

Recusal Examination for the October 2015 North Pacific Fishery Management Council decision concerning Western Aleutian Islands Golden King Crab Full Offload Delivery Exemption

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This document examines whether any of the affected individuals on the North Pacific Fishery Management Council (Council) must be recused from voting on a Council decision concerning the Western Aleutian Islands Golden King Crab Full Offload Delivery Exemption, hereinafter referred to as the WAG delivery exemption.

Statutory and Regulatory Background

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

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

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

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

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

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

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

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

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

Determination of affected individuals

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

In accordance with section 302(j)(2) of the MSA and 50 CFR 600.235(b)(1) and (b)(2), these seven members have disclosed and reported their financial interests in harvesting, processing, marketing, lobbying, or advocacy activity by filing with the Executive Director of the Council their annual, updated NOAA Form 88-195, Statement of Financial Interests.

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

Among other things, a “Council decision” includes Council actions that could result in the approval of “a fishery management plan (FMP) or FMP amendment” or a Council “request for amendment to regulations implementing an FMP,” commonly referred to as a regulatory

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

amendment. 50 CFR 600.235(a). The Council is currently scheduled to take final action at its October 2015 meeting on the WAG delivery exemption. Under current regulations implementing the Crab Rationalization (CR) Program, vessels are prohibited from resuming fishing for CR crab “on board a vessel once a landing has commenced and until all CR crab are landed.” 50 C.F.R. § 680.7. This prohibition was established as part of the regulations implementing the CR Program. A Council action to modify this prohibition, such as the WAG delivery exemption under consideration by the Council, would require a regulatory amendment.² Therefore, the Council’s action on the WAG delivery exemption is a “Council decision” because it could result in a “request for amendment to regulations implementing an FMP.”

Determination of the “fishery or sector of the fishery” affected by a Council decision on the WAG delivery exemption

The fishery or sector of the fishery is determined by the action before the Council. The June 2015 Initial Review Draft Regulatory Impact Review/Initial Regulatory Flexibility Analysis for the WAG Full Offload Delivery Exemption (Analysis) includes two alternatives:

Alternative 1: No action. Status quo is maintained. Vessels are prohibited from resuming fishing for CR crab on board a vessel once a landing has commenced and until all CR crab are landed.

Alternative 2: Create an exemption from the prohibition from resuming fishing for CR crab on board a vessel once landing has commenced and until all CR crab are landed for vessels harvesting WAG.

As explained in section 3.2 of the Analysis:

The purpose of this action would be to create an exemption for WAG from the regulations that prohibit the continuation of a fishing trip subsequent to a partial offload of crab in the crab program. The regulatory exemption would allow vessels prosecuting the WAG fishery to make partial deliveries of crab and then continue fishing before fully offloading all harvested crab. Specifically, it would allow vessels harvesting WAG to deliver partial loads of live crab to Adak opportunistically; when the markets and the commercial airline are available. ...

The action was specifically identified for the WAG fishery due to 1) the remote and economically challenging characteristic of the fishery, 2) the possibility of mutual benefits to harvesters, the local processor, and the community, and 3) consistency with previous Council action that intended to encourage entrepreneurial activity related to fisheries in the Western Aleutian Islands.

As explained in the Analysis at section 1.3, the Aleutian Islands golden king crab fishery is split into two distinct management areas – one area east of 174° W longitude and one area west of 174° W longitude.³ Each area has a separate total allowable catch (TAC). The area west of 174°

² According to the June 2015 Analysis, the action under consideration by the Council “would not require an FMP amendment.”

³ Analysis, at section 1.3.

W longitude is the WAG fishery. The Analysis specifically states that the action under consideration by the Council “only applies to the WAG fishery, which is west of 174°W longitude.” Furthermore, the WAG fishery is managed under the Crab Rationalization (CR) Program, a catch share program in which NMFS issues IFQs to holders of harvester quota shares. Within the WAG fishery, NMFS issues West designated IFQ or Undesignated IFQ. West designated IFQ must be delivered to an eligible processor located west of 174° longitude. 50 C.F.R. § 680.40. Undesignated IFQ can be delivered to an eligible processor regardless of the processor’s location. The WAG delivery exemption applies to all WAG IFQ, both West designated and Undesignated, enabling any IFQ holder to make partial offloads at processors with corresponding WAG IPQ. For these reasons, the fishery or sector of the fishery affected by the Council’s decision is the entire WAG fishery and all of the WAG IFQ issued by NMFS.⁴

NMFS annually issues IFQ for the WAG fishery, which begins on August 1. The most recent year for which IFQ were issued is the 2015/2016 fishing year. The 2015/2016 total allowable catch for WAG is 2,682,000 lbs.⁵ Based on this amount, NMFS issued a total of 2,681,998 lbs of WAG IFQ for the 2015/2016 WAG fishery.⁶ Because the percentage of IFQs attributable to an affected individual is the determining factor for fisheries in which IFQs are assigned, the 10% threshold for determining whether a Council member has a significant interest in the amount of IFQ issued in the WAG fishery is 268,199.8 lbs of WAG IFQ.

