

Public Testimony Sign-Up Sheet

Agenda Item C-2(g) BSAI Crab Regl Deliv. Emerg Relief

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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver ^{DO} _{FOR}
Executive Director
DATE: September 28, 2008
SUBJECT: Crab management

ESTIMATED TIME 12 HOURS (all C-2 items)

ACTION REQUIRED

Discussion paper on BSAI Crab Regional Delivery Emergency Relief.

BACKGROUND

At its June 2008 meeting, the Council received a report of its crab advisory committee. The committee's report suggested that the Council explore options for providing an exemption from regional landing requirements, in the event that unavoidable circumstances prevent compliance with those requirements. In response to the paper and public testimony, the Council directed staff to develop a discussion paper on emergency exemption from regional delivery requirements that considers the use of civil contracts between harvesters, processors, and the designee of the affected community to define the qualification for that relief and other terms (such as any compensation for lost economic activity or revenues that might arise out of the waiver of the landing requirement). The civil contracts are intended to streamline administration of the waiver by NOAA Fisheries. In response, staff has prepared the attached discussion paper (Item C-2(g)), which explores options for establishing the exemption, including those suggested by the Council, as well as under which NOAA Fisheries would actively administer the exemption. In the event that the Council wishes to proceed with this action, it could adopt a draft purpose and need statement and alternatives that would establish the terms of and process for granting the exemption.

Exemption from regional landing requirements
North Pacific Fishery Management Council
October 2008

In the spring of 2007, the Council established a committee to address certain concerns with the crab rationalization program. In the course the committee's meetings, members expressed concern that at times of extreme icing and other uncontrollable circumstances, the regional landing requirements applicable to Class A individual fishing quota (IFQ) could pose safety risks, loss of resource (such as excessive deadloss), or extreme economic hardships to participants in the crab fisheries. At its June 2008 meeting, after receiving the committee's report, the Council directed staff to develop a discussion paper concerning potential measures to provide an exemption from those regional landing requirements. The Council specifically directed staff to examine the use of civil contracts between harvesters, processors, and the designee of the affected community as a means to facilitate, clarify and streamline the process that may result in an exemption from the regional landing requirement by NMFS. This paper is staff's response to that request. The paper includes a draft purpose and need statement and possible elements and options that could be used to structure alternatives for this action.

Background

In each of the first three years of the crab rationalization program, ice conditions in the North region delayed deliveries from vessels carrying full tanks of crab in the Bering Sea *C. opilio* fishery. In addition, in the second year, a fire on a floating processor limited capacity in the North region, further complicating compliance with regional delivery requirements in the *C. opilio* fishery. Captains and vessel owners confronted with these circumstances have expressed several concerns. Vessels can become trapped in the ice or damaged by travelling through ice, jeopardizing safety of both the vessel and its crew. An extended wait to offload while waiting for ice to clear can contribute to excessive deadloss. Extended waits to offload can also increase the risk of gear loss and associated harm to the resource, if ice conditions on the grounds change rapidly. Each of these risks can impose substantial economic hardship to share holders and vessel owners. Despite these risks, current regulations provide NOAA Fisheries with no authority to grant an exemption to regional landing requirements.

Many harvesters suggest that risks arising from regional landing requirements should be addressed through development of an exemption defining circumstances under which participants are permitted to deliver harvests of regionally designated IFQ outside the specified region. To ensure that regional landing requirements continue to serve their intended purpose, committee members suggested that any provision exempting participants from those requirements should define an exemption that allows participants to avert unreasonable risks, but not allow those persons to avoid the requirements for either convenience or simple economic gain. In developing an exemption, the committee also suggested that the Council should consider whether the exemption should contain a compensatory mechanism to address processor or community losses arising from the exemption. In addition to its compensatory effect, such a mechanism might discourage unwarranted uses of the exemption.

Administration of any exemption for regional landing requirements by NOAA Fisheries is likely to be complicated. If NOAA Fisheries is called on to make factual determinations of whether conditions of the exemption are satisfied, it is possible that the granting of the exemption could be delayed while NOAA Fisheries verifies evidence concerning those conditions. To simplify administration, it has been suggested that the conditions under which an exemption would be granted and the terms of any compensation could be defined by a civil contract among interested stakeholders. The Council requested staff to include consideration of this approach in this discussion paper.

