

Public Testimony Sign-Up Sheet

Agenda Item

C-2(a,b) CRAB

Rpt
Crab
Committee
9/10/10

	NAME (PLEASE PRINT)	AFFILIATION
1	Tim Henkel	Deep Sea Fishermen's Union
2	Linda Kozak	Kozak + Assoc.
3	John Henkel Armi Thomas	HPA Adak Crab Coalition
4	BETH Stewart	AEB
5	John Moller	
6	John Henkel	City of Adak
7	Jeff Steele	Boeing Huber & Co
8	Simeon Swatzoff / Mateo Paz-Soldan	City of St. Paul
9	Vince Tutrakoff	Comm. of Adak
10	Agaton Krakoff	"Adak
11	Frank Kelly	City of Unalaska
12	Larry Cotter	APLDA
13	JOE PLESH	TRIDENT
14	Florence Colburn	Crab Group Indep. Harvesters
15	Heather McAnty	CBSFA
16	Pat Henderson	TAX / St. Paul
17	Lenny Herzog	Alaska King Crab Harvesters Coop
18	MIKE STANLEY	GOLDEN KING CRAB HARVESTERS Ass'n
19	Dave Draser	Adak Fish
20	Clem Tillian	Algot Co.
21	Michelle Ridgway	CRABUS Alaska
22	Margaret Hall	Rondys, Inc
23	Mike Swatzoff	Adak resident
24	Steve Minor	NPCA
25	Stephen Taufen	Groundswell Fisheries Movement

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.

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Public Testimony Sign-Up Sheet

Agenda Item C-2(A,B) ^{Sheet 2} _{Continued}

	NAME (PLEASE PRINT)	AFFILIATION
1/	Tom Miller	Crew
2/	Tim Miller	Crew
3/	Shawn Dochtermann	Crewmembers Association
4/	LINDA FUEES	CITY OF KODAK / KIPD
5/	Keith Colburn	FN Wizard
6/	TERRY LEITZEL	ICICLE
7/	Gary Faintes	Trailblazer
8/	JEFF STEPHAN	
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MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver *Chris*
Executive Director
DATE: March 28, 2008
SUBJECT: Crab management

ESTIMATED TIME 16 HOURS (all C-2 items)

ACTION REQUIRED

- (a) Receive report from the Crab Advisory Committee
- (b) Refine problem statement and elements/options for analysis of 90/10 A share/B share modifications.

BACKGROUND

(a) Report of the Crab Advisory Committee

At its February 2008 meeting, the Council received a report from the Crab Advisory Committee, which included several proposals for the Council's purpose and need statement, as well as discussion of potential bases for the Council's proposed action. That report summarized the committee's discussions of the proposed revisions to the current 90/10 A share/B share split, community, processor, and crew concerns (under both the existing program and under the proposed program revisions), and emergency relief from regionalization. The report also included two proposals advanced to address crew issues and recommended processes for addressing arbitration issues and data issues.

In response to the report and public testimony, the Council directed the committee to prioritize discussion of the following items:

1. identification of problems in the Aleutian Island golden king crab fisheries and potential alternatives to address those problems;
2. potential provision for emergency exemption from regionalization;
3. proposals to provide equitable access to the program by crew;
4. review and possible revision of the community right of first refusal; and
5. development of improvements to the binding arbitration process.

Since the February Council meeting, the committee met once, during which all of the above issues were discussed. Minutes from that meeting are attached (Item C-2(a)(1)).

Three proposals concerning management changes to the Aleutian Islands golden king crab fisheries were discussed by the committee. These proposals each included a purpose and need statement. The three purpose and need statements overlap, but each has a different scope and focus. The first concerns only the Western Aleutian Islands golden king crab fishery and cites underharvest of the TAC in the first two years of the program, low market prices, inefficient processor share use caps, and other factors as the reason for a reconsideration of management alternatives for the that fishery.

The second proposed purpose and need statement also concerns the Western Aleutian Island golden king crab and Western Aleutian Islands red king crab fisheries. This proposal also identifies unharvested TAC in the Western golden king crab fishery as a problem. The proposal questions initial allocations of processing shares in both fisheries. In the golden king crab fishery, the allocations are asserted to be based on qualifying years during which the fishery was not fully utilized, and therefore, fails to allocate shares based on actual processing histories. The proposal suggests that the allocations of red king crab processor shares are arbitrary because they were based on processing in the golden king crab fishery. The proposal suggests that processor share allocations did not adequately consider National Standard 8 requirements, because the interests of Adak and Atka were not adequately taken into account. The proposal also asserts that the requirements for limited access programs were not correctly implemented because present participation, investment, and dependency of Adak in crab processing were not adequately considered. The proposal also asserts that the analysis before the Council was inadequate because confidentiality requirements limited the analysis of IPQ impacts. The proposal concludes with assertions that the golden king crab is not fully utilized because regionalized deliveries cannot be made to Adak, that regionalization is ineffective in protection Adak interests, and that processing in Adak has dropped precipitously under the program.

The third proposed purpose and need statement concerns both the Eastern and Western Aleutian Islands golden king crab fisheries. It identifies these fisheries as unique because of their few harvesting and processing participants and suggests that failure to harvest the full Western TAC and consolidation of processing have caused problems with processor competition and realizing the full value from these fisheries.