Determination as to whether the WAG delivery exemption is a particular matter primarily of individual concern for any Council member under 50 CFR 600.225

We have determined that the WAG delivery exemption is not a particular matter primarily of individual concern for any affected individual. Although only a small number of vessels have been active in the fishery,⁷ WAG IFQ appears to be held by 22 persons that would be affected by the Council’s decision. Therefore, the WAG delivery exemption would affect more than a few fishery participants, and it is not a matter primarily of individual concern.⁸

⁴ The WAG delivery exemption also affects processors holding WAG individual processing quota (IPQ). However, because no affected individual currently has financial interests that hold WAG IPQ, IPQ is not included in this recusal analysis.

⁵ See Alaska Department of Fish and Game News Release, “Aleutian Islands Golden King Crab Season Opening August 1 Total Allowable Catch Announced,” July 15, 2015, at: http://alaskafisheries.noaa.gov/sustainablefisheries/crab/rat/adfg/2015_16aigoldens.pdf.

⁶ See NMFS Crab Cooperative Permits and Information, Summary by Cooperative, Fishery, Member, and Quota Type 2015/2016, at: <http://alaskafisheries.noaa.gov/sustainablefisheries/crab/rat/ram/permits.htm#crab>

⁷ According to table 3-7 of the Analysis, only 2 to 3 catcher vessels have been active in the fishery since implementation of the CR Program.

⁸ The proposed rule preamble for the recusal regulations at 50 CFR 600.235 identified “management measures that affect only the [Council] member’s business and a few other fishery participants” as an example of a particular matter primarily of individual concern. 62 Fed. Reg. 42474, 42475 (August 7, 1997).

Individual determinations as to whether there is an expected and substantially disproportionate benefit from a Council decision on the WAG delivery exemption for any affected individual under 50 CFR 600.235

Mr. Cross

According to Mr. Cross' financial disclosure statement dated May 1, 2015, Mr. Cross is employed with Aleutian Spray Fisheries, Inc. (ASF). ASF has financial interests in a number of Federal commercial fisheries conducted within the Council's jurisdiction, including several CR Program crab fisheries.⁹ Additionally, Mr. Cross is a board member of the Aleutian Island Cooperative, a non-profit crab cooperative that receives cooperative IFQ for several CR Program crab fisheries. None of Mr. Cross' financial interests involved in CR Program crab fisheries hold WAG IFQ. Because the Council's decision on the WAG delivery exemption will not result in an expected and substantially disproportionate benefit to Mr. Cross' listed financial interests, no significant and predictable effect from a Council decision on the WAG delivery exemption exists for any of Mr. Cross' disclosed financial interests. Therefore, Mr. Cross is not required to recuse himself from voting on the WAG delivery exemption under 50 CFR § 600.235.

Mr. Down

According to Mr. Down's financial disclosure statement dated February 23, 2015, Mr. Down's financial interests do not hold IFQ or IPQ in the WAG fishery. Because the Council's decision on the WAG delivery exemption will not result in an expected and substantially disproportionate benefit to Mr. Down's listed financial interests, no significant and predictable effect from a Council decision on the WAG delivery exemption exists for any of Mr. Down's disclosed financial interests. Therefore, Mr. Down is not required to recuse himself from voting on the WAG delivery exemption under 50 CFR § 600.235.

Mr. Fields

According to Mr. Fields' financial disclosure statement dated February 6, 2015, Mr. Fields' financial interests do not hold IFQ or IPQ in the WAG fishery. Because the Council's decision on the WAG delivery exemption will not result in an expected and substantially disproportionate benefit to Mr. Fields' listed financial interests, no significant and predictable effect from a Council decision on the WAG delivery exemption exists for any of Mr. Fields' disclosed financial interests. Therefore, Mr. Fields is not required to recuse himself from voting on the WAG delivery exemption under 50 CFR § 600.235.