Purpose and need statement

Participants in the fishery have identified three potential problems that could be addressed through a provision allowing an exemption from regional landing requirements. All problems arise from the occurrence of an unanticipated event (such as ice conditions or the disability of a processing facility or harbor) that prevents delivery of landings as required by regional landing requirements. Most prevalent have been assertions that ice conditions in and around the Pribilof Islands, where all North region processing takes place, have created a substantial risk to vessels and crews in the fishery. A second need for the exemption could arise if events prevent the delivery of landings in a region for an extended period of time which could lead to excessive deadloss of harvested crab. A third problem could arise if an unanticipated event or circumstance could prevent harvest of a portion of the TAC. Although economic costs should not be the sole motivator for an exemption, it is possible that in some circumstances, costs arising from an unanticipated event could make harvest of the TAC for landing in a specific region unreasonably costly. These costs might be unavoidable, despite all reasonable efforts of the IFQ and IPQ holders. A well-drafted purpose and need statement could identify unavoidable costs arising from an unanticipated circumstance that would make harvest of IFQ designated for landing in a region uneconomical as a reasonable motivation for an exemption provision.

During committee consideration of this issue, stakeholders presented the committee with a draft purpose and need statement. The following is a revision of that purpose and need statement:

In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require the associated catch to be delivered and processed in the designated region. Periodically, including at times in the first three years of the program, harbors in the Northern Region as defined in the program, are closed by the advance of the Bering Sea ice pack. These ice conditions have disrupted the crab fishery, contributing to safety risks and preventing harvesters from entering harbors to deliver to shore-based and floating processors located in the region, as required by the regional share designations. In addition, other unforeseeable events, events such as an earthquake or tsunami, or man-made disaster, could prevent deliveries or limit the available processing capacity in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements. Such an exemption should also provide a mechanism for reasonable compensation to communities harmed by the granting of the exemption to ensure that the community benefits intended by the regional designations continue to be realized despite the exemption.

Potential exemption alternatives

This section of the paper sets out possible alternatives, elements, and options that could be used to define the exemption and its administration. The two approaches to definition and administration of the exemption suggested by the committee are considered throughout this discussion. Since those administrative approaches have implications for the substantive definition of the exemption, the discussion that follows presents the administrative options first. After those administrative options are set out, various elements and options substantively define the exemption. In the discussion of the substantive

elements, the potential differences in the administrative options on the effects of the exemption are discussed.

Methods of defining the exemption and any compensation

Given that the claims for the exemption are likely to be based on unavoidable and unforeseeable events, whether the event is likely to qualify for the exemption, what the scope of the exemption should be and any subsequent compensatory action are likely to be case specific. A flexible structure able to accommodate this variability could be beneficial. To achieve this end, it has been suggested that contractual relationships be used to define exemption criteria and compensation. In considering the use of contracts for defining the exemption, it is important to consider that regulations, by necessity, must generally define the exemption. A contract, however, could be used to add specificity, defining certain circumstances that would (or would not) qualify for the exemption and an appropriate level of compensation to affected stakeholders.

In most instances, conditions that require an exemption from regional landing requirements and the exemption itself are likely to impose hardships on IFQ holders, IPQ holders, and communities who would otherwise benefit from the landings. IFQ and IPQ holders are likely to have costs associated with rechanneling landings and processing to communities unaffected by the circumstance driving the exemption. Communities will lose tax revenues and economic activity that would have resulted from the landings and processing. Balancing these different interests is challenging. IFQ holders may bear additional travel costs and could have added deadloss from delayed landings (in comparison the circumstances in the absence of the qualifying event). Depending on the terms of the exemption, an IPQ holder could either lose the expected production from the processing of the landing altogether or just bear the cost of having to shift processing activity (possibly through custom processing) to a different location.

