71 assumed that NMFS's regulations required all individual CDQ *projects* to be 'fisheries related,' and this

assumption provided the basis for the status quo alternative. The OAA decision modifies the status quo in such a way that was not considered by the Council in June 2002.

Finally, in April 2005, the Council reviewed draft groundfish, halibut, crab, and prohibited species quota allocation recommendations from the State of Alaska CDQ Team for the 2006 – 2008 allocation cycle. Upon review of those draft recommendations and public testimony, the Council expressed concerns related to the way in which the program standards and evaluation criteria in State regulations are applied in the evaluation of the CDPs and development of the allocation recommendations. These concerns were related in a letter to Governor Murkowski, with the suggestion of convening a panel to review the CDQ Program. Subsequent to the April Council meeting, Governor Murkowski appointed a Blue Ribbon Panel to review and recommend changes to the CDQ Program.

In the meantime, the State notified the public that the 2006 – 2008 CDQ allocation recommendations would be suspended, pending the completion of the Blue Ribbon Panel's report to the Governor. Given that NMFS must have received the State's 2006 – 2008 recommendations by May 1, 2005 in order to have time to issue a final agency decision by December 31, 2005, NMFS issued an initial administrative determination on August 8, 2005, to remove the December 31, 2005 expiration date for the CDPs and the CDQ allocations to the CDQ groups that were approved for 2003 – 2005. NMFS extended the current CDPs and CDQ allocations until December 31 of the year in which a final agency action replaces them with new CDPs and allocations issued by NMFS. This decision became a final agency action on September 7, 2005, as there were no formal appeals by the CDQ groups. Effectively, the 2003 – 2005 CDPs and allocations represent the current allocations to the CDQ groups and will continue at least through 2006.¹ This action was taken to ensure that approved CDQ allocations were in place for 2006.

As stated previously, the Governor accepted the Blue Ribbon Panel recommendations on October 4, and they were presented to the Council at its October 2005 meeting. In late October, the Governor sent a letter (**Attachment 1**) to the Alaska Congressional delegation, stating that he has directed the State CDQ Team to begin implementing the panel's recommendations to the extent possible in State regulations and to undertake a new allocation process for 2007 - 2011. The stated goal is to submit 2007 – 2011 allocation recommendations to NMFS by May 2006. Staff understands the intent is to consult with the Council on the 2007 - 2011 allocation recommendations at the April 2006 Council meeting.

Action for the December 2005 Council meeting

Given the above events, and the fact that the panel's recommendations would also require changes to Federal regulations, the Council requested that staff provide a proposed structure for alternatives and options for a revised Amendment 71 analysis which incorporates the recommendations of the Blue Ribbon Panel. The intent was that the Council would consider the proposed analytical structure at its December 2005 meeting. A summary of the structure proposed by staff is provided in the following section.

Note that should the Council choose to initiate a new analysis for Amendment 71 based on revised alternatives, it is likely necessary to partially rescind its previous action on Amendment 71 taken in June 2002. It is only necessary to *partially* rescind this action because one of the issues on which the

¹The 2003-2005 CDQ allocations extended by NMFS on September 7, 2005, do not include allocations of the two new crab species added to the CDQ Program in April 2005 under Crab Rationalization (Eastern Aleutian Islands golden king crab and Adak red king crab). These two crab species were not part of the 2003-2005 CDQ allocations originally approved by NMFS on January 17, 2003, so they could not be extended in the 9/7/05 decision. The 2005 CDQ allocations for these two crab species were made separately in October 2005 and provide allocations only for 2005. The State should submit new CDQ allocation recommendations for these two crab species in 2006 and fully incorporate them into the CDQ allocation process through the 2007-2011 CDQ allocation recommendations. The State likely will include the 2006 allocation recommendations for these two crab species in its April 2006 consultation with the Council.

Council made recommendations in June 2002 has been implemented. The Council originally made recommendations on eight issues related to the CDQ Program, one of those being to simplify and streamline administrative regulations related to quota transfers, authorized vessels, and alternative fishing plans. NMFS implemented this particular recommendation through Federal rulemaking in March 2005. It is the remaining issues related to the purpose of the CDQ Program, the process for allocating quota among the CDQ groups, and oversight of the economic development aspects of the program that NMFS has not been able to implement to date.

At this meeting, the Council may need to consider partially rescinding its previous action (on Issues 1 – 7) on BSAI Amendment 71 from June 2002. The other action for this meeting is to review the revised structure of alternatives and options proposed by staff. The Council could choose to modify and/or approve this structure and initiate a new analysis of BSAI Am. 71 at this meeting.

Proposed alternatives for BSAI Amendment 71

Should the Council partially rescind its previous action on Amendment 71 and initiate a new analysis, the Council would need to approve new alternatives and options for analysis. This section summarizes the three primary alternatives as proposed by staff. Each alternative is comprised of 8 components. The first four components are related to oversight of the economic development aspects of the program, and the next four components are related to the CDQ allocation process. An outline of the analytical structure is as follows:

Outline of revised structure for BSAI Amendment 71

ALTERNATIVE 1. No action.

ALTERNATIVE 2. Previous Council preferred alternative from June 2002.

ALTERNATIVE 3. State of Alaska Blue Ribbon Panel recommendations.

Alternatives 1 – 3 each consist of the following components:

CDQ Program Oversight

Component 1: Define the role of government in oversight of the CDQ Program

Component 2: Extent of government oversight (definition of a CDQ project, subsidiary oversight)

Component 3: Allowable investments

Component 4: CDQ Program purpose

CDQ Allocation Process

Component 5: Process by which CDQ allocations are made

Component 6: Fixed versus variable allocations

Component 7: CDQ allocation evaluation criteria

Component 8: Duration of allocation cycle

Alternative 1 is the no action alternative, meaning current State and Federal oversight would continue and NMFS would continue to make competitive allocations through informal administrative adjudication. In effect, NMFS approval of CDPs and CDP amendments would continue to be necessary prior to the projects being undertaken. In addition, CDPs would be evaluated using the current twenty criteria in State regulation and other regulations the State applies to the allocation process. Note also that the intent that CDQ projects be fisheries related is only conveyed in the purpose statement in Federal regulations; there are no explicit requirements governing allowable projects. The OAA decision discussed earlier results in a status quo alternative such that NMFS regulations do not specifically require that each CDQ project be fisheries related, only that the CDP as a whole meet the fisheries related purpose.