The alternatives suggested by one or more of the proposals to address the identified concerns for the Western Aleutian Islands golden king crab fishery are:

- 1) Await full implementation of new custom processing use cap exemptions
- 2) Forced divestiture if not utilized 2 or 3 years out of five
- 3) Reallocation of PQS, CP and CPO shares to more adequately address community concerns.
- 4) Convert west-designated IFQ shares to "B" shares
 - Option 1: with compensation to PQS holders
 - Option 2: without compensation to PQS holders
 - Option A: new "B" shares are not regionalized
 - Option B: new "B" shares are west-designated
 - Suboption: require onshore delivery
- 5) Reallocation of PQS, CP and CPO shares to more adequately address community concerns and processing investment
 - Option 1: with compensation to PQS holders
 - Option 2: without compensation to PQS holders

One proposal suggested that alternatives 4) and 5) could be applied to the Western Aleutian Islands red king crab fishery. In addition, one proposal suggested that alternative 4) could be applied to the Eastern Aleutian Islands golden king crab fishery.

(b) Refine problem statement and elements/options for analysis of 90/10 A share/B share modifications

At its October 2007 meeting, the Council requested staff to prepare an analysis for review at the October 2008

meeting examining the effects of a change in the A share/B share split. The Council requested that the analysis examine:

- 1) the status quo 90/10 split, as well as 80/20, 70/30, 50/50, and 0/100 share splits,
- 2) incremental changes in the share split over a period of years,
- 3) a one-pie IFQ allocation to vessel owners, processors, and skippers and crewmembers based upon each sector's investments and participation in the fishery, and
- 4) the effects of shifts in the share split as the annual TAC levels rise and fall in each fishery.

At its February 2008 meeting, the Council indicated that, to better frame its consideration of changes from the status quo, it would consider revisions to its purpose and need statement and the development of more specific elements and options for that analysis. The Council also request that staff make available strawman elements and options that could be used to further specify its alternatives at this meeting. A copy of the Council's draft purpose and need statement, its October 2007 motion, and staff's draft strawman elements and options are attached as **Item C-2(b)(1)**.

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Report to the Council Crab Advisory Committee February 2008

Committee Members – Sam Cotton (chair), Lenny Herzog, Kevin Kaldestad, Jerry Bongen, Florence Colburn, Dave Hambleton, Phil Hanson, Rob Rogers, John Moller, Linda Freed, Frank Kelty, Simeon Swetozof, Ernie Weiss, Tim Henkel, Steve Branson

Overview

In general, committee members have very differing opinions concerning the scope of the proposed action and the purpose and need statement. There are committee members that believe only minor technical changes are needed for most fisheries, and there are other committee members that believe that changes to the overall structure of the program (i.e., the 90/10 share split) should be considered for all fisheries.

The committee struggled to understand its specific role. Most (if not all) committee members, at some point in the process, questioned whether areas of committee discussion were within the scope of the Council's direction for the committee. The committee would benefit greatly from further direction from the Council with any of its future work.

Discussion of purpose and need

Some committee members suggested that the Council's initiation of an action may be premature and that no clear problem that would be addressed by the change in the 90/10 A share/B share split has been identified. In addition, several committee members believe that additional information is needed to identify problems to be addressed by the potential change in the A share/B share split.

Some members suggested that an analysis of the A share/B share split should be undertaken in the very near future, as any delay cause the current 90/10 A share/B share split to be more established complicating future changes with potential negative effects on current participants. In addition, several data issues need to be explored to identify specific problems to be addressed by program changes. These include further analysis of crew and community effects. The analysis of these effects is complicated by lack of available data.

All committee members suggested that any purpose and need statement distinguish problems by fishery, region, and locale, as problems under the program may differ across fisheries and space. Specifically, Kodiak and St. Paul have very different issues that would likely need to be addressed by different measures.

Consensus – Western Aleutian Islands golden king crab fishery has problems that are different from all others and could be addressed separately.

Review of possible rationales for Council action

As a part of the review of the purpose and need, the committee reviewed several possible rationales for Council action restructuring the program. The following summarizes opinions expressed by committee members in that discussion.

B share issues

- *The B share allocation is inadequate to support entry to the processing sector*
Pro - not much opportunity for entry – entry is only possible on a small scale

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- Con - not completely accurate statement since some processors have entered the fisheries – some processors entered based solely on the opportunity to buy B share crab – processor entry is greater than prior to the program, suggesting the program has created processor entry opportunity
- *The B share allocation is inadequate to support competition for landings*
 - Pro – may not be adequate competition among existing processors
 - Con – some existing processors are competing with each other and entrants for B share landings
- *The B share allocation is inadequate to support development of new markets and products*
 - Pro – product development has not occurred
 - Con – processors are increasingly serving niche markets and those markets take time to develop – product development is a very challenging market, in part, because of international supplies of specialty products – this is not a program issue, but a market issue
 - Consensus – TAC has not affected opportunities for market development**
- *The B share allocation is inadequate to support development of crab processing in certain communities*
 - Consensus - this concern applies only in the Western Aleutians**
- *The B share allocation is inadequate to support historic levels of processing in certain communities*
 - Pro – this is perceived a problem by Kodiak – but their historic processing interest goes back several years (70s/80s)
 - Con – this interest is too dated – would deprive current community participants of their recent activity

Arbitration and share matching issues

Consensus – Under any processor delivery or regional landing restriction, the program requires arbitration – arbitration issues are not a reasonable justification for program revision- likewise, share matching is needed to address coordination of shares under the program and is not a reasonable justification for program modification.