One issue that arises when considering contractual establishment of any aspect of the exemption is the identification of parties to the contract. Clearly, the IFQ holder and the matched IPQ holder must be parties to the agreement. Since these shares are regionalized (and not bound to a particular community) the community party to the contract is not clear. Although imperfect, the contract could require that the entity representing community interests for any rights of first refusal on the subject IPQ be a party to the contract. Although shares are tied to a region, the starting point for establishing regional and community interests related to the IPQ is the community in which processing occurred that led to the allocation of IPQ (the 'community of origin'). In the first instance, it is this community that was intended by the Council to benefit from the IPQ through the establishment of the rights of first refusal and the requirement to process in the 'community of origin' during the first two years of the program. Although other communities in the same region may benefit from the regional designation on shares, it was the interest of the community of origin that was primary consideration when the program was implemented. Using this rationale, it seems reasonable to require that any compensation agreement include the IFQ holder, the matched IPQ holder, and the community of origin on the matched IPQ. Since the community of origin is represented in the program by a representative entity that holds the right of first refusal on IPQ, that entity could be considered as the contracting entity for purposes of defining the exemption from regionalization (including compensation provisions).

Since IPQ are mobile within a region, another possible party to the contract could be the community in which the IPQ intends to receive the delivery, if that community is different from the community of origin. Including the processing community could be justified, since it is that community which would receive any benefits of the processing activity in the absence of an exemption. Although inclusion of this party may be desirable, if the goal is to establish a contract that preserves the distribution of benefits that would have occurred in the absence of the exemption, including this community to the contract could be

problematic. If the community had little or no historic processing, it is possible that the community is not represented by a community entity under the program. In the absence of a representative community entity another party would need to be identified to represent the community in the contract. Also, it may be difficult to establish that the community will support processing of the IPQ in a manner that allows for the entry of a contract. Since IPQ are mobile, it is possible that in season processing decisions could result in movement of processing among communities. This uncertainty may prevent identification of the community in which the processing would have occurred in the absence of the exemption. In addition to these practical impediments, it is not clear that community and regional protections are intended to protect interests beyond those historic interests that existed prior to program implementation. Including the community the community in which processing would occur but for the exemption in some cases could extend that protection to communities that had no historic processing in the crab fisheries (or at a minimum could result in a redistribution of interests among historic processing communities based on processing practices under the program, as opposed to practices prior to the program). Given its practical impediments and potential inconsistency with the intent of the community protections under the program, inclusion of a community other than the community of origin in the contract defining compensation for an exemption may not be appropriate.

Although the party most suitable for representing regional interests may be the entity holding rights of first refusal on IPQ, in some instances no right of first refusal may exist. These PQS were initially issued based on historic processing that occurred outside of communities eligible for rights of first refusal. In four of the five regionalized fisheries, less than 3 percent of the PQS pool are free from rights of first refusal. In the St. Matthew Island blue king crab fishery, almost 65 percent of the PQS pool is not subject to a right of first refusal. To use contractual provisions to define the exemption and any compensation will require that a party be identified to represent regional interests. Identifying a party to represent regional interests is complicated since several communities exist in each region and no community can claim a historic dependence on the processing activity that led to the PQS allocation.

Table 1. Percent of PQS pool with no right of first refusal by fishery.

NoROFR				
Bristol Bay red king crab	Bering Sea <i>C. opilio</i>	Eastern Aleutian Island golden king crab	St. Matthew Island blue king crab	Pribilof red and blue king crab
2.7	2.9	0.9	64.6	0.3

Sources: NMFS Restricted Access Management IFQ database, crab fishing year 2006-2007.

Note: Eastern and Western Bering Sea *C. bairdi* and Western Aleutian Island golden and red king crab fisheries are not subject to regionalization.

An added advantage to using a system of contracts to administer compensation is that NOAA Fisheries need not be involved in the administration of compensation. Instead, the parties can administer any compensation, with enforcement through civil actions between the parties to the compensation contract. Although settlement of claims through civil actions may increase costs to the parties if one party contests a claim, in most instances the private administration of claims will reduce costs and expedite claim processing by removing the administrative requirements that apply to agency processing of claims.

The following options for defining the exemption and any compensation could be considered:

Method of defining the exemption and compensation:

Option 1: The exemption and any compensation shall be specified in regulation. Any compensation exchanged by the IFQ holder, IPQ holder, and the community entity holding (or formerly holding) the right of first refusal on the IPQ on using the exemption will be specified in regulation.