Alternative 2 is a suite of components that represents the Council's previous preferred alternative selected in June 2002. This alternative would, for the most part, maintain the current State and Federal oversight roles, but would identify those elements of oversight in the FMP. In addition, several provisions related to government oversight (oversight of subsidiaries, allowable projects) would be explicitly established in regulation. Alternative 2 would also continue the current competitive allocation process via NMFS informal administrative adjudication. The allocation cycle would be set at three years, and CDPs would be evaluated based on a condensed list of ten criteria in Federal regulations.

Note that, as proposed by staff, Alternative 2 also contains an option that was not part of the Council's preferred alternative from June 2002. Option 1 under Component 5 would make allocations to the individual CDQ groups through Federal rulemaking, as opposed to the current process of approving allocations through informal administrative adjudication. This option was considered under the previous analysis for Amendment 71 and not selected as part of the Council's preferred alternative. However, NMFS recommends including this option for general comparison purposes. In effect, the analysis would consider two mechanisms (informal administrative adjudications and rulemaking) for establishing CDQ allocations under Alternative 2, Component 5.

Alternative 3 is a suite of components that represents the State of Alaska's Blue Ribbon Panel recommendations to modify the CDQ Program. This alternative would eliminate duplication in the oversight roles for the Federal and State governments by amending the BSAI FMPs and Federal regulations such that there is no Federal oversight of the *economic development* aspects of the CDQ Program. The State would implement regulations under State authority to address the Blue Ribbon Panel recommendations related to no prior approval of CDPs and CDQ projects, financial reporting and disclosure, the requirement that projects over \$2 million would be submitted to the State for review and comment, and limits on non-fisheries related projects. These elements would not be addressed in Federal regulations or the FMPs. NMFS would continue to make CDQ allocations through an informal adjudicative process based on State recommendations, regulate the designation of eligible communities, and administer the fisheries management aspects of the program, as is mandated in the Magnuson-Stevens Act. The State would develop its CDQ allocation recommendations using the five evaluation criteria that would compare a group's performance at the beginning and end of a ten-year cycle. Each new ten-year cycle would be limited to potentially modifying a maximum of 10% of each CDQ group's percentage allocations; 90% of the allocations would be fixed.

The following table summarizes the three primary alternatives and the eight components of each alternative. **Attachment 2** provides a text version of this table, which includes additional detail on each of the alternatives.

Table 1. BSAI Amendment 71 proposed alternatives and options

Component	Alternative 1 (no action)	Alternative 2 (June 2002 Council preferred alt)	Alternative 3 (Blue Ribbon Panel)
CDQ PROGRAM OVERSIGHT			
1. Define the role of government in oversight of the CDQ Program	No additions to the BSAI FMP outlining the role of government in oversight of the economic development aspects of the program. Prior approval of CDPs and amendments to CDPs is required.	Amend the BSAI FMP to identify elements of the Federal government's responsibility for oversight of the economic development aspects of the program. Prior approval of CDPs and amendments to CDPs is required.	Eliminate duplication in NMFS and State roles. Prior approval of CDPs and amendments is not required. CDQ groups must submit proposed investments over \$2 million to Banking & Securities for review/comment. State imposes penalties for non-compliance.
2. Extent of government oversight (definition of a CDQ project, oversight of subsidiaries)	NMFS regulations governing the extent of oversight of the business activities of the CDQ groups and affiliated businesses would not be revised. NOAA GC opinion (10/4/00) concludes that NMFS regulations are unclear and need to be revised.	Government oversight (primarily requirements for reporting and prior approval of investments) extends to subsidiaries controlled by CDQ groups. Effective management control or controlling interest is defined by ownership of 51% or more.	State regulations would establish financial reporting requirements similar to ANCSA corporations; require an annual report to communities; and require disclosure of compensation for CDQ group employees and all subsidiaries.
3. Allowable investments	No change to current regulations, which include a fisheries related purpose statement, but no specific requirements for each CDQ project to be fisheries related (per 11/26/04 OAA decision). NMFS can disapprove a CDQ project only if it would make the CDQ as a whole inconsistent with the purpose of the program.	Limit each CDQ group to fisheries related projects, with the exception of allowing each group to invest up to 20% of its previous year's pollock CDQ royalties on non-fisheries related projects. Non-fisheries projects must be in economic development projects in the CDQ region and be self-sustaining. Groups may also use funds for administration, charitable contributions, scholarships & training, stock/bonds.	State regulations would limit each CDQ group to fisheries related projects, with the exception of allowing each group to invest up to 20% of net revenues in non-fisheries projects in the CDQ region. Non-fisheries projects would not be allowed to fund infrastructure projects unless the CDQ group was providing matching funds.

Table 1 continued.

Component	Alternative 1 (no action)	Alternative 2 (June 2002 Council preferred alt)	Alternative 3 (Blue Ribbon Panel)
4. CDQ Program Purpose	Per 50 CFR 679.1(e): The goals and purpose of the CDQ program are to allocate CDQ to eligible western AK communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally-based, fisheries related economy.	Revise purpose statement in Federal regs and FMP: The goals and purpose of the CDQ Program are to allocate CDQ to qualified applicants representing eligible western AK communities as the first priority, to provide the means for investing in, participating in, starting or supporting commercial fisheries business activities that will result in an ongoing, regionally based fisheries economy, and, as a second priority, to strengthen the non-fisheries related economy in the region.	(Same as Alt. 2) Revise purpose statement in Federal regs and FMP: The goals and purpose of the CDQ Program are to allocate CDQ to qualified applicants representing eligible western AK communities as the first priority, to provide the means for investing in, participating in, starting or supporting commercial fisheries business activities that will result in an ongoing, regionally based fisheries economy, and, as a second priority, to strengthen the non-fisheries related economy in the region.