Processor consolidation issues

Some committee members support removal of processor consolidation related issues from justifications for program modification

- *Processor consolidation has prevented the development of new products and markets*
 - Pro – some committee members believe this needs additional exploration
 - Con – consolidation is not affecting production decisions
- *Processor consolidation has threatened community sustainability*
 - Pro – consolidation contributed to divestiture and potential movement of shares from communities – this may justify examining sideboard issues in the processing sector
 - Con – this may occur, but it is not a program structure issue

Fleet consolidation issues

- *Fleet consolidation has resulted loss of captain and crew positions*
 - Pro – possible examination of vessel caps is appropriate, possible compensation of crew who lost jobs is important
 - Con – the consolidation was an expected effect of the program, vessel caps exacerbate crew problems, crew compensation for job loss is unnecessary since most jobs were part time and not large commitment
- *Fleet consolidation has resulted in lower quality and lower paying jobs for captain and crew*
 - Pro – exorbitant lease fees have cut into crew shares
 - Con – existing jobs are better than prior to program implementation
- *Fleet consolidation has resulted in extended processing seasons preventing processors from realizing production efficiencies*

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- Pro – processors have been affected by elongated seasons resulting from fleet consolidation

Con – this was an intended affect of the program, which might be better addressed another way (rather than through program modification)
- *Fleet consolidation has harmed community-based support industries*

Pro – in some instances this occurred, because the number of vessels declined – this is an intended effect

Con – some communities have benefited by having boats in the community for extended periods
- *Fleet consolidation has harmed community-based harvesting crews*

Committee members agreed that this effect is reflected in the comments that appear above concerning crew effects
- *Current allocations of harvester and processor shares do not adequately reflect historic participation and investment in the fisheries by harvesters and processors*

Pro –there may be an inequity in the distribution of benefits between the sectors

Con – any issue in this respect is fully captured by other issues (primarily B share issues)
- *Current allocations of harvester and processor shares do not adequately reflect historic participation and investment in the fisheries among processors*

Pro – *in the Western fisheries only*, the processor allocations may not adequately reflect recent history, there may be an inequity in the distribution
- *Current program structure does not adequately consider community investment in the fisheries*

Pro – may be addressed through measures other than share allocations

Con – community use of tax revenues is already a reflection of community investment, the program currently recognizes these investments
- *The absence of a harvest share allocation to crew and the 3 percent harvest share allocation to captains do not reflect historic participation and investment and is unfair and inequitable*

Pro – lack of crew and 3 percent captain allocation is inadequate, it does not reflect time/human capital investment

Con – financial investments are the proper focus and those are adequately accounted for, reallocation would be inequitable
- *Initial allocation of long term (or permanent) harvesting and processing shares unjustly enriches recipients of those shares and deprives the public of the benefits of the resource*

Pro – permanency of allocations that are not linked to continuing participation removes the share holdings from those running fishing operations, the high value of shares initially allocated reflects a great windfall to their recipients

Con – this does not reflect a problem in the existing program and overshadows great benefits of the program, the initial allocations reflect effort exerted to earn those allocations
- *Any program revision should contain provisions to maintain or even extend community protections*

The program needs to recognize the variety and diversity of communities that have interests in these fisheries

Suggested Purpose and Need Statements

Several committee members and members of the public presented proposals for purpose and need statements and alternatives for analysis. The following proposals are attached:

Phil Hanson/Dave Hambleton Proposal (attached as Proposal A) – suggests currently identifiable problems are with 1) community access to capital to exercise rights of first refusal and 2) the Western

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Aleutian Islands brown king crab fishery management, which may need revision in the future, if the custom processing/use cap measure does not address production efficiency issues in that fishery.

John Moller Proposal (attached as Proposal B) – suggests the removal of PQS from the Western Aleutian Islands brown king crab and Western Aleutian Islands red king crab because of the initial allocation of PQS in that fishery did not adequately consider the history or investments in the fishery by Adak.

Mike Stanley Proposal (attached as Proposal C) – proposal differentiates Aleutian Island golden king crab fisheries from all other fisheries. The East is distinguishable for its IPQ consolidation. The West is distinguishable for the share of its IFQ/TAC that has remained unharvested.

Simeon Swetsoff/Pat Hardina Proposal (attached as Proposal D) – suggests revision of Council's purpose and need statement – suggests the 90/10 split may be sufficient to achieve Council's purposes for B shares. Also, suggests that the recent custom processing exemption from processor share use caps and development of electronic transfers may address some issues with B shares use. Identifies community concerns with changes in the A share/B share split. The proposal identifies the absence of community interests as a problem in the proposed purpose and need statement. The revision also suggests that the committee work to vet possible problems in the fisheries.

Florence Colburn Proposal (attached as Proposal E) – suggests revision of the current problem statement – identifies that the choice of 90/10 is a Council policy decision – suggests that the purpose and need should not identify an outcome, but should be a basis for considering changes. We need to examine the effects of the existing system and how potential changes in 90/10 would affect participants. Also, identifies unresolved arbitration issues as potential need for being addressed and acknowledges work being done on it. Questions whether arbitration is working as intended, because it is being resorted to frequently for price setting.

Data Issues

The committee identified several data needs. Staff suggests that additional data collection would be necessary and beneficial only for items 1) and 5) shown below. Specifically, ex vessel prices by share type and location could be improved by an industry led effort. Dave Hambleton and Lenny Herzog agreed to work with industry to prepare a suggested protocol for collection of the data for review by the committee. Staff has agreed to assist with these efforts. The proposal is intended to provide aggregated price data that industry could present to the Council to verify assertions concerning price effects of the share system of the program. The protocol would be discussed with NOAA GC to limit potential for anticompetitive uses of the data.

