

Alternatives for the National Marine Fisheries Services' (Federal Government) Role in Management and Oversight of the Community Development Quota Program

Prepared by: Sally Bibb (NMFS, Alaska Regional Office) for the State's Blue Ribbon Panel Reviewing the CDQ Program. June 2, 2005 meeting date.

Based on the Magnuson-Stevens Act (MSA) as it is currently written, NMFS must remain involved and responsible for the following three areas of CDQ Program management and oversight:

1. Eligible communities

The Magnuson-Stevens Act contains the eligibility criteria for the CDQ Program. Therefore, NMFS must be involved in ensuring that the communities that participate in the program meet the eligibility criteria.

2. Management of the CDQ fisheries

Management of the CDQ fisheries refers to the regulations that govern the harvest of the CDQ allocations of groundfish, prohibited species, halibut, and crab. The CDQ fisheries are managed as a component of the overall Bering Sea and Aleutian Islands (BSAI) groundfish, halibut, and crab fisheries. NMFS directly regulates the harvest of groundfish, prohibited species, and halibut by establishing regulations for seasons, closed areas, legal fishing gear, observer coverage requirements, catch accounting requirements, record keeping and reporting requirements, and penalties associated with quota overages or other fishery violations. The Council and NMFS have deferred management of the crab CDQ fisheries to the State of Alaska under the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (crab FMP).

3. Allocations of quota among the CDQ groups

NOAA General Counsel has advised NMFS and the Council that the MSA does not authorize the Secretary of Commerce to delegate to the State the final authority or responsibility to make allocations among the CDQ groups or communities. The Secretary of Commerce is ultimately responsible to ensure that the CDQ allocations are consistent with the MSA and other applicable Federal law. At one time, NMFS suggested a possible MSA amendment that could provide the authority to delegate CDQ allocations among the groups to the State, but the State Attorney General's Office advised that this proposal was not consistent with the Alaska constitution.

The MSA does not specify the process through which CDQ allocations must be made, so the Council has the authority to recommend whether allocations be made through the current administrative process, a revised administrative process, or through Federal rulemaking.

The current administrative process involves the CDQ groups submitting proposed community development plans (CDPs) to the State as an application for CDQ allocations; the State submitting its CDQ allocation recommendations, rationale for the recommendations, and the proposed CDPs to NMFS; NMFS reviewing the State's recommendations and rationale and the proposed CDPs; NMFS issuing an initial administrative determination about whether to approve or disapprove the State's recommendations and the proposed CDPs; NMFS providing the CDQ groups with an opportunity to administratively appeal its initial decision, and NMFS final agency action upon resolution of any appeals.

A revised administrative process could involve changes in some elements of the current administrative process. For example, the CDPs could be submitted as applications for CDQ allocations, but NMFS would not be required to approve or disapprove the CDPs or amendments to the CDPs. This revision would address concerns that a federal action to approve CDPs, amendments to CDPs, or individual CDQ projects require NMFS to comply with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other federal laws when approving the CDQ Program economic development projects.

The Federal rulemaking process would involve the Council making recommendations to NMFS about CDQ allocations which are based on an analysis of alternative allocations (e.g., the State could recommend one set of alternative allocations for the Council's consideration); NMFS would issue the Council's recommendations as a proposed rule; take public comment; and then (assuming all Federal legal and procedural requirements had been met), publish a final rule establishing the CDQ allocations in Federal regulations at 50 CFR 679. Under the rulemaking option, CDQ allocations could only be changed by a future rulemaking. The federal rulemaking process is not necessarily faster than the administrative process, but rulemaking does not involve an administrative appeals process.

Oversight of the Economic Development Aspects of the CDQ Program

The MSA 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. **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.** If the Council wanted to reduce NMFS's role in oversight of the economic development aspects of the CDQ Program, it could recommend that specific elements of oversight be delegated to the State of Alaska with no involvement by NMFS, as was recently done for oversight of the allocation of golden king crab to a non-profit entity representing the community of Adak. The Council could provide direction to the State in the groundfish and crab FMPs and NMFS would remove regulations addressing NMFS's role in these oversight elements from 50 CFR 679. The State could be required to report back to the Council and NMFS about its oversight activities or any other element of the CDQ Program, but NMFS would not be involved in reviewing and approving or disapproving oversight actions taken by the State under this delegation of responsibility.