Table 1 continued.

Component	Alternative 1 (no action)	Alternative 2 (June 2002 Council preferred alternative)	Alternative 3 (Blue Ribbon Panel)
CDQ ALLOCATION PROCESS			
5. Process by which CDQ allocations are made	Continue to make allocations through NMFS administrative adjudication. CDQ groups are provided an opportunity to comment on the State's initial recommendations and can appeal NMFS's decision to approve or disapprove State's recommendations.	Continue to make allocations through NMFS administrative adjudication. CDQ groups are provided an opportunity to comment on the State's initial recommendations and can appeal NMFS's administrative decision to approve or disapprove the State's recommendations. ² Option 1: Make allocations through Federal rulemaking.	Continue to make allocations through NMFS informal administrative adjudication. CDQ groups are provided an opportunity to comment on the State's initial recommendations and can appeal NMFS's initial administrative determination to approve or disapprove the State's recommendations.
6. Fixed versus variable allocations	100% of CDQ is allocated on a competitive basis as recommended by the State of AK and approved by NMFS.	100% of CDQ is allocated on a competitive basis as recommended by the State of AK and approved by NMFS.	10% of each group's CDQ allocation by species would be allocated on a variable basis every 10 yrs starting in 2012. 90% of each group's CDQ would be fixed. The 90/10 provision would apply to the CDQ allocations that are in effect at the time that the final rule for Amendment 71 is effective. It is assumed that the baseline allocations that the 90/10 provision would apply to would be determined through the current allocation process prior to implementation of Am. 71. ³
7. CDQ allocation evaluation criteria	State CDQ allocation recommendations are based on the 20 criteria in State regulations at 6 AAC 93.040 and other State regs. Evaluation criteria are not specified in Federal regulations.	State CDQ allocation recommendations are based on a condensed list of 10 criteria published in Federal regulations.	State CDQ allocation recommendations are based on 5 criteria. Groups are evaluated on their individual performance relative to the criteria at the start and end of a 10-year cycle. The evaluation criteria are only applied to the portion (10%) of the CDQ that is not 'fixed'.
8. Duration of allocation cycle	Continue to make periodic, competitive allocations among the groups. The State determines the length of the allocation cycle.	Establish a 3-year allocation cycle in Federal regulations. Allow the State to recommend reallocation of CDQ mid-cycle under specific circumstances, with Council/NMFS approval.	Establish a 10-year cycle in Federal regulation, to coincide with the U.S. Census. The allocation cycle and process only applies to the 10% of the CDQ allocations that are not 'fixed.'

²While an appeals process was not part of the Council's preferred alternative in June 2002, NOAA GC has determined that an administrative appeals process is necessary for decisions about the approval of allocations, CDPs, and amendments to the CDPs under the Administrative Procedure Act. Thus, no appeals process is not a viable alternative.

³The State is starting a new allocation process that would recommend CDQ allocations for 2007 – 2011. The State intends to submit recommendations to NMFS by May 2006. It is assumed that the 2007 – 2011 allocations represent the baseline allocations intended by the Blue Ribbon Panel.

Clarifications related to the Blue Ribbon Panel recommendations (proposed Alternative 3)

There are four issues related to the recommendations of the Blue Ribbon Panel that require clarification prior to analysis of proposed Alternative 3. Three of these issues are related to the panel's recommendation on fixed and variable allocations. The last issue is related to the panel's recommendation to eliminate the duplicative roles of NMFS and the State with regard to the oversight of the economic development aspects of the program.

One of the primary Blue Ribbon Panel recommendations is to modify the CDQ Program such that the percentage allocations to each CDQ group have a fixed component (90%) and a variable component (10%). This recommendation is included under Alternative 3, Component 6. The stated objective of 'fixing' 90 percent of each CDQ group's allocations is to increase stability, promote long-term planning, and reduce negative competition among the CDQ groups. In effect, 90 percent of the percentage allocations to each CDQ group would be fixed and 10 percent would be subject to change at the beginning of each ten-year allocation cycle (the "90/10 provision"). Under Alternative 3, any changes to the 10 percent of each CDQ group's allocations would be based on the State's application of the five evaluation criteria recommended by the panel and would be implemented through the current administrative process for making CDQ allocations.

First, assessing the effect of fixing 90 percent of each CDQ group's allocations requires identification of the initial set of percentage allocations to which the 90/10 provision will apply (i.e., the "baseline" CDQ allocations). The baseline, combined with the 90/10 provision, would establish long-term allocations among the CDQ groups, of which a maximum of 10% would potentially change with every allocation cycle. Thus, identification of the baseline allocations is a significant step, as 90 percent would be effective over the long-term. Note that the full effect of the 90/10 provision cannot be fully understood without understanding both this issue and the second issue identified by staff, which is described further in this paper.

The Blue Ribbon Panel noted in its final report that it did not recommend baseline percentage allocations to which the 90/10 provision would be applied in future allocation cycles. The final report provides two different statements that indicate conflicting options for determining the baseline CDQ allocations. On page 1, in the statement by the Chair, the report states that "[I]t is critical that your [Governor's] office set allocations that will be used as the baseline. These allocations need to be established before our recommendations can be effective."

The statement on page 1 of the panel report indicates that the panel recommends that the baseline CDQ allocations should be the next set of CDQ allocations recommended by the Governor of Alaska and approved by NMFS. The Governor issued a news release on October 4, 2005, providing notification that the State intends to submit 2007 – 2011 CDQ allocation recommendations to NMFS by May 2006. The Governor's letter to the Alaska Congressional delegation on October 25 reiterates this direction (see Attachment 1). The letter also relates specific concerns with potential MSA amendments, including any statutory action to "set allocations or complicate the already burdensome regulatory structure."