Data needs identified by the committee

- 1) Landings and ex vessel prices by share type (A share/B share/C share/CDQ) and location are critical to understanding the effects of the share structure and landings requirements of the program.
- 2) Comparison of historical landing patterns and landing patterns under the rationalization program by share type are important to understanding the effects of the program on communities.
- 3) Basic data showing the allocations of IFQ in the different fisheries by share type at different TAC levels under the existing structure may be useful for exploring the effects of the program's system of share allocations.
- 4) Additional crew data are critical to understanding crew impacts. Specifically, individual crew data are important for documenting individual participation. (State initiative and comprehensive committee)

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- 5) Landings and ex vessel prices by location (including region), share type (A share/B share/C share/CDQ), and processors/harvester affiliation – including role of different share types in negotiations
- 6) Analysis of binding arbitration effect on ex vessel price by region and share type
- 7) Role of different share types in cooperative fishing plans (A share/B share/C share/CDQ)
- 8) Lease rates for IFQ (by share type) and IPQ and analysis of prices
- 9) Analysis of binding arbitration outcomes relative to historic division of first wholesale revenues
- 11) Comparison of landings by share type (A share/B share/C share/CDQ) with cooling off rights distribution
- 12) Changes in the distribution/consolidation of QS and PQS holdings among processors and CDQ groups (including pre-rationalization vessel/license transfers and since initial allocation) – (also considering mergers)
- 13) Distribution of share holdings/vessel ownership by location
- 14) Changes in landings taxes and business taxes - pre/post-rationalization
- 15) Changes in processor capacity - pre/post-rationalization
- 16) Changes in processor employment - pre/post-rationalization
- 17) Changes in processing days - pre/post-rationalization

Modification from 90/10 A share/B share split

Some committee members suggested that because they believe the program requires no changes, it is difficult to suggest appropriate revisions/additions to elements and options. Some committee members suggested that there was no analytical basis for the original 90/10 share split. Some committee members believe that any analysis should encompass a broad range of share splits to fully assess differential impacts of the share split.

Some committee members suggested that any change from 90/10 1) should provide for compensation for persons deprived of processor shares 2) should provide for compensation to communities. The committee briefly discussed the basis for community landings (i.e., distribution of landings among communities). Some committee members suggested that compensation might differ for those who have purchased shares. It was suggested that any reallocation of harvest shares from their current holders may need to include harvester compensation, particularly for those who have purchase harvest shares. Some committee members suggested that splits of 0/100 and 50/50 should be excluded from consideration because regional/community issues could not be addressed with these large shifts in the portion of the fishery subject to processor shares.

Some committee members believe that the one-pie alternative should be removed from consideration. Others believe that the one-pie alternative may be useful for contrasting alternatives by illuminating differences in the program alternatives. In addition, some processors supported retaining a one pie alternative with harvest shares divided between the sectors, as that may be more equitable than large change in the A share/B share split. Some committee members believe that any one-pie alternative should include a direct allocation to communities. Other committee members believe that other measures are more appropriate to support community interests. Some committee members suggested that we should examine measures other than share allocations to address losses under a program change for all interests. Committee members also expressed concern that interests have vested too quickly for a revocable privilege that was created recently. Some committee members believe that community protections for the program will need significant revision to protect community interests under any shift from 90/10.

Some committee members suggested that any change from 90/10 would require that newly created B shares be subject to regionalization structure. Some committee members also suggested that arbitration

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will be necessary for any regionalized shares. It was acknowledged that the arbitration system would need modification to be applied to regionalized B shares.

Several committee members suggested that any proposed changes in the A share/B share split considered should be specific to each fishery to distinguish by circumstances in the different fisheries. Specifically, committee members noted that the Aleutian Island brown king crab fisheries differ not only from the other fisheries, but also from each other. For example, in the Eastern fishery almost all of the processing occurs in Dutch Harbor. In the most recent season, one PQS holder did not apply for its IPQ, leading to substantial concentration of IPQ in the fishery. In the West, a large portion of the TAC was left in the water in the most recent season. In that fishery, the one shore-based facility located in the west (where 50 percent of the A share landings must occur) holds little PQS. That processor's inability to reach agreements with PQS holders likely contributed to that failure to harvest the allocation. This unharvested TAC may have limited the community benefits realized under the program. Some committee members suggested that no IPQ are needed in this fishery. These committee members suggested that the fishery participation was stable prior to rationalization and that the fishery did not have overcapacity. These committee members suggested that adjusting the A share/B share split may alleviate some of the problems in these two fisheries. In addition, it was pointed out that the preseason sale of crab by one processor at a price substantially below the in-season market price may harm some harvesters in the fishery. Another committee member suggested that the arbitration system is equipped to address this issue, if the harvester would be unjustly harmed by the low priced sale. Some committee members also suggested waiting until the use cap exemption for custom processing took effect to see, whether problems persist or whether action to modify manage are needed. Also, it was suggested that the effects of the large catcher processor participation in the western fishery should affect any changes considered in that fishery.

One committee member suggested that the Pribilof and St. Matthew Island fisheries are likely to have small TACs and may be worth distinguishing when considering different A share/B share splits. Processing sector committee members, however, suggested that the recent Council action on custom processing will enable processors to address any capacity issues that could complicate processing of deliveries under the existing 90/10 share split.

Some committee members suggested that no large changes should be considered in the Bristol Bay and *opilio* fisheries. Some committee members believe that the only possible rationale for changes in the share split in these fisheries is that the 90/10 split can impose logistical challenges to participants attempting to comply with the A share landing requirements. Some committee members suggested that nothing beyond a 70/30 be considered for these fisheries.

Some committee members suggested that changes in the share split be undertaken in a single step. These committee members suggested that incremental changes would require annual adjustments to the changes in IPQ issuance. These changes were thought to be potentially disruptive for participants. Other committee members suggested that incremental changes could mitigate negative effects to those harmed by the change in the share split. Some committee members also suggested that the effects of the change may be better understood, if the changes are incremental. These committee members suggested that any added uncertainty would be worth the benefit of easing the effects of the transition on communities. It was also suggested that from processor perspective, to the extent that a change is uncompensated, a slower, later change will have less negative effects. Some committee members suggest that the appropriateness of incremental changes depends on the scope the change in the share split.