Elements of oversight that the Council could recommend be delegated to the State to reduce NMFS's role or that could be removed from the program entirely are:

(i) Those currently in NMFS regulations:

- CDQ groups must submit a community development plan (CDP),
- the CDP is an application for CDQ allocations,
- the CDP is a working business plan that must be kept up to date (this is the mechanism through which NMFS and the State require that the CDQ groups get prior approval for all CDQ projects),
- information required to be submitted in a CDP (e.g. information about the CDQ group board of directors, staff, CDQ projects, subsidiaries, business partners, contracts, budgets, organizational chart,

plans for how the CDQ allocations will be used to provide economic development, employment, and training benefits to the eligible communities, etc.)

- circumstances under which a substantial amendment or technical amendment to a CDP must be submitted (types of changes or monetary limits),
- information required to be submitted in a substantial amendment,
- CDQ groups must annually submit audited financial statements, a budget report, and a budget reconciliation report.

(ii) Others

- oversight of subsidiaries,
- allowable investments and expenditures (either allowable categories or monetary limits on certain categories).

The Council or NMFS should request input on specific proposals to delegate oversight responsibilities to the State under the FMP to determine the scope of the delegation authority and recourse, if any, the CDQ groups would have to the Council or NMFS if a group believed that an action taken by the State was not consistent with the MSA or other federal laws.

Table 1a. CDQ issues and current authority assuming Federal role continues similar to status quo
Issues Related to the CDQ Allocation Process

Prepared by Nicole Kimball (NPFMC) and Sally Bibb (NMFS), 6/2/05

Possible Element of Program to be Modified	Magnuson Stevens Act	Federal regulations	BSAI Fishery Management Plans (FMP)	State regulations	Council recommendation on BSAI Am. 71 (June 2002)
1. Change the process by which CDQ allocations are made (from administrative determination to rulemaking)	No changes necessary, meaning that changes to the purpose of the program would not be inconsistent with the current MSA language.	Would require amending Federal regs at 679.30 which describe the current administrative process for allocating CDQ among the CDQ groups.	Council discretion.	Would require amending State regs.	The Council recommended better defining the allocation process in Federal regulation and including an expanded State hearing and comment process. The Council did not recommend changing the current process of making allocations through administrative determination.
2. Change the process by which CDQ allocations are made (from administrative determination to fixed in statute)	Would necessitate amending MSA to include specific percentage allocations of each quota category among the CDQ groups. (There are 47 CDQ quota categories to be allocated among the 6 CDQ groups.)	Would require amending Federal regs at 679.30 to remove the current administrative process for allocating CDQ among the CDQ groups.	Council discretion.	Would require amending State regs to remove the current allocation process provisions.	See above.
3. Changing the duration of the allocation cycle	No changes necessary.	Would require adding to Federal regs at 679.30 to clarify the duration of the allocation cycle. Cycle duration is not explicit in current regs (it is set at the discretion of State).	Council discretion.	Would require amending State regs to clarify the duration of the allocation cycle at 6 AAC 93.020. Currently regs do not define the duration of the cycle.	The Council recommended establishing a 3-year allocation cycle in Federal regulations. The Council also recommended allowing the State to recommend mid-cycle adjustments under extraordinary circumstances. The Council would have to approve the State's recommended reallocations.
4. Fixing a portion of the allocations and allowing the remaining portion to continue to be allocated competitively	No changes necessary.	Would require amending Federal regs at 679.30. Currently all of the 47 CDQ quota categories are allocated competitively.	Council discretion.	Would require amending State regs to clarify that only a portion of the allocations will be evaluated on a competitive basis and recommendations would be submitted to NMFS on that portion only.	The Council recommended status quo on this issue (to continue the current allocation process by which all of the allocations are made based on a competitive process).
5. Streamlining the CDP process: changing the evaluation criteria (reducing criteria and making them more objective)	No changes necessary.	Council and NMFS discretion. Federal regs do not currently include the CDQ allocation evaluation criteria used by the State.	No changes necessary.	Changes to evaluation criteria would be required at 6 AAC 93.040.	The Council recommended reducing the evaluation criteria to 10 factors (as opposed to the current 20) and publishing them in Federal regulation. Many of the criteria remain subjective in nature. (The criteria are listed in the Council motion on Am. 71 under Issue 5).

*Note that 'no changes necessary' means that the current language in the statute, FMP, or regulations would not be inconsistent with the proposed change. It does not prohibit amendments from being made to that particular authority, but it is not necessary to implement the change.