The second statement referenced from the panel's report is in the last sentence in paragraph one on the top of page 6. The report states that "[T]he panel realizes it has not made recommendations on how to "fix" the 90% allocations, or whether that should be done through MSA or rulemaking." This statement indicates a possibility that the CDQ allocations could be made by Congress through an amendment to the Magnuson-Stevens Act or could be established through Federal rulemaking based on Council recommendations. Staff cannot speculate whether Congress will establish CDQ allocations to each individual group in the MSA, or whether Congress would enact the 90/10 provision recommended by the panel if such action was taken. Establishing CDQ allocations through rulemaking means that an analysis would be completed to support Council recommendations on specific percentage allocations among the

CDQ groups, and that the Council's preferred alternative would be implemented through Federal regulations. Both of these possible options are alternatives to the current informal administrative adjudication which requires that the State submit its recommendations to the Council for review and to NMFS for approval.

In sum, the panel report mentions three different processes for establishing baseline CDQ allocations to which the 90/10 provision would apply. Given the communication issued by the Governor since the panel report was completed, staff assumes that the upcoming 2007 – 2011 allocation recommendations referenced in the Governor's press release and letter represent the baseline allocations to which the Blue Ribbon Panel recommends applying the 90/10 provision. This intent is reflected in Alternative 3.

In effect, the State would complete its evaluation of the CDPs, consult with the Council, and submit its 2007 – 2011 allocation recommendations to NMFS by May 2006. NMFS would review these allocation recommendations and, absent any unresolved administrative appeals, these allocation recommendations could be approved by NMFS effective January 1, 2007. Upon Council final action on Amendment 71, should Alternative 3 be the preferred alternative (which includes the 90/10 provision and a ten-year allocation cycle), the next allocation cycle would be 2012 – 2021 and a maximum of 10% of each CDQ group's percentage allocations would be subject to change. The 90/10 provision would apply to the CDQ allocations that are in effect at the time that the final rule for Amendment 71 is effective. It is anticipated that the allocations that would be in place at that time will be the State's 2007 - 2011 CDQ allocation recommendations. **The Council should inform staff if this does not mirror its desired intent under Alternative 3.**

Note that the development of a new Amendment 71 and the State's 2007 – 2011 allocation process are concurrent efforts. Since Alternative 3 currently assumes that the 90/10 provision will apply to the baseline (2007 – 2011) allocations in future allocation cycles, this alternative may effectively make 90% of the 2007 – 2011 allocations permanent (depending on the choice the Council makes on the following issue).⁴ Thus, the baseline allocations must be known in order to adequately analyze the impact of Alternative 3. The baseline allocation recommendations will be submitted to NMFS by May 2006 if the State process operates as intended. NOAA GC has noted that there may be concern under National Standard 4 if the Council takes final action to apply the 90/10 provision of Alternative 3 to the 2007 – 2011 allocations prior to approval of these allocations by NMFS.⁵ Thus, the Council may not be able to take final action on this component of Alternative 3 until the 2007 - 2011 allocations are approved. NOAA GC may provide additional guidance on this issue at this meeting. Note, also, that it is likely that allocations would not be approved by NMFS until late 2006 or early 2007, depending upon appeals.

Secondly, the application of the 90/10 provision needs to be clarified. One approach would be to start with the 2007 – 2011 baseline allocations, and apply the 90/10 provision to this baseline once, for the first allocation cycle (2012 – 2021). In effect, this approach would establish the total amount of CDQ that would be fixed (90%) for all the groups and the total amount that would be available for reallocation among the groups (10%) in perpetuity. Note that this means that by the second ten-year cycle, while the total amount of CDQ that can be allocated among the groups is still 10% of the baseline, it does not necessarily represent 10% of each group's allocations from the previous cycle, if any allocations changed in the previous ten-year cycle. As an example:

⁴Note that the 90/10 provision is permanent only in the sense that it would not change until and unless new rulemaking was undertaken to modify this provision.

⁵National Standard 4 states that "[C]onservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges."

Example 1: Apply the 90/10 one time during first ten year allocation cycle

Baseline allocation (2007 – 2011) to CDQ group A for species X = 20%

2012 – 2021 cycle:

90% of the baseline = 18% (fixed in perpetuity)

10% of the baseline = 2% (this is the maximum % that can change for Group A during the allocation cycle)

If Group A loses half of its 2% during the allocation process, its final 2012 – 2021 allocations for species X will be:

$$18\% + 1\% = 19\%$$

2022 – 2031 cycle:

90% of the baseline = 18% (fixed in perpetuity)

19% - 18% = 1% (the maximum % that can change for Group A during the 2022 – 2031 allocation cycle)

An alternative approach would be to start with the 2007 – 2011 baseline allocations and apply the 90/10 provision during every new allocation cycle; thus, the baseline would change with each new allocation cycle. In effect, this approach would not ultimately ‘fix’ 90% of the baseline allocations for more than a ten-year period. The baseline would instead readjust with each new allocation cycle. As an example:

Example 2: Apply the 90/10 during each ten year allocation cycle

Baseline allocation (2007 – 2011) to CDQ group A for species X = 20%

2012 – 2021 cycle:

90% of the baseline = 18% (fixed during 2012 - 2021)

10% of the baseline = 2% (this is the maximum % that can change for Group A during the allocation cycle)

If Group A loses half of its 2% during the allocation process, its final 2012 – 2021 allocations for species X will be:

$$18\% + 1\% = \mathbf{19\% \text{ (new baseline)}}$$

2022 – 2031 cycle:

90% x 19% = 17.1% (fixed during 2022 - 2031)