Option 2: The exemption shall be generally defined in regulation. To receive an exemption, however, an IFQ holder the holder of matched IPQ, and the entity holding (or formerly holding) the right of first refusal for the IPQ shall have entered a contract that defining conditions under which an exemption will be granted and the terms of any compensation that:

Suboption 1: may more specifically define circumstances that will qualify (or not qualify for the exemption) and/or

Suboption 2: defines any compensation that may be exchanged by the IFQ holder, IPQ holder, and the community entity holding (or formerly holding) the right of first refusal on the IPQ on using the exemption

If the Council elects to use a system of contracts to specifically define the exemption and any compensation (option 2), a party to represent regional interests must be identified for IPQ that have never been subject to rights of first refusal. Alternatively, these IPQ (and matched IFQ) could be exempt from the contractual requirement (and any accompanying compensation).

Throughout the remainder of this paper issues related to the use of contracts to assist in the definition of the exemption and any compensation, in contrast to a more conventional system under which the exemption is fully defined in regulation, are considered.

Administration of the exemption

The effectiveness of the exemption in relieving hardship arising from regional landing requirements may depend on the administration of the exemption. In general, two systems of NOAA Fisheries administration of the exemption have been suggested. Under the first, more conventional approach, NOAA Fisheries would be called on to make an administrative finding that an event has occurred that merits an exemption. Administration of an exemption to regional landing requirements poses several challenges. Although the objective application of criteria for determining eligibility for an exemption by NOAA Fisheries may be appealing to both participants seeking the exemption and stakeholders who may suffer losses when an exemption is granted, several issues arise through NOAA Fisheries administration of the exemption. First, NOAA Fisheries administration of general standards that lack specific criteria is complicated. The need for an exemption applicable to unanticipated circumstances (which would include circumstances other than icing in the harbor) requires a flexible standard without specifically delineated criteria. While a less specific standard may accommodate a broader range of needs, it also may increase the scale of agency fact finding required for determining whether the exemption standard has been met. This increased scale of fact finding may not only increase administration costs, but may also delay decision making. The need for efficient and timely administration of the exemption is a second challenge to an agency administered standard. Under conventional agency administration, an agency finding of qualification for the exemption would require that the agency make an evidentiary determination that the standard is met. These findings are not made lightly, requiring verification of conditions (which in the crab fisheries will likely be in remote locations with limited accessibility). Although a slight delay in processing an application for an exemption may be desirable (particularly if the exemption is based on ice conditions that may clear), administrative delays could also lead captains to wait to be informed of the decision on the exemption, which may expose their vessels and crews to additional risk and may

contribute to costly deadloss to crab on board. In addition, any agency administered exemption will require provision for appeals by affected parties, which may be time consuming and limit the effectiveness of the exemption. The conflict between the need for expedited consideration of exemption applications and the need for a flexible standard for determining qualification for the exemption suggest that agency administration may limit the effectiveness of any exemption provision.

Under the second approach (which is being suggest to reduce administrative complexity and streamline decision making), discretion would be shifted to the IFQ holder (or its representative) seeking the exemption. To receive an exemption, the IFQ holder would be required to submit an affidavit attesting to conditions that qualify for the exemption. The system would accept the affidavit at face value, granting the exemption based on a sufficient affidavit. The use of affidavits could streamline this process, limiting the need for agency fact finding for determining whether to grant an exemption.

The IFQ holder is likely to be in the best position to know whether conditions prevent an IFQ delivery that satisfy the exemption criteria, and therefore, is likely in the best position to submit the affidavit. The IFQ holder would also be responsible for any misrepresentation of conditions.¹ Conditions justifying an exemption range from conditions on the water, which are observed by the captain of the harvesting vessel, or conditions on shore, which may be observed by the IPQ holder or IFQ holder. In either case, the IFQ holder can be expected to have regular communication with others involved in the delivery, providing the IFQ holder with information to assess whether exemption criteria are met. The exemption could be implemented on a case-by-case basis to accommodate individual circumstances that may vary across participants. For example, ice conditions, which to date are believed to be the most likely event that would justify an exemption, vary greatly with location. Also, the ability to navigate through ice safely varies across vessels. The captain of a vessel, with whom the IFQ holder is expected to be in regular communication, is likely in the best position to make any decision of whether that vessel can safely traverse through local ice conditions to make a delivery. The use of an affidavit is intended to place discretion concerning decisions with the captain, who can communicate with the IFQ holder concerning conditions. Under the system of affidavits, NOAA Fisheries would summarily grant an exemption on receipt of a complete application, including the IFQ holder's affidavit attesting to conditions satisfying exemption criteria. The use of affidavits could aid in overcoming several potential complications in administration.