Table 1b. CDQ issues and current authority assuming Federal role continues similar to status quo
Issues Related to Oversight of the Economic Development Aspects of the CDQ Program (Use of the Allocations or Revenues)

Possible Element of Program to be Modified	Magnuson Stevens Act	Federal regulations	BSAI Fishery Management Plans (FMP)	State regulations	Council recommendation on BSAI Am. 71 (June 2002)
1. Change the purpose of the program	No changes necessary.	Would require amending Federal regs at 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."	Would require amending the BSAI groundfish and crab FMPs.	State discretion. Purpose not currently in state regs.	The Council recommended changing the purpose of the program in the BSAI FMP and Federal regs: "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."
2. Expand purpose of program to allow a portion of income to be spent on non-fisheries projects	No changes necessary.	Would require amending Federal regs to revise the purpose of the program and to clarify the types of non-fisheries projects that would be allowed and the amount of each group's income that may be spent on them. Currently, regs are not clear on this issue.	Would require amending the groundfish and crab FMPs to change the overall purpose of the program.	Would likely require changes to state regs, at the very least to modify the evaluation criteria such that they account for allowable non-fisheries projects.	The Council recommended revising Federal regulations to allow investments in non-fisheries related projects. Each CDQ group would be allowed to invest up to 20% of its previous year's pollock CDQ royalties in non-fisheries related investments. These investments must be in economic development projects in the region of AK represented by the CDQ groups and be self-sustaining.
3. Establish a limit on administrative expenses	No changes necessary.	Would require amending Fed regs to define a limit on administrative expenses, because NMFS would be expected to enforce that limit. No limit in current regs.	No changes necessary.	State discretion. No limit in current State regs, and no explicit evaluation criterion related to admin expenses.	Not specifically addressed in Amendment 71. However, the Council recommended revising Federal regulations to allow investments in non-fisheries projects. As part of this recommendation, Federal regulations would be clarified such that the groups are allowed to spend money on administrative expenses, but no limit was proposed.
4. Establish a cap on salaries of the CDQ group staff	No changes necessary.	Would require amending Fed regs to define a limit on salaries, because NMFS would be expected to enforce that limit. No salary limits in current regs.	No changes necessary.	State discretion. No salary limits in current regs.	Not addressed in Amendment 71.
5. Increase the threshold (\$ amount) at which an amendment to the CDP needs to go through the State/Federal approval process	No changes necessary.	Would require amending Federal regs at 679.30(g)(4) to change threshold. Monetary threshold for a substantial amendment is currently \$100,000; or more than a 20% increase in the annual budget of the project; or more than a 20% increase in actual expenditures over the approved annual budget for administrative operations.	No changes necessary.	State discretion. Currently, State regs at 6 AAC 93.055 reference Federal reg requirements.	Under Issue 6, related to the extent of government oversight of the CDQ groups and subsidiaries, the Council selected Alternative 2, which included a recommendation by the State to increase the threshold for substantial amendments from \$100,000 to \$250,000.

Table 1b (cont). CDQ issues and current authority assuming Federal role continues similar to status quo
Issues Related to Oversight of the Economic Development Aspects of the CDQ Program (Use of the Allocations or Revenues)

Possible Element of Program to be Modified	Magnuson Stevens Act	Federal regulations	BSAI Fishery Management Plans (FMP)	State regulations	Council recommendation on BSAI Am. 71 (June 2002)
6. Streamline the CDP process: reducing the information requirements	No changes necessary.	Reducing the information required to be submitted in the CDP, amendments, and other related reports (e.g., annual progress reports, budget reports, and reconciliation reports) would require amending Federal regs at 679.30(a) and (g).	No changes necessary.	Changes to the information requirements would be required throughout State regs.	The Council did not recommend specific changes to the information required in the CDP, but some revisions would be needed to support the Council's recommendations (e.g. on non-fisheries related CDQ projects).
7. Ensure that community residents and the Board of Directors of each group are included in the development of the CDP	No changes necessary.	Council and NMFS discretion. Federal regulations do not currently address this topic.	No changes necessary.	State regulation changes would be necessary if this evaluation criterion were modified. The current criteria is in State regs at 6 AAC 93.040(b)(18): "The degree of participating community input in developing the proposed CDP."	Not addressed in Amendment 71.
8. Oversight of subsidiaries	No changes necessary.	Would require amendments to Federal regs. Current regs are not clear on this issue.	No changes necessary.	Would likely require additions to State regs. Current regs are not clear on this issue.	The Council recommended clarifying that government oversight extends to subsidiaries controlled by the CDQ groups. To have effective management control or controlling interest in a company, the ownership needs to be a minimum of 51%.

*Note that 'no changes necessary' means that the current language in the statute, FMP, or regulations would not be inconsistent with the proposed change. It does not prohibit amendments from being made to that particular authority, but it is not necessary to implement the change.