10% x 19% = 1.9% (the maximum % that can change for Group A during the 2022 – 2031 allocation cycle)

A third clarification necessary to analyze Alternative 3 is the relative weighting of the evaluation criteria that is proposed under Component 7. The Blue Ribbon Panel recommended five criteria:

1. Population/poverty level (as indicated in U.S. Census) (10%)
2. Number of jobs created (permanent and temporary) (30%)
3. Amount of in-region investments in both fisheries and non-fisheries projects (35%)
4. Amount and number of scholarships and training investments (15%)
5. Community economic development (as documented by Alaska DCCED, through measure of total local revenue and median household income) (10%)

While the panel weighted the criteria for the allocation formula as shown above in its report, it noted that this ranking was an “example of showing how the formula works, the ranking/weighting was determined by the Blue Ribbon Committee as their view of the importance of each area as it applies to the program as a whole...In the final analysis it is up to the State administration and the CDQ groups to set the ranking/weighting of the methodology.”

In the Council’s analysis of Amendment 71, it can construct its alternatives as it sees fit. The Council could maintain the weighting of the criteria as proposed by the panel and outlined in Alternative 3, Component 7. Alternatively, the Council could choose a different weighting scheme(s) for analysis. Finally, the Council could instead determine that only the evaluation criteria would be in the FMPs and Federal regulation, and that the State would determine the weights of the criteria. The weighting of the criteria would have to be determined by the State prior to the first application of these criteria, which is currently intended for the 2012 – 2021 allocation cycle. **This issue requires clarification by the Council prior to the analysis being completed.**

Finally, the last issue is related to eliminating NMFS’s role in the oversight of the economic development aspects of the CDQ program. This relates to Components 1 – 3 in Alternative 3. The Magnuson-Stevens Act does not require government oversight of the economic development aspects of the CDQ Program, i.e., how the CDQ groups use their allocations to provide benefits to the eligible communities. These elements exist in NMFS regulations at 50 CFR 679 because either the Council specifically recommended them or NMFS implemented them to support the Council's general recommendations. Thus, whether these oversight elements continue to be required in NMFS regulations and whether these oversight responsibilities are conducted by NMFS or the State are policy decisions under the authority of the Council and the Secretary of Commerce.

The Blue Ribbon Panel recommended eliminating duplication in Federal and State oversight roles, and generally changing from a program that requires the groups to receive Federal and State approval prior to making investments to one comprised of stricter securities oversight by the Alaska Division of Banking and Securities. Alternative 3 is intended to represent these proposed changes.

Under Alternative 3, State regulations could include reporting requirements, financial disclosure requirements, limits on allowable investments and expenditures, and requirements for prior review of certain investments. The State would impose penalties for non-compliance with these requirements. At a minimum, the alternative requires that:

1. CDQ groups must submit proposed investments over \$2 million to the Division of Banking and Securities for review and comment. No approval process is required.
2. the Division of Banking and Securities would receive and review financial and annual reports.

Staff has interpreted the panel's recommendation to eliminate duplication of State and Federal roles and proceed with State oversight of the economic development aspects of the program such that NMFS would remove Federal oversight of the economic development aspects of the program from Federal regulations and the BSAI FMPs.

In effect, the Federal government would not dictate nor delegate the responsibilities of the State, and it would be the State's decision to implement regulations consistent with the Council's recommendations under Components 1-3 of Alternative 3. If the Council selected these components as part of its preferred alternative, it would be supporting the Blue Ribbon Panel's recommendations on the State's role in oversight of the economic development aspects of the CDQ Program, but the Council would not be directing how or whether the State must implement these components through the FMP or NMFS regulations. This would remove both NMFS and the Council from oversight of how the CDQ groups use their allocations to provide benefits to the eligible communities, although State regulations could require that financial reports and/or annual reports are also submitted to the Council. The State would retain primary control of the economic development aspects of the program, and NMFS's role would be limited to the responsibilities currently outlined in the MSA and FMPs (i.e., eligible communities, approving CDQ allocations, and fisheries management).

In sum, while the panel made recommendations related to the State's responsibilities, it did not recommend how those responsibilities should be implemented. This issue is highlighted to indicate how staff interprets the intent of the Blue Ribbon Panel recommendations on oversight as represented in Alternative 3, Components 1 – 3. Approval of the alternative as currently structured would mean that Federal oversight would be removed from Federal regulations and not be specified in the FMPs, which would allow the State to establish State regulations at its discretion to govern the economic development aspects of the program.

Alternatively, if the Council wanted to direct the State about specific aspects of oversight, it must do that either through the BSAI FMPs or through Federal regulations. In both of these cases, NMFS would remain involved in oversight of the economic development aspects of the CDQ Program because the State would be accountable to NMFS and the Council to conduct its oversight responsibilities consistent with the requirements of the FMP or Federal regulations. In addition, the CDQ groups could appeal to NMFS if they wanted to assert that the State was not acting consistent with the FMP or Federal regulations. Therefore, options that would allow the Council to specifically direct the State on elements of oversight would not accomplish the Blue Ribbon Panel's recommendation of *eliminating* duplication in the State and NMFS's role in oversight.

Additional clarifications of the Blue Ribbon Panel recommendations will likely be necessary as staff begins to analyze Alternative 3. However, it is assumed that staff could bring any further questions or clarifications back to the Council at a subsequent meeting. The Council may need an additional meeting to refine and finalize the alternatives for analysis.

Summary

At this December meeting, the Council's action is to review the revised structure of alternatives and options proposed by staff. The Council could choose to modify and/or approve this structure and initiate a new analysis of BSAI Amendment 71 at this time. In addition, the Council may need to consider partially rescinding its previous action (on Issues 1 – 7) on BSAI Amendment 71 from June 2002. Staff has also identified four issues related to recommendations of the Blue Ribbon Panel that require clarification prior to being analyzed under Alternative 3.