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Community Issues

Some committee members also suggested that some community concerns could be alleviated by shifting the IPQ threshold (or by having the share split shift) with TACs. Changing the IPQ distribution with TAC could allow more shares to be marketed competitively when TACs are higher. Some committee members pointed out that B shares are more important to logistical coordination at low TACs, suggesting that the B share allocation should be higher at low TACs. Other committee members suggested that the IPQ share should decrease at higher TACs (as under the current threshold). Some committee members suggested it is important to maintain community linkages for any harvest shares not subject to IPQ landing requirements to protect community interests. Some committee members suggested that changing from the current share split will have negative effects on communities, particularly during periods of low TACs. These effects could be compounded by high fuel costs that effect the spatial distribution of landings. Differences in ex vessel prices by location may also compound these effects.

Some committee members suggested that any newly created B shares should be regionalized to protect communities. Since B shares are not currently subject to regionalization, the application of regionalization to newly created B shares would create a new share type under the program. Some committee members expressed concern that retaining regionalization on newly created B shares (i.e., North B share) would greatly diminish the value of those shares to harvesters, but would be important to communities (particularly in the North region). Some committee members suggested that regionalization could be applied only to newly created B share QS in the North. This revision, however, would not address concerns of harvesters, who believe the North region may have little competition for B share landings. Some committee members suggested that any regionalized shares would require arbitration. To apply arbitration to B shares would require substantial revision of the arbitration program (because share matching cannot be applied to B share allocations).

Some committee members suggested that regionalization of B shares may do little to protect some communities. Instead, a redistribution of landings would occur within the region, leaving the some committees unprotected. Other communities are likely to benefit from this redistribution. Some committee members suggested that community specific harvest share allocations could be used to mitigate this redistributive effect. Some committee members also suggested that regionalization of B shares (or a system of community linked shares) could harm harvesters, since the arbitration system does not apply to B share landings. In remote areas, it is possible that little competition for landings could lead to B share landing prices being lower than A share landing prices, which are subject to arbitration.

The committee also discussed the potential to use compensation, instead of regionalization to address community interests arising from the change in the split. Some committee members asserted that any compensation would be inadequate, since processing activity is the important community component in the North. Absent landing requirements of regionalization, the processing interest would not be protected.

Some committee members suggested that the existing distribution of B share landings has arisen from individual QS holder decisions, rather than from the lack of available B shares for a competitive market. These committee members suggested that share leasing (undertaken by QS holders) has had a large impact on the distribution of landings, limiting the amount of B share landings in certain communities. In addition, some committee members suggested that current prices for A share/IPQ landings have been high enough to discourage some competition in the market (i.e., A share/IPQ landing have been at a competitive price), particularly in communities that wish to attract additional landings. Other committee members suggested that the lack of available B shares has limited the distribution of B share landings. Some committee members suggested that this *opilio* season could be important for considering the potential for B shares to induce competition because of the relatively high TAC in the fishery.

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Specifically, it was pointed out that as many as 10-12 million pounds of unrestricted shares (B shares/C shares/CDQ pounds) would be available for landing from the *opilio* fishery. Some committee members believe that CDQ pounds should not be considered unrestricted shares, since they are not part of the rationalization program.

Some committee members suggested that the weak community protections (specifically the right of first refusal) offer some communities little protection, while others benefit greatly from the stronger protections (specifically the current 90/10 share split and regionalization). These committee members suggested that more should be done to protect communities that are vulnerable to the weak protections.

Some committee members suggested that crew impacts also have consequences for their home communities. These community impacts, however, are not addressed by the program. These committee members suggested that a crew allocation could be used to mitigate these effects. These committee members suggest that effective crew protections should be considered community protections. Some committee members pointed out that these effects are largely a symptom of the pervasive leasing under the program. Some committee members suggested that the effects of leasing have been both the loss of jobs and diminished quality in remaining jobs, since crew shares are paid on post-royalty vessel revenues. Most vessel owners that have continued to fish are said to pay full crew shares on all revenues from owned shares, but must deduct royalties paid to share lessors in calculating crew shares on leased quota. It was suggested that at prevailing lease rates, vessel operators are subsidizing crew shares of QS holders that lease their shares. Some committee members suggested that caps on lease rates could be used to mitigate crew effects arising from high lease rates. Despite these circumstances, several committee members maintain that many of the remaining crew jobs pay well and are high quality jobs.

Some communities also questioned the utility of rights of first refusal because of the high cost of buying into the fisheries. These committee members suggested that assisted financing of share purchases should be considered for community share purchases. In addition, it was suggested that the use of intra-company transfers could subvert the protection of the right of first refusal.

Revision of rights of first refusal

The committee discussed the erosion of rights of first refusal that would occur with any change in 90/10 split. Since PQS and IPQ interests would be removed, rights of first refusal would also no longer exist with respect to those shares.

The committee also discussed the need to address the 'intra-company transfer' exemption from rights of first refusal. Some committee members suggested that these transfers can fully undermine the right, since three consecutive years of IPQ intra-company transfers will remove the right with respect to the underlying PQS. Some committee members suggested that community entities should be permitted to intervene in these intra-company transactions, but did acknowledge that a system would need to be developed to determine a price for retaining the shares in the community. Some committee members expressed concern that the right applies to the transaction as structured by the parties to it. These transactions may include items other than the shares (e.g., capital, equipment, etc). The breadth of the items that may be included in a transaction limits the effectiveness of the provision, since communities may not have the assets to make large scale acquisitions and may have no interest in acquiring items other than the shares. It was noted that the community benefits have arisen from crab vessels remaining in Alaska ports (including King Cove) for extended periods, rather than returning to Seattle between crab seasons.

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One committee member expressed a concern that effects of the program on processors in other fisheries should continue to be discussed.

Processor Issues

Some committee members suggested that any shift from the current 90/10 should be compensated with a portion of the new B shares created by that change. These committee members believe any change in the share distribution is effectively a shift in the distribution of rents from the fisheries. Other committee members suggested that minor changes in the A share/B share split (such as 85/15 or 80/20) would not merit processor compensation. Some committee members suggested that determining the appropriate compensation requires a consideration of whether the existing program benefits one sector over the other (i.e., is one sector better compensated for stranded capital than the other). Once this is known, the need for compensation of changes in the program can be considered.