Table 2a. CDQ issues and current authority assuming the Federal role in oversight is reduced

Issues Related to the CDQ Allocation Process

NO CHANGES from Table 1a because NMFS must remain involved in the CDQ allocation process

Possible Element of Program to be Modified	Magnuson Stevens Act	Federal regulations	BSAI Fishery Management Plans (FMP)	State regulations	Council recommendation on BSAI Am. 71 (June 2002)
1. Change the process by which CDQ allocations are made (from administrative determination to rulemaking)	No changes necessary, meaning that changes to the purpose of the program would not be inconsistent with the current MSA language.	Would require amending Federal regs at 679.30 which describe the current administrative process for allocating CDQ among the CDQ groups.	Council discretion.	Would require amending State regs.	The Council recommended better defining the allocation process in Federal regulation and including an expanded State hearing and comment process. The Council did not recommend changing the current process of making allocations through administrative determination.
2. Change the process by which CDQ allocations are made (from administrative determination to fixed in statute)	Would necessitate amending MSA to include specific percentage allocations of each quota category among the CDQ groups. (There are 47 CDQ quota categories to be allocated among the 6 CDQ groups.)	Would require amending Federal regs at 679.30 to remove the current administrative process for allocating CDQ among the CDQ groups.	Council discretion.	Would require amending State regs to remove the current allocation process provisions.	See above.
3. Changing the duration of the allocation cycle	No changes necessary.	Would require adding to Federal regs at 679.30 to clarify the duration of the allocation cycle. Cycle duration is not explicit in current regs (it is set at the discretion of State).	Council discretion.	Would require amending State regs to clarify the duration of the allocation cycle at 6 AAC 93.020. Currently regs do not define the duration of the cycle.	The Council recommended establishing a 3-year allocation cycle in Federal regulations. The Council also recommended allowing the State to recommend mid-cycle adjustments under extraordinary circumstances. The Council would have to approve the State's recommended reallocations.
4. Fixing a portion of the allocations and allowing the remaining portion to continue to be allocated competitively	No changes necessary.	Would require amending Federal regs at 679.30. Currently all of the 47 CDQ quota categories are allocated competitively.	Council discretion.	Would require amending State regs to clarify that only a portion of the allocations will be evaluated on a competitive basis and recommendations would be submitted to NMFS on that portion only.	The Council recommended status quo on this issue (to continue the current allocation process by which all of the allocations are made based on a competitive process).
5. Streamlining the CDP process: changing the evaluation criteria (reducing criteria and making them more objective)	No changes necessary.	Council and NMFS discretion. Federal regs do not currently include the CDQ allocation evaluation criteria used by the State.	No changes necessary.	Changes to evaluation criteria would be required at 6 AAC 93.040.	The Council recommended reducing the evaluation criteria to 10 factors (as opposed to the current 20) and publishing them in Federal regulation. Many of the criteria remain subjective in nature. (The criteria are listed in the Council motion on Am. 71 under Issue 5).

*Note that 'no changes necessary' means that the current language in the statute, FMP, or regulations would not be inconsistent with the proposed change. It does not prohibit amendments from being made to that particular authority, but it is not necessary to implement the change.

Table 2b. CDQ issues and current authority assuming the Federal role in oversight is reduced
Issues Related to Oversight of the Economic Development Aspects of the CDQ Program (Use of the Allocations or Revenues)

Possible Element of Program to be Modified	Magnuson Stevens Act	Federal regulations	BSAI Fishery Management Plans (FMP)	State regulations	Council recommendation on BSAI Am. 71 (June 2002)
Reduce NMFS's role in oversight of economic development aspects (element added by analysts to distinguish between Table 1b and Table 2b)	No changes necessary.	Would require amendments to remove any current role for NMFS that would be delegated to the State and to add any new reporting requirements for the State to the Council or NMFS.	Would require amendments to delegate specific oversight responsibilities to the State. Some things that probably could be delegated to the State are the CDPs, amendments, allowable investments and expenditures, oversight of subsidiaries, and reporting requirements. Legal analysis by NOAA GC is needed to clarify boundaries of delegation.	State discretion. Likely that State regs would be amended to explain how the State would regulate, monitor, and enforce this requirement.	The Council did not recommend reducing NMFS's role in any aspect of the CDQ Program under Amendment 71. However, the alternative of delegating some oversight responsibilities to the State under the FMP was not specifically included in Amendment 71.
1. Change the purpose of the program	No changes necessary.	Would require amending Federal regs at 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."	Would require amending the BSAI groundfish and crab FMPs.	State discretion. Purpose not currently in state regs.	The Council recommended changing the purpose of the program in the BSAI FMP and Federal regs: "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."
2. Expand purpose of program to allow a portion of income to be spent on non-fisheries projects	No changes necessary.	Council discretion to recommend. This element probably could be delegated to the State, and NMFS regulations would be revised to remove any role for NMFS in regulating, monitoring, or enforcing allowable expenditures and investments by the CDQ groups.	Would require amending the groundfish and crab FMPs to delegate this responsibility to the State. Would be Council's discretion about what specifically would be delegated to the State any reporting requirements for the State back to the Council and NMFS.	State discretion. Likely that State regs would be amended to explain how the State would regulate, monitor, and enforce this requirement.	The Council recommended revising Federal regulations to allow investments in non-fisheries related projects. Each CDQ group would be allowed to invest up to 20% of its previous year's pollock CDQ royalties in non-fisheries related investments. These investments must be in economic development projects in the region of AK represented by the CDQ groups and be self-sustaining.
3. Establish a limit on administrative expenses	No changes necessary.	This element probably could be delegated to the State. NMFS regulations would not contain the limit because NMFS would not be regulating, monitoring, or enforcing this requirement.	Would require amendments to delegate specific oversight responsibilities to the State.	State discretion. Likely that State regs would be amended to explain how the State would regulate, monitor, and enforce this requirement.	Not specifically addressed in Amendment 71. However, the Council recommended revising Federal regulations to allow investments in non-fisheries projects. As part of this recommendation, Federal regulations would be clarified such that the groups are allowed to spend money on administrative expenses, but no limit was proposed.