FRANK H. MURKOWSKI
Governor



Item C-3(b)(1)
P.O. Box 110001
Juneau, Alaska 99811-0001
(907) 465-3500
Fax (907) 465-3532

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

October 25, 2005

The Honorable Ted Stevens
United States Senator
522 Hart Senate Building
Washington, DC 20510

The Honorable Lisa Murkowski
United States Senator
709 Hart Senate Building
Washington, DC 20510

The Honorable Don Young
United States Congressman
2111 Rayburn Building
Washington, DC 20515-0201

Dear Congressional Delegation Members:

On October 4, 2005, I received the recommendations of the Community Development Quota (CDQ) Blue Ribbon Panel, which made four key recommendations affecting federal and state regulations. I was pleased with the panel's diligent review of the program and with its recommendations.

I have given directions to my CDQ Team to begin the process of implementing the Blue Ribbon Panel recommendations for the Western Alaska CDQ program. Working with the Department of Law, the CDQ Team has already started the process of revising the state's CDQ regulations. State regulations will incorporate changes to government oversight, investment review, and reporting requirements, including the public disclosure of critical financial information to community members as recommended by the panel. The goal is to submit new 2007-2011 allocation recommendations to the National Marine Fisheries Service (NMFS) by May 2006.

I have also received a memorandum from Commissioner Bill Noll, Commissioner McKie Campbell, and my Fisheries Policy Advisor Alan Austerman urging me to preserve state oversight of the CDQ program, and I agree. Since its inception in 1992, state oversight has been a key to the success of the program. The Blue Ribbon Panel recognized the importance of state oversight and recommended the need for a new type of state review directed at fostering the growth and success of this important program.

Congressional Delegation Members
October 25, 2005
Page 2

There is also concern that changes in the Magnuson-Stevens Act are being promoted to end state oversight. Since the Blue Ribbon Panel affirmed the importance of state oversight, such actions are not advised. I would further assert that the CDQ program and its future is best served by maintaining the maximum flexibility in the overriding statute, be it either federal or state.

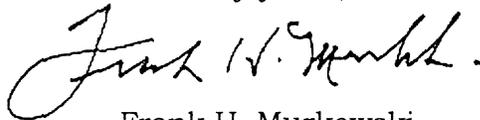
Additional areas of specific concern include:

- Any statutory actions that would set allocations or complicate the already burdensome regulatory structure;
- That no prior approval of CDQ group economic development projects by the U.S. Secretary of Commerce be required;
- Government oversight for the nonfisheries management portions of the CDQ program should be delegated to the Governor of Alaska; and
- That the 65 eligible communities which currently participate in the program should be listed in federal statute.

Limited federal legislative or regulatory changes may be needed to implement these changes and continue to advance the CDQ program. It is hoped that most of the necessary federal changes can be made by regulation rather than in federal law.

Finally, the State of Alaska CDQ Team has begun working with federal agencies, including the NMFS and the North Pacific Fisheries Management Council, to assist in identifying any changes in federal regulations necessary to implement the Blue Ribbon Panel's recommendations.

Sincerely yours,



Frank H. Murkowski
Governor

cc: William C. Noll, Commissioner, Alaska Department of Commerce,
Community, and Economic Development
McKie Campbell, Commissioner, Alaska Department of Fish and Game
John Katz, Director, State/Federal Relations and Special Counsel,
Alaska Governor's Office
Alan Austerman, Fisheries Policy Advisor, Alaska Governor's Office
Tom Case, Member, CDQ Blue Ribbon Panel
Stephanie Madsen, Member, CDQ Blue Ribbon Panel
Carl Marrs, Facilitator, CDQ Blue Ribbon Panel
Dennis Metrokin, Member, CDQ Blue Ribbon Panel
Ron Miller, Member, CDQ Blue Ribbon Panel
Ed Rasmuson, Member, CDQ Blue Ribbon Panel

BSAI Amendment 71: Alternatives proposed for analysis

ALTERNATIVE 1. No action

CDQ Program oversight

Component 1: Define the role of government in oversight of the CDQ Program

Do not amend the BSAI or crab FMPs to outline the role of government in oversight of the economic development aspects of the program. Prior approval by the State and NMFS of Community Development Plans (CDPs) and amendments to CDPs is required. CDQ groups must obtain prior approval for most investments and expenditures.

Component 2: Extent of government oversight

NMFS regulations governing the extent of oversight of the business activities of the CDQ groups and affiliated businesses¹ would not be revised. NOAA GC opinion (10/4/00) concludes that NMFS regulations are unclear and need to be revised.

Component 3: Allowable investments

The purpose statement in Federal regulations implements the intent of the program to develop fisheries related economies, without a clear description of allowable projects. There is no specific requirement for each CDQ project to be fisheries related (per Office of Administrative Appeals 11/26/04 decision). NMFS can disapprove a proposed CDQ project only if it would make the CDP as whole inconsistent with the purpose of the program.

Component 4: CDQ Program purpose

Per Federal regulations at 50 CFR 679.1(e): The goals and purpose of the CDQ program are to allocate CDQ to eligible western Alaska communities to provide the means for starting or supporting commercial fisheries business activities that will result in an ongoing, regionally-based, fisheries related economy.

CDQ Allocation Process

Component 5: Process by which CDQ allocations are made

Allocations would continue to be made through NMFS informal administrative adjudication. (NMFS regulations do not adequately describe the process and need to be revised.) The current process is such that CDQ groups are provided an opportunity to comment on the State's initial recommendations. The State consults with the Council. CDQ groups can appeal NMFS's decision to approve or disapprove the State's recommendations. Current allocations remain in effect if NMFS cannot approve new allocation recommendations before the allocation cycle ends.

Component 6: Fixed versus performance-based allocations

100% of CDQ is allocated on a competitive basis as recommended by the State of Alaska and approved by NMFS. The State decides how to balance demographic and socioeconomic factors with performance criteria (see Component 7).