Mr. Hull

According to Mr. Hull's financial disclosure statement dated January 7, 2015, Mr. Hull's financial interests do not hold IFQ or IPQ in the WAG fishery. Because the Council's decision on the WAG delivery exemption will not result in an expected and substantially disproportionate

⁹ ASF has ownership interests in Horizon Crab, LLC and BS Crab Group LLC. Neither company holds quota share or processing quota share for WAG and NMFS does not issue WAG IFQ or IPQ to either company.

benefit to Mr. Hull's listed financial interests, no significant and predictable effect from a Council decision on the WAG delivery exemption exists for any of Mr. Hull's disclosed financial interests. Therefore, Mr. Hull is not required to recuse himself from voting on the WAG delivery exemption under 50 CFR § 600.235.

Mr. Kinneen

According to Mr. Kinneen's financial disclosure statement dated January 14, 2015, Mr. Kinneen is employed with Norton Sound Economic Development Corporation (NSEDC), a Community Development Quota (CDQ) entity.¹⁰ Although NSEDC has financial interests in a number of Federal commercial fisheries conducted within the Council's jurisdiction, only its ownership interest in KDS, Inc. is relevant for this recusal determination.¹¹ Because KDS, Inc. is a wholly-owned subsidiary of NSEDC, its activity in the WAG fishery is attributable to NSEDC and considered in the recusal determination for Mr. Kinneen.

For the 2015/2016 fishing year, KDS, Inc. was eligible to receive 1,189,644 lbs of WAG IFQ.¹² KDS, Inc. timely applied for this WAG IFQ and instructed NMFS to assign its 2015/2016 WAG IFQ to a cooperative. This amount of WAG IFQ exceeds the 10% threshold of 268,199.8 lbs. of WAG IFQ. According to regulations at 50 CFR 600.235(c), exceeding the threshold indicates that Mr. Kinneen has a significant interest in the WAG fishery and demonstrates that the action will result in an expected and substantially disproportionate impact on Mr. Kinneen's financial interests. Because the WAG delivery exemption will have a significant and predictable effect on Mr. Kinneen's financial interests, he is required to recuse himself from voting on the WAG delivery exemption under 50 C.F.R. 600.235. Although Mr. Kinneen is required to recuse himself from voting, he may participate in all aspects of the Council's deliberations relating to the action after he notifies the Council of the voting recusal and identifies the financial interests that are affected. Mr. Kinneen also may state for the record how he would have voted on the action.

Mr. Long

According to Mr. Long's financial disclosure statement dated January 5, 2015, Mr. Long is employed as a captain and fish master with Glacier Fish Company (Glacier Fish). Glacier Fish is part owner of Iquique US, LLC. Neither Glacier Fish nor Iquique US, LLC are involved in CR Program crab fisheries or hold WAG IFQ or IPQ.¹³ Because the Council's decision on the WAG delivery exemption will not result in an expected and substantially disproportionate benefit to Mr. Long's listed financial interests, no significant and predictable effect from a Council decision on the WAG delivery exemption exists for any of Mr. Long's disclosed financial interests. Therefore, Mr. Long is not required to recuse himself from voting on the WAG delivery exemption under 50 CFR § 600.235.

¹⁰ NSEDC does not receive an allocation of WAG under the CDQ Program and does not hold WAG IFQ or IPQ.

¹¹ Other than KDS, Inc., none of NSEDC's financial interests hold WAG IFQ or IPQ.

¹² NMFS, Crab Cooperative Permits and Information, Summary by Cooperative, Fishery, Member, and Quota Type 2015/2016, <http://alaskafisheries.noaa.gov/sustainablefisheries/crab/rat/ram/permits.htm#crab>

¹³ Glacier Fish is partly owned by Siu Alaska Corporation and Nippon Suisan USA, Inc. Neither Siu Alaska Corporation nor Nippon Suisan USA, Inc. owns a controlling interest in Glacier Fish, and the entities appear to operate independently from one another. Therefore, the financial interests of Siu Alaska Corporation and Nippon Suisan USA, Inc. are not attributed to Mr. Long for this recusal determination.

Mr. Mezirow

According to Mr. Mezirow's financial disclosure statement dated August 29, 2015, Mr. Mezirow's financial interests do not hold IFQ or IPQ in the WAG fishery. Because the Council's decision on the WAG delivery exemption will not result in an expected and substantially disproportionate benefit to Mr. Mezirow's listed financial interests, no significant and predictable effect from a Council decision on the WAG delivery exemption exists for any of Mr. Mezirow's disclosed financial interests. Therefore, Mr. Mezirow is not required to recuse himself from voting on the WAG delivery exemption under 50 CFR § 600.235.