Table 2b (cont.) CDQ issues and current authority assuming the Federal role in oversight is reduced
Issues Related to Oversight of the Economic Development Aspects of the CDQ Program (Use of the Allocations or Revenues)

Possible Element of Program to be Modified	Magnuson Stevens Act	Federal regulations	BSAI Fishery Management Plans (FMP)	State regulations	Council recommendation on BSAI Am. 71 (June 2002)
4. Establish a cap on salaries of the CDQ group staff	No changes necessary.	This element probably could be delegated to the State. NMFS regulations would not contain the limit because NMFS would not be regulating, monitoring, or enforcing this requirement.	Would require amendments to delegate specific oversight responsibilities to the State.	State discretion. Likely that State regs would be amended to explain how the State would regulate, monitor, and enforce this requirement.	Not addressed in Amendment 71.
5. Increase the threshold (\$ amount) at which an amendment to the CDP needs to go through the State/Federal approval process	No changes necessary.	This element probably could be delegated to the State. NMFS regulations would not contain the limit because NMFS would not be regulating, monitoring, or enforcing this requirement.	Would require amendments to delegate specific oversight responsibilities to the State.	State regs would have to be amended. Currently, State regs at 6 AAC 93.055 reference Federal reg requirements.	Under Issue 6, related to the extent of government oversight of the CDQ groups and subsidiaries, the Council selected Alternative 2, which included a recommendation by the State to increase the threshold for substantial amendments from \$100,000 to \$250,000.
6. Streamline the CDP process: reducing the information requirements	No changes necessary.	This element probably could be delegated to the State. NMFS regulations would not contain the CDP information requirements because NMFS would not be regulating, monitoring, or enforcing this requirement.	Would require amendments to delegate specific oversight responsibilities to the State.	State discretion. Likely that State regs would be amended to explain how the State would regulate, monitor, and enforce this requirement.	The Council did not recommend specific changes to the information required in the CDP, but some revisions would be needed to support the Council's recommendations (e.g. on non-fisheries related CDQ projects).
7. Ensure that community residents and the Board of Directors of each group are included in the development of the CDP	No changes necessary.	This element probably could be delegated to the State. NMFS regulations would not contain the requirement because NMFS would not be regulating, monitoring, or enforcing the requirement.	Would require amendments to delegate specific oversight responsibilities to the State.	State discretion. Likely that State regs would be amended to explain how the State would regulate, monitor, and enforce this requirement.	Not addressed in Amendment 71.
8. Oversight of subsidiaries	No changes necessary.	This element probably could be delegated to the State. NMFS regulations would not contain any regulations about the oversight of subsidiaries because NMFS would not be regulating, monitoring, or enforcing this requirement.	Would require amendments to delegate specific oversight responsibilities to the State.	State discretion. Likely that State regs would be amended to explain how the State would regulate, monitor, and enforce this requirement.	The Council recommended clarifying that government oversight extends to subsidiaries controlled by the CDQ groups. To have effective management control or controlling interest in a company, the ownership needs to be a minimum of 51%.

*Note that 'no changes necessary' means that the current language in the statute, FMP, or regulations would not be inconsistent with the proposed change. It does not prohibit amendments from being made to that particular authority, but it is not necessary to implement the change.