The following general approaches to establishing the provision for an exemption from regional landing requirements could be adopted:

Administration:

Option 1: The exemption shall be administered through agency determination of whether a specific event satisfies exemption criteria.

Option 2: The exemption shall be administered through submission of an affidavit by the holder of the IFQ for which the exemption is applied. An affidavit attesting to the satisfaction of requisite conditions for the exemption shall constitute conclusive evidence of qualification for the exemption.

¹ Although the captain may be best positioned to verify certain circumstances justifying the exemption, it is likely that some circumstances (such as those on shore) cannot be verified by the captain. In addition, it is unlikely that a captain on the water will be able to have a signature notarized, as necessary for an affidavit, and may not be able to submit written documents, as needed for the application.

Throughout the remainder of this paper issues related to the use of affidavits for establishing qualification for the exemption in contrast to a more conventional system under which NOAA Fisheries makes evidentiary findings of qualification for the exemption are considered.

Definition of the exemption

In discussing the development of a potential exemption, committee members and stakeholder representatives suggested a variety of definitions of eligibility for the exemption. In general, committee members sought to limit the exemption to deliveries of catch using regionally designated IFQ that were prevented by unavoidable circumstances. Initial efforts focused on defining an exemption accessible if specific unavoidable circumstances arise. Specifically defining events that qualify for an exemption is problematic because the nature of the exemption is to accommodate unforeseen events that prevent deliveries. Although the types of events that might qualify for the exemption (such as ice, natural disasters, and disabling of a processing facility) are reasonably identifiable, it is possible that some events might not be identifiable. As such, it is reasonable to define an exemption with a description of the type of events that would qualify for the exemption. One advantage of using contractual agreements to further define the exemption is that the terms of those contracts could add specificity to the terms of the exemption. Although the general qualification for the exemption would need to be included in regulation, a regulation that provides for contractual agreements to add greater specificity to qualifications for the exemption will offer greater flexibility to the parties to define specific circumstances that should (or should not) qualify for the exemption. This added flexibility could limit the need to undertake time consuming regulatory modifications to make minor changes to the exemption provision.²

In addition to defining the criteria under which an exemption might be granted, the term of any exemption will need to be considered in developing an exemption provision. The exemption will need to be defined such that harvest of the TAC will not be prevented, if the event creating the need for the exemption persists. For example, if a harbor becomes inaccessible because of storm damage late in a season and other facilities in the region are unavailable, the exemption may need to allow fishing to continue under the exemption to ensure that the TAC will be fully harvested. Two approaches could be adopted to address this situation. First, the exemption could be defined to include provision for continuation of fishing, in the event that led to the exemption persists to a point that the full harvest of IFQ are in doubt. This approach would likely require that the application for exemption include a section that could be used if the IFQ holder seeks an exemption that allows continued fishing. A second approach could be to adopt a more flexible definition that defines the exemption criteria generally in regulation, but allows more specific definition in contract (including definition of the term of any exemption). The contractual structure would allow the addition of specificity in relatively short order to ensure that the TAC can be fully harvested.

The following provision could be used to define a qualifying event or circumstance that qualifies for the exemption, including any specific circumstances that would (or would not) qualify for the exemption:

Qualifying circumstance: An unavoidable circumstance that prevents the delivery or processing of crab in a region as required by regionally designated IFQ and matched IPQ will qualify for the exemption from regional landing requirements. To qualify for the exemption a circumstance

² The use of contracts could pose some risk, if one party in the negotiation is at a distinct disadvantage in negotiations. Consequently, it is important that the Council be attentive to the performance of the system of exemptions (including the contracts defining exemptions) to ensure that the exemption has its intended effect.

must: a) be unavoidable, b) be unique to the IFQ and/or IPQ holder, c) be unforeseen or reasonably unforeseeable, and d) have actually occurred.³

Option: The following specific circumstances would qualify for the exemption:

a. [include specific circumstances]

Option: The following circumstances would not qualify for the exemption:

a. [include specific circumstances]

Option: IFQ holders affected by the circumstance that is the basis for the exemption shall discontinue fishing (i.e., set no additional pots) as long as the circumstance persists.