Component 7: CDQ allocation evaluation criteria

State CDQ allocation recommendations would be based on 20 evaluation criteria in State regulations at 6 AAC 93.040 and other State regulations. Evaluation criteria are not specified in Federal regulations.

¹ For purposes of this analysis, an 'affiliated business' is any entity that is owned in whole or in part by a CDQ group. A 'subsidiary' is an entity controlled by a CDQ group, and is also known as a 'consolidated affiliate' because the entity controlled by a CDQ group generally is consolidated with the CDQ group for financial reporting purposes. Affiliated businesses owned by the CDQ group, but not controlled by the CDQ group are known as 'unconsolidated affiliates.'

Component 8: Duration of allocation cycle

Continue to make periodic, competitive allocations among the groups, but the duration of the cycle is not set in regulation. The State determines the length of the allocation cycle.

ALTERNATIVE 2. Council preferred alternative from June 2002

CDQ Program oversight

Component 1: Define the role of government in oversight of the CDQ Program

Amend the BSAI groundfish FMP to identify elements of the Federal government's responsibility for oversight of the economic development aspects of the CDQ Program. Prior approval of CDPs and amendments to CDPs is required. Government oversight of the CDQ Program and CDQ groups is limited by the following purposes:

1. Ensure community involvement in decision-making;
2. Detect and prevent misuse of assets through fraud, dishonesty, or conflict of interest;
3. Ensure that internal investment criteria and policies are established and followed;
4. Ensure that significant investments are the result of reasonable business decisions, i.e., made after due diligence and with sufficient information to make an informed investment decision;
5. Ensure that training, employment, and education benefits are being provided to the communities and residents; and
6. Ensure that the CDQ Program is providing benefits to each CDQ community and meeting the goals and purpose of the program.

Option 1: Amend the BSAI FMP such that there is no Federal oversight of the economic development aspects of the CDQ Program. If this option is selected, all regulations governing oversight of the economic development aspects of the program would be removed, including those addressed under Components 2 and 3 of this alternative. A revised purpose statement under Component 4 also would be necessary.

Component 2: Extent of government oversight

Amend Federal regulations to clarify that government oversight (primarily requirements for reporting and prior approval of investments) extends to subsidiaries controlled by CDQ groups. To have effective management control or controlling interest in a company the ownership needs to be 51% or greater.

Component 3: Allowable investments

Limit each CDQ group to fisheries related projects, with the exception of allowing each group to invest up to 20% of its previous year's pollock CDQ royalties on non-fisheries related projects. Non-fisheries projects must be in economic development projects in the CDQ region and be self-sustaining. Groups may also use funds for administration, charitable contributions, scholarships and training, and stocks/bonds.

Component 4: CDQ Program purpose

Amend Federal regulations and the BSAI FMP to state: The goals and purpose of the CDQ Program are to allocate CDQ to qualified applicants representing eligible Western Alaska communities as the first priority, to provide the means for investing in, participating in, starting or supporting commercial fisheries business activities that will result in an on-going, regionally based fisheries economy and, as a second priority, to strengthen the non-fisheries related economy in the region. (Fisheries-related projects will be given more weight in the allocation process than non-fisheries related projects.)

CDQ Allocation Process

Component 5: Process by which CDQ allocations are made

Allocations would continue to be made through NMFS informal administrative adjudication. The current process is such that CDQ groups are provided an opportunity to comment on the State's initial recommendations. The State consults with the Council. CDQ groups can appeal NMFS's decision to approve or disapprove the State's recommendations.² Current allocations remain in effect if NMFS cannot approve new allocation recommendations before the allocation cycle ends.

Option 1: Allocations would be established through Federal rulemaking rather than through the current administrative process. In effect, the Council would initiate rulemaking in the future to analyze alternative percentage allocations among the groups, recommend a specific set of allocation recommendations to NMFS, and NMFS would implement the Council's recommendations through proposed and final rulemaking. If the Council selected this mechanism to make CDQ allocations, it would change the nature of the decisions that the Council would make under Components 6, 7, and 8.

Component 6: Fixed versus performance-based allocations

(Same as Alternative 1). 100% of CDQ is allocated on a competitive basis as recommended by the State of Alaska and approved by NMFS. The State must apply the evaluation criteria specified in Component 7, but it decides how to balance demographic and socioeconomic factors with performance criteria.

Component 7: CDQ allocation evaluation criteria

State CDQ allocation recommendations would be based on the following list of ten criteria published in Federal regulations:

1. Number of participating communities, population, and economic condition.
2. A CDP that contains programs, projects, and milestones which show a well-thought out plan for investments, service programs, infrastructure, and regional or community economic development.
3. Past performance of the CDQ group in complying with program requirements and in carrying out its current plan for investments, service programs, infrastructure, and regional or community economic development.
4. Past performance of CDQ group governance, including: board training and participation; financial management; and community outreach.
5. A reasonable likelihood exists that a for-profit CDQ project will earn a financial return to the CDQ group.
6. Training, employment, and education benefits are being provided to residents of the eligible communities.
7. In areas of fisheries harvesting and processing, past performance of the CDQ group and proposed fishing plans in promoting conservation based fisheries by taking action that will minimize bycatch, provide for full retention and increased utilization of the fishery resource, and minimize impact to the essential fish habitats.
8. Proximity to the resource.
9. The extent to which the CDP will develop a sustainable fisheries-based economy.
10. For species identified as "incidental catch species" or "prohibited species," CDQ allocations may be related to the recommended target species allocations.

²While an appeal process was not part of the Council's preferred alternative in June 2002, NOAA GC has determined that an administrative appeal process is necessary for decisions about the approval of allocations, CDPs, and amendments to the CDPs under the Administrative Procedure Act. Thus, not having an appeals process is not a viable alternative.