Some committee members suggested that any loss of QS by harvesters will not be made up for by a change in the A share/B share split (i.e., if any compensation is paid for a change in the split, QS holders will be worse off). In addition, it was suggested that harvester problems that drive the need for shift in A share/B share split will not be addressed to the extent that the processors are given harvest shares (i.e., giving up quota to processors will weaken harvester position in negotiations). It was suggested that an alternative to compensating processors with harvest shares could be a processor buyback. A charge on landings could be used to fund the buyback. It was noted that a processor buyback would likely require Congressional approval.

Crew Issues

Some committee members suggested that the benefits received by share holders who have leased quota at high lease rates have been at the expense of crew more than others. In addition, it was suggested that the current program lacks mechanism for natural progression of crew in fishery from the deck to wheelhouse to vessel ownership. Some committee members suggested that this situation could be mitigated by the loan program; however, even that program would have limited effect, given the high price of shares in the fisheries.

Two written proposals have been presented to the committee to address crew issues (see Crew Proposals A and B). The first would establish a skipper/crew pool of shares to be managed for crew benefit. The shares in the pool would be distributed among members of the pool based on a point system similar to the system used for eligibility for the Gulf Tanner crab fisheries. The pool would require funding, which would be an allocation of quota from the fishery, effectively reducing the existing owner QS allocations under the program. The initial proposal is to have the allocation match the current crew share (approximately 40 percent of the QS pool).

Depending on the structure, this crew allocation would be intended to address the interests of both active crew and crew displaced under the program. Some committee members suggested that a crew pool allocation could be used to bargain for better crew shares. This pool could also be used to bargain down lease fees (particularly, if the boat owner is charging a royalty on initially allocated shares). It was suggested that any individual's (or pool member's) share of the allocation could be restricted by a cap, so that owner operators with substantial share holdings (and less in need of protection) do not receive the allocation. The management of crew pool might be fashioned after hook-and-line agreement used in the Cape Cod groundfish fishery. Some committee members request that additional definition for management of the pool and the distribution of benefits from the pool be developed. It was also suggested that a crew pool could be regionalized to mitigate community effects.

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Some committee members suggested that crew could be worse off under this proposal, if royalties are charged on crew holdings and crew shares paid for their work are decreased. In addition, it was suggested that crew entry could be curtailed in the long run under this proposal, since entering crew would have no stake in the pool. It was suggested that entering crew would work their way into the pool over time, just as current crew shares increase with experience. Some committee members suggested that the negative effects on many crew displaced by the program should be addressed. Some committee members stressed that the objective of crew initiatives are not to return to the pre-rationalized fishery, but to address problems under the existing system.

Committee members also suggested that other measures be considered, such as establishing a crew training program to increase the number of persons trained as fishing crew. This may address some concerns of crew who believe jobs under the program are too demanding. Additional crew would allow some cycling of crews on and off boats in-season. These measures could put more people to work in the fisheries. It is acknowledged that average earnings from a crew position could decline under this proposal.

The committee received a second proposal that could either supplement or substitute for a crew allocation. Under the proposal, 10 percent of any share transfer would become C shares at the time of transfer. This conversion would occur until 30 percent of the QS pool were C shares. These shares would be subject to the active participation requirements that the Council defines for C shares. Under the proposal, these shares would also be exempt from PQS landing requirements, potentially depriving processors and communities from protections of those aspects of the program. It was noted that this proposal might have reduced effects on current share holders, since they would not have shares voided, involuntarily transferred, or taken back. Supporters of the crew proposals suggested that work on the proposal continue at the next meeting to address these concerns.

Arbitration Issues

All committee members agreed that A share landings must be subject to arbitration under any A share/B share split. The Congressional limit on processors using IPQ landings to negotiate B share deliveries effectively limits the ability of harvesters to use B share landings to negotiate A share landings. As a result, any IPQ landings need to be subject to arbitration. So, *short of a straight IFQ program without IPQ, the arbitration system is necessary.* In addition, some committee members suggested that arbitration would be necessary even in a regionalized harvest IFQ only system.

Committee consensus – modifications to the arbitration system should be undertaken separately from broader program changes suggested by the Council motion. Jake Jacobsen presented a proposal for technical revisions of the arbitration program. The committee agreed that staff can work with the arbitration organizations to review the proposed changes and return with proposed revisions for presentation to the committee at the next meeting.

The committee discussed the uses of data in arbitration. Specifically, the committee expressed concern that the best available data be used in developing the non-binding price formula. Committee members suggested that industry is discussing arbitration data issues and is amenable to continuing those discussions. The committee agreed that data issues are important to success of the arbitration system, so they are appropriate for committee and Council oversight, but do not require any immediate committee or Council attention.

Emergency relief from regionalization

The committee also discussed the potential need for emergency relief from regionalization for ice or other unexpected circumstances. The committee requested community representatives to consider whether

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relief from regionalization might be acceptable in certain situations and the appropriate terms for that relief. Some committee members advised that past circumstances suggest the need for relief might have been alleviated if the B share pool were larger. The committee also discussed efforts made by processors and communities to keep harbors accessible during periods of icing. Some committee members suggested that icing problems are usually temporary and can be worked through in a brief period. It was suggested that communities could come up with recommendations on how to address harbor closures of 5-10 days because of ice. It is hoped that the terms of any relief would be limited in a manner that prevents improper use of the provision by persons wishing to avoid regional landing requirements. It was suggested that the best solution would be a negotiated agreement among the affected parties. It was pointed out that it could be problematic to identify affected parties (including communities), since shares are not currently linked to a specific community. Some committee members also expressed concern that any relief provision be limited to specifically identifiable events to ensure that undue leverage is not asserted by an affected party. The committee also discussed the potential for cooperatives to address these issues through fleet coordination of fishing and landings that would limit the need for any relief provision.