Suboption: In the event that it is determined that the discontinuance of fishing may prevent full harvest of IFQ, IFQ holders will be permitted to continue fishing, making deliveries under the exemption, as long as the circumstance persists.

Option: Additional specificity of the exemption and its term may be included in any contract between the IFQ holder, the holder of matched IPQ and the entity holding (or formerly holding) a right of first refusal on the matched IPQ.

Mitigation requirements

In addition to meeting qualifying criteria to be allowed an exemption from regional landing requirements, it was further suggested that the IFQ holder (and matched IPQ holder) be required to take reasonable steps to avoid the need for the exemption. These steps could include attempting to arrange delivery of catch to a facility in the designated region that is unaffected by the unavoidable circumstance, providing a support vessel to assist with the delivery, or using substitute IFQ (and IPQ, if necessary) that allow delivery outside the designated region. Although it may be desirable for participants to explore these options, care should be taken in defining mitigation prerequisites for the granting of the exemption. Simple requirements that certain actions be undertaken could be problematic. For example, requiring an IFQ holder to obtain substitute IFQ allowing delivery outside the region, if possible, could impose excessive costs with little benefit to anyone but the seller of the substitute IFQ. In addition, a strict requirement to engage in a search for substitute IFQ could delay a landing resulting in deadloss. Alternatively, a provision could be defined that requires the IFQ or IPQ holder to take reasonable actions to avoid the need for the exemption, without specifying those actions.

Although fully defining mitigation requirements could be problematic, one simple mitigation requirement that could be a prerequisite for the exemption is that the IFQ holder has no available IFQ that could be used to make delivery outside the region (i.e., no Class B IFQ, C share IFQ, and Class A IFQ that may be delivered outside the affected region). On its face, this provision might appear reasonable, but given the system of commitments between IFQ holders and processors under the program, it is possible that use of other IFQ could constitute a breach of contract by the IFQ holder. On the other hand, it is possible that IFQ holders could include provision for emergency use of IFQ in contracts in which those shares are committed. Such a provision could serve to limit the use of the exemption and simplify administration by limiting use of the exemption to circumstances where the IFQ holder has no shares that, on their face, could be used to support the landing. Without question, this type of requirement will be disruptive to delivery schedules and could limit the extent to which IFQ holders and IPQ holders obtain the greatest value from their allocations. Yet, given that the exemption is only to be available to address circumstances that cannot be otherwise controlled, it is unlikely that the exemption could ever be granted without causing delivery schedule disruptions and losses of efficiency. The requirement, however, may

³ These criteria are taken from the exemption to 'cooling off' provision landing requirements that applied on a community basis to some IPQ in the first two years of the program (see 50 CFR 680.42(b)(4)(ii)).

reduce the extent of those disruptions by acting as a catalyst for participants to considered contingencies, if they anticipate having difficulty complying with the regional delivery requirements.

Administration of the exemption may also be simplified by a provision that limits use of the exemption to times when the IFQ holder has no IFQ that may be substituted for the regionally limited IFQ. Any time the exemption is used, NOAA Fisheries will need to credit landings against IFQ and matched IPQ. If an IFQ holder has both IFQ that are usable to support the landing and IFQ requiring the exemption to support the landing, it is possible that questions may arise concerning whether the IFQ holder intends to use the exemption for the landing (i.e., NOAA Fisheries will need to be certain which IFQ should be credited with the landing at the time of the landing). IFQ accounting would be simplified, if the exemption is available only when IFQ to support the landing without the exemption are held by the person receiving the exemption.

Possible mitigation requirements could be:

Requirement to attempt to mitigate:

Option 1: To receive an exemption the IFQ holder and the holder of matched IPQ shall have exerted all reasonable efforts to avoid the need for the exemption, which may include attempting to arrange delivery to other processing facilities in the designated region unaffected by the unavoidable circumstance, attempting to arrange for the use of IFQ (and IPQ, if needed) not requiring delivery in the affected region, and delaying fishing.

Option 2: An IFQ holder will not be granted an exemption, if the IFQ holder holds any unused Class B IFQ, C share IFQ, or Class A IFQ that may be delivered outside of the affected region.