Component 8: Duration of allocation cycle

Establish a 3-year cycle in Federal regulations. Allow the State to recommend reallocation of CDQ mid-cycle under extraordinary circumstances. The State would be required to consult with the Council on recommended reallocations, and reallocations would need to be implemented by NMFS administrative adjudication.

ALTERNATIVE 3. State of Alaska Blue Ribbon Panel recommendations**CDQ Program oversight****Component 1: Define the role of government in oversight of the CDQ Program**

~~Eliminate duplication of NMFS and State roles by recommending specific oversight responsibilities for the State of Alaska (Division of Banking and Securities).~~ This alternative would eliminate duplication in the oversight roles for the Federal and State governments by amending the BSAI FMPs and Federal regulations such that there is no Federal oversight of the *economic development* aspects of the CDQ Program.³ (*Council clarification on the interpretation of the Blue Ribbon Panel recommendations is needed*). The State would implement regulations under State authority related to reporting requirements, financial disclosure requirements, limits on allowable investments and expenditures, and requirements for prior review of certain investments. The State would impose penalties for non-compliance with these requirements. Prior approval of CDPs and CDP amendments is not required. State regulations would, at a minimum, require that:

1. CDQ groups submit proposed investments over \$2 million to the Division of Banking and Securities for review and comment. No approval process is required.
2. the Division of Banking and Securities receive and review financial and annual reports.

Component 2: Extent of government oversight

The Council would recommend that the State implement regulations, including financial reporting requirements similar to ANCSA corporations; an annual report to communities; and disclosure of compensation for CDQ group employees and all subsidiaries.

The Council would request the State to provide an annual report to the Council about its oversight of the economic development aspects of the CDQ Program, including copies of each CDQ group's annual report to its communities.

Component 3: Allowable investments

The Council would recommend that the State implement regulations to limit each CDQ group to fisheries related projects, with the exception of allowing each group to invest up to 20% of net revenues in non-fisheries related projects in the CDQ region and to prohibit the funding of non-fisheries infrastructure projects unless the CDQ group was providing matching funds.

Component 4: CDQ Program purpose

(Same as Alt. 2) Amend Federal regulations and the BSAI FMPs to state: The goals and purpose of the CDQ Program are to allocate CDQ to qualified applicants representing eligible Western Alaska communities as the first priority, to provide the means for investing in, participating in, starting or supporting commercial fisheries business activities that will result in an on-going, regionally based

³NMFS would continue to make CDQ allocations through an informal adjudicative process based on State recommendations, regulate the designation of eligible communities, and administer the fisheries management aspects of the program, as mandated in the Magnuson-Stevens Act.

fisheries economy and, as a second priority, to strengthen the non-fisheries related economy in the region.⁴

CDQ Allocation Process

Component 5: Process by which CDQ allocations are made

Allocations would continue to be made through NMFS informal administrative adjudication. The current process is such that CDQ groups are provided an opportunity to comment on the State's initial recommendations. The State consults with the Council. CDQ groups can appeal NMFS's initial administrative determination to approve or disapprove the State's recommendations. Current allocations remain in effect if NMFS cannot approve new allocation recommendations before the allocation cycle ends.

Component 6: Fixed versus variable allocations

Ten percent (10%) of each group's CDQ allocation by species would be allocated on a variable basis every ten years starting in 2012. Ninety percent (90%) of each group's CDQ would be fixed. The 90/10 provision would apply either one time to the CDQ allocations that are in effect at the time that the final rule for Amendment 71 is effective or could be applied at the beginning of each allocation cycle, starting in 2012 (*Council clarification on these options is needed*). It is assumed that baseline allocation recommendations to which the 90/10 provision would be applied for the 2012 – 2021 allocation cycle would be determined through the current allocation process prior to implementation of Am. 71.⁵

Component 7: CDQ allocation evaluation criteria

State CDQ allocation recommendations would be based on five criteria. Groups are evaluated on their individual performance relative to the criteria at the start and end of a ten-year cycle. The evaluation criteria are only applied to the portion (10%) of the CDQ that is not 'fixed' (see Component 6). Each CDQ group is evaluated based on the following list of five criteria that are established in the FMPs and Federal regulations:

1. Population/poverty level (as indicated in U.S. Census) (10%)
2. Number of jobs created (permanent and temporary) (30%)
3. Amount of in-region investments in both fisheries and non-fisheries projects (35%)
4. Amount and number of scholarships and training investments (15%)
5. Community economic development (as documented by Alaska DCCED, through measure of total local revenue and median household income) (10%)

NOTE: The weighting of the evaluation criteria needs to be clarified by the Council prior to completion of the analysis. The Council could require the weighting of the criteria as proposed above by the Blue Ribbon Panel, or the Council could choose a different weighting scheme(s) for analysis. Alternatively, the Council could determine that only the evaluation criteria would be in the FMPs and Federal regulation, and that the FMP would direct the State to determine the weights of the criteria in State regulations.

⁴If the Council agrees with staff's interpretation that there would be no Federal government role in oversight of the economic development aspects of the CDQ Program under Alternative 3, the analysis will address whether it is necessary or appropriate for the FMP to include such a specific statement about the goals and purpose of the CDQ Program.

⁵The State is starting a new allocation process that would recommend allocations for 2007 – 2011. The State intends to submit recommendations to NMFS by May 2006. It is anticipated that the 2007 – 2011 allocations will represent the baseline allocations and be in place at the time of implementation of Am. 71.

If one or more groups realize a reduction in their allocations, that ‘available’ quota should be divided by the formula or equally among the remaining CDQ groups. If all groups performed at status quo or improved relative to the criteria, no allocation changes would be made. If all groups did worse, no allocation changes would be made.

Component 8: Duration of allocation cycle

Establish a 10-year cycle in Federal regulation, to coincide with the U.S. Census.⁶ The intent is that the first cycle would be 2012 - 2021.

⁶The allocation cycle and process only applies to the 10% of the CDQ allocations that is not ‘fixed.’