A proposal for this exemption was received by the committee, which would grant an exemption only if persons requesting the relief take any reasonable and available steps to address the emergency prior to the granting of emergency relief. Generally, the committee believed the proposal is a good starting point, but will need revision to improve its workability. The committee agreed that members should continue to work with the communities and NMFS to improve the workability of the proposal. The proposal included provision for tax redistribution to the community that lost processing. Committee members suggested that this provision would likely require a State law change and could be very complicated to administer since tracking of the tax amounts might not be possible in some circumstances. In addition, tax rate difference across jurisdictions might result in the collection less tax revenue than is required to compensate the community that lost processing (under its tax rates).

Strawman elements and options for revision of 90/10 A share/B share split in the crab rationalization program

At its February 2008 meeting, the Council requested staff to post on its website draft strawman elements and options to aid the public in providing comment to the Council concerning alternatives for analysis to revise of the 90/10 A share/B share split in the crab rationalization program. Following are the draft purpose and need statement, the Council motion identifying alternatives for analysis, and those draft strawman elements and options.

Draft purpose and need statement

At its October 2007 meeting the Council adopted the following draft purpose and need statement to guide its consideration of revisions to the crab rationalization program:

Share allocations to harvesters and processors under the BSAI crab rationalization program were intended to increase efficiencies and provide economic stability in both the harvesting and processing sectors. Recognizing that processor quota shares reduce market competition for deliveries subject to share match requirements, the Council adopted B share IFQ to provide some degree of competition, encourage processors to pursue market opportunities for their products, and possibly facilitate processor entry. The Council included a system for binding arbitration in the program to resolve price disputes for deliveries subject to share match requirements.

The Council has heard many concerns about the BSAI crab rationalization program suggesting the proportion of B shares is not adequate to meet the Council's intended purpose for those shares and, thus, towards furthering the goals of the program. Information to date has not shown that the 90/10 split has promoted 1) competitive negotiated deliveries, or 2) unserved and underserved markets, or 3) processor entry; there is no indication that the current A share/B share split is sufficient to promote all three.

The Council has also heard concerns over the complexity of the program, and also about the uncertainties and costs associated with share matching and binding arbitration. An increase in B shares might help to resolve these issues, though the scope and magnitude of expected effects of change from status quo are unknown. The optimal A share/B share split has not been analytically determined, nor was a clear analytical evaluation for the original 90/10 share split ever presented. Further, the appropriateness of various split levels may vary between fisheries and as TAC levels rise and fall. These aspects also have not been analyzed.

There are several data issues, as well, that should be evaluated. For example, these may be a need for accurate data on final ex vessel price for each share type to harvesters and first wholesale revenues for processors.

*The Council's request for an 18-month review includes,
"After receiving the analysis [18-month review], the Council will consider whether the A share/B share split and the arbitration program are having their intended effect and, if not, whether some other A share/B share split is appropriate."*

It is time now to evaluate alternative A share/B share splits.

Council motion concerning revision of crab rationalization program

At the October meeting, the Council also adopted the following motion concerning its intent to consider revision to the 90/10 A share/B share split under the crab rationalization program:

*The Council requests staff prepare an analysis for review at the October 2008 meeting examining the effects of a change in the A share/B share split on the distribution of benefits between harvesters and processors and on the role or necessity of binding arbitration in harvester and processor negotiations. Further, the analysis should include a discussion of expected effects of such a change on the distribution of landings among communities and expected effects on crew. Analysis should be provided for the status quo 90/10 split, 80/20, 70/30, 50/50, and 0/100 separately for each fishery. Additionally analysis should include an option to achieve each of these levels through incremental shifts over time (e.g., 5 percent per year for a shift to 80/20 and 10 percent per year for each of the other split levels). Additional analysis should include a one-*ie* IFQ allocation to vessel owners, processors, and skippers and crewmembers based upon each sector's investments and participation in the fishery. A discussion should be included on the effect of shifts as the annual TAC levels rise and fall in each fishery (for example, having the proportion of B shares increase as TAC decreases).*

The Council asks the Crab Advisory Committee to continue their work, with a focus on programmatic issues and effects of policy decisions related to the BSAI crab rationalization program. The committee shall be reformed with the addition of 4 community members and two crew representatives appointed by the Council Chairman, since communities and crew are vital components within the crab rationalization program. The newly formed committee shall also be tasked with discussing potential solutions to concerns that may arise from any adjustments to the A share/B share split. These could include issues such as 1) potential compensation to processors from harvesters for lost economic opportunity from a shift in market power, 2) potential changes in landing distribution, 3) the remaining need and necessary changes to the binding arbitration program, 4) use and effectiveness of regional landing requirements to protect communities, and 5) respective impacts on crew. In addition, the committee shall make recommendations on how best to provide for economic data needs. The Crab Advisory Committee shall provide a report to the Council at the February 2008 meeting indicating its progress on this assignment.