Compensation

Some stakeholders may oppose the use of a system of affidavits because it could carry some risk of abuse. Cases where the criteria for an exemption are clearly not met could be feared, but are unlikely to pose a substantial problem. Less clear cases could arise when conditions may (but do not clearly) merit an exemption. In these cases, it may be feared that an IFQ holder would be inclined to pursue an exemption any time borderline conditions are present. For example, an IFQ holder could elect to submit an affidavit supporting an exemption rather than subjecting a vessel to a minor, acceptable risk. Excessive use of affidavits in this manner could have notable effects on stakeholders, particularly communities and processors that depend on landings from the fisheries. This potential should be considered in development of the system of exemptions. Specificity in the definition of the criteria for an exemption may help limit the number of cases where the qualification for the exemption is uncertain. This specificity could be achieved through either regulatory definition of the exemption or use of contracts to add specificity to the exemption criteria. In addition, a system of reasonable compensation to other stakeholders in the event an exemption is granted could create a noticeable disincentive for excessive use of the exemption by IFQ holders seeking only to avoid minor inconveniences.

Compensation for costs and losses arising from the exemption could take on a few different forms. The simplest regulatory means of addressing the redistribution of benefits would be a system of cash payments. Yet, the amount of those payments may differ across stakeholders and circumstances. For example, a community that loses one landing from a season with several million pounds of deliveries may be fully compensated for any loss by reimbursement of lost tax revenues. Tax revenues, however, differ by community and can be difficult or impossible to track to specific landings. In general, local governments typically receive between 1.5 and 2.5 percent of the ex vessel revenue from each landing as shared fishery business taxes ('raw fish tax). If the landing takes place in a city that is within a borough,

any payment is shared evenly between the city and borough. In addition, a municipality may collect its own raw fish tax on landings. Municipal raw fish taxes vary by community, ranging from approximately 1 percent to 3 percent of ex vessel revenues. Based on these tax rates and tax sharing arrangements, local municipalities lose between approximately 2.5 percent and 5.5 percent of ex vessel revenues in tax revenues with a loss of landings. In addition, communities may be prevented from knowing ex vessel landings amounts and revenues by confidentiality protections, limiting their ability to rely on the provision. If the exemption is applied, IFQ holders and IPQ holders will bear a tax burden in another jurisdiction, where the IFQ landings take place. In some cases, the tax burden arising from using the exemption could exceed the tax burden in the absence of the exemption. Imposing an additional payment burden on persons using the exemption to address circumstances beyond their control may be viewed by some as unfair.

In considering compensation, it should also be noted that a community may suffer losses in economic activity, in addition to losses of tax revenues, particularly if deliveries are prevented for several weeks.⁴ One means of addressing losses in economic activity may be to compensate for those losses by requiring landing of an equivalent amount of quota at a future time. Depending on the timing of the exemption, it is possible that these compensating landings could be made at two times. One option could be for the IFQ holder to make compensating landings later in the same season. If the Council were to elect to adopt a mitigating alternative that only allows exemptions when an IFQ holder has no IFQ that would allow landings outside the region of the exemption, the only means of making a compensating landing in the same season would be for the IFQ holder to acquire shares in season. Alternatively, the IFQ holder could receive an allocation in the following year that are redesignated for the region in which the exemption was granted. Redesignations, however, may be infeasible. It may be unfair to a recipient of a QS transfer early in the season (but after IFQ issuance) who may have no involvement in the IFQ use in the season of the exemption to have IFQ redesignated. To offset the lost landings, the redesignation would need to be for an equivalent amount of IFQ in the following year. TAC changes will leave IFQ redesignations uncertain until only a few days prior to those allocations are made. With the variety of annual IFQ and IPQ allocations and the complexity of determining those allocations, share redesignations could further delay IFQ/IPQ issuance. In most cases, IFQ holders are cooperatives that are not QS holders. Changes in cooperative membership and transfers of QS from year to year may result in extremely complicated and costly tracking of QS to ensure that offsetting IFQ are issued. Arranging compensating share redesignation will also be complicated for IPQ holders. If the IPQ holder receives the landings covered by the exemption, redesignation of IPQ may be appropriate. In some cases, however, other processors may receive the benefits of redirected landings under an exemption. Redesignation of IPQ in that case might be inappropriate. In addition, some IPQ holders may hold no PQS for the region where the exempted shares were landed making redesignation impossible. These inequities and complexities suggest that other means of compensation may be more appropriate than share redesignation.

The degree to which it is appropriate for an IFQ holder or IPQ holder to pay compensation for losses arising from exemptions is debatable, since those parties are unlikely to have caused the circumstance that prevented deliveries and effects may differ across IFQ holders and IPQ holders. Some IFQ holders may bear additional costs from rescheduling deliveries and traveling to more distant ports, while others may have no additional costs from the exemption. Likewise, an IPQ holder who has activity and production redistributed to another location will be affected differently from one who loses the benefit of the activity and production altogether. These uncertainties and differences suggest that a flexible mechanism for determining any compensation for exemptions may be appropriate. To allow this flexibility it has been

⁴ The loss of a few deliveries over a few days is unlikely to substantially affect the community's economy, if the community is already supporting a fully staffed processing facility that is prepared for the redirected deliveries.

suggested that contractual agreements be used for specifying any compensation that may be required in the event an exemption is received.

Use of a contractual arrangement allows for flexibility to address changes in circumstances and improved information as the parties develop a better understanding of the scope of necessary exemptions and the consequences of those exemptions for the different stakeholders. Although it may appear the community of origin is in a weak position with respect to any negotiations concerning compensation, requiring the contract and making the community representative a required party to the contract effectively provides that entity with the power to prevent any exemption. IFQ and IPQ holders would therefore be forced to negotiate terms for compensation to the community entity. The community entity might be willing to concede reasonable terms to avoid being cast or perceived as extracting excessive compensation from IFQ and IPQ holders unable to comply with regional landing requirements without exposing their vessels and crews to unreasonable risks. In addition, providing the parties with the ability to negotiate compensation allows for more creative arrangements than simple cash payments to compensate for the effects of the exemption. For example, delivery arrangements for unrestricted shares at some future time may be a more agreeable resolution to all parties than a payment to the community entity. These delivery arrangements may impose less cost on IFQ and IPQ holders who may already be bearing unexpected costs arising from the disruption of their operating plans.

Compensation

Option 1: Compensation for the exemption shall be:

Suboption 1: Payment of ___ percent of the ex vessel gross revenues received by the IFQ holder for the landing exempt from regional landing requirements. Payment shall be made to:

- a. the entity holding a right of first refusal on the IPQ that are match to the IFQ for which the exemption is granted
- b. the community that is the beneficiary of the right of first refusal. In the event that a borough and city are the beneficiaries of the right of first refusal the payment will be divided equally between those two governments.

Suboption 2: Redesignation of IFQ

Option 2: Compensation shall be as agreed by the holder of IFQ, the holder of matched IPQ, and the entity holding the right of first refusal on the matched IPQ.

Issues

In considering amendments allowing for exemption from regional landings requirements, the Council should consider that much of the above discussion is dependent on the existing structure of the program. If the Council changes the structure of the program, particularly amendments that would remove PQS from the fisheries or would result in regionalized Class B IFQ, portions of the above discussion will not apply. Specifically, exemptions that are applied to Class B IFQ landings cannot be linked to a specific community (since no corresponding IPQ would exist). No community can be identified that would suffer a loss of historic processing associated with applying the exemption to specific IFQ, since those IFQ are designated for the region, but are not associated with any IPQ (which would establish the association with a specific community). Under alternatives that rely on entities holding a right of first refusal for negotiating contracts for specifically defining the exemption and compensation, an entity representing regional interests would need to be identified. In addition, to the extent that compensation payments might be made to the entity holding a community right of first refusal under some alternatives, a different entity would need to be identified. These issues will need to be considered, if the Council chooses to develop a system that designates Class B IFQ by region.

In the event that the Council elects to develop a system of contracts and affidavits to support NOAA Fisheries administration of the exemption, the Council will need to identify a party to represent regional interests in those contracts, for IPQ that are not subject to a right of first refusal. No party that represents regional interests in general exists, and no community can lay claim to having a historic interest in those IPQ landings.

Several administrative complexities arise under any of the suggested options for establishing an exemption from regional landing requirements. NOAA Fisheries processing of applications for the exemption and the means of identifying the specific IFQ that are subject to granted exemption must be developed. NOAA Fisheries administration of compensation requirements will need to be fully defined, if the Council elects to advance options that specify compensation (as opposed to contractual defining of compensation). These complexities (and others) will need to be more fully explored, if the Council intends to proceed with this action.