Strawman elements and options

To assist the Council in the identification of alternatives for analysis, staff has drafted the following strawman elements and options that could be a starting point for the development of specific alternatives, elements, and options for consideration:

Bristol Bay red king crab – North/South division at 56°20'N latitude (2.6 percent North)

A share/B share split

Option 1. Status quo (90/10)

Option 2. 80/20

Incremental shifts of:

Option a. 5 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 3. 70/30

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option. Arbitration changes

Option 4. 50/50

Incremental shifts of:

- Option a. 5 percent per year
- Option b. 10 percent per year
- Option c. 20 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 5. 0/100

Incremental shifts of:

- Option a. 5 percent per year
- Option b. 10 percent per year
- Option c. 20 percent per year
- Option d. 30 percent per year
- Option e. 45 percent per year

QS allocation divided with allocation of:

- ___ percent to vessel owners divided among current QS holders based current share holding
- ___ percent to processors divided among current QS holders based current share holding
- ___ percent to captains/crew divided among _____

Option A. Arbitration changes – MUST BE SPECIFIED

Option B. Discontinue arbitration program

Option 6. Change A share/B share split with TAC

- ___/___ for TACs greater than _____
- ___/___ for TACs greater than _____ and less than _____
- ___/___ for TACs greater than _____ and less than _____
- ___/___ for TACs less than _____

Bering Sea C. opilio – North/South division at 56°20'N latitude (47.0 percent North)

A share/B share split

Option 1. Status quo (90/10)

Option 2. 80/20

Incremental shifts of:

Option a. 5 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 3. 70/30

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option. Arbitration changes

Option 4. 50/50

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 5. 0/100

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option d. 30 percent per year

Option e. 45 percent per year

QS allocation divided with allocation of:

___ percent to vessel owners divided among current QS holders based current share holding

___ percent to processors divided among current QS holders based current share holding

___ percent to captains/crew divided among _____

Option A. Arbitration changes – MUST BE SPECIFIED

Option B. Discontinue arbitration program

Option 6. Change A share/B share split with TAC

___/___ for TACs greater than _____

___/___ for TACs greater than _____ and less than _____

___/___ for TACs greater than _____ and less than _____

___/___ for TACs less than _____

Eastern Bering Sea C. bairdi – none (or undesignated)

Western Bering Sea C. bairdi – none (or undesignated)

Also no rights of first refusal

A share/B share split

Option 1. Status quo (90/10)

Option 2. 80/20

Incremental shifts of:

Option a. 5 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 3. 70/30

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option. Arbitration changes

Option 4. 50/50

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 5. 0/100

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option d. 30 percent per year

Option e. 45 percent per year

QS allocation divided with allocation of:

___ percent to vessel owners divided among current QS holders based current share holding

___ percent to processors divided among current QS holders based current share holding

___ percent to captains/crew divided among _____

Option A. Arbitration changes – MUST BE SPECIFIED

Option B. Discontinue arbitration program

Option 6. Change A share/B share split with TAC

___/___ for TACs greater than _____

___/___ for TACs greater than _____ and less than _____

___/___ for TACs greater than _____ and less than _____
___/___ for TACs less than _____

Pribilof red and blue king crab – North/South division at 56°20' N latitude (67.5 percent North)
St. Matthew Island blue king crab – North/South division at 56°20'N latitude (78.3 percent North)

A share/B share split

Option 1. Status quo (90/10)

Option 2. 80/20

Incremental shifts of:

Option a. 5 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 3. 70/30

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option. Arbitration changes

Option 4. 50/50

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 5. 0/100

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option d. 30 percent per year

Option e. 45 percent per year

QS allocation divided with allocation of:

___ percent to vessel owners divided among current QS holders based current share holding

___ percent to processors divided among current QS holders based current share holding

___ percent to captains/crew divided among _____

Option A. Arbitration changes – MUST BE SPECIFIED

Option B. Discontinue arbitration program

Option 6. Change A share/B share split with TAC

___/___ for TACs greater than _____

___/___ for TACs greater than _____ and less than _____

___/___ for TACs greater than _____ and less than _____

___/___ for TACs less than _____

Eastern Aleutian Islands golden king crab – South of 56°20'N latitude (100.0 percent South)

A share/B share split

Option 1. Status quo (90/10)

Option 2. 80/20

Incremental shifts of:

Option a. 5 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 3. 70/30

Incremental shifts of:

- Option a. 5 percent per year
- Option b. 10 percent per year
- Option. Arbitration changes
- Option 4. 50/50
 - Incremental shifts of:
 - Option a. 5 percent per year
 - Option b. 10 percent per year
 - Option c. 20 percent per year
 - Option. Arbitration changes – MUST BE SPECIFIED
- Option 5. 0/100
 - Incremental shifts of:
 - Option a. 5 percent per year
 - Option b. 10 percent per year
 - Option c. 20 percent per year
 - Option d. 30 percent per year
 - Option e. 45 percent per year
 - QS allocation divided with allocation of:
 - ___ percent to vessel owners divided among current QS holders based current share holding
 - ___ percent to processors divided among current QS holders based current share holding
 - ___ percent to captains/crew divided among _____
 - Option A. Arbitration changes – MUST BE SPECIFIED
 - Option B. Discontinue arbitration program
- Option 6. Change A share/B share split with TAC
 - ___/___ for TACs greater than _____
 - ___/___ for TACs greater than _____ and less than _____
 - ___/___ for TACs greater than _____ and less than _____
 - ___/___ for TACs less than _____

Western Aleutian Islands golden king crab – Undesignated/West 174°W longitude (50.0 percent West)
A share/B share split

- Option 1. Status quo (90/10)
- Option 2. 80/20
 - Incremental shifts of:
 - Option a. 5 percent per year
 - Option. Arbitration changes – MUST BE SPECIFIED
- Option 3. 70/30
 - Incremental shifts of:
 - Option a. 5 percent per year
 - Option b. 10 percent per year
 - Option. Arbitration changes
- Option 4. 50/50
 - Incremental shifts of:
 - Option a. 5 percent per year
 - Option b. 10 percent per year
 - Option c. 20 percent per year
 - Option. Arbitration changes – MUST BE SPECIFIED
- Option 5. 0/100
 - Incremental shifts of:
 - Option a. 5 percent per year
 - Option b. 10 percent per year

Option c. 20 percent per year

Option d. 30 percent per year

Option e. 45 percent per year

QS allocation divided with allocation of:

___ percent to vessel owners divided among current QS holders based current share holding

___ percent to processors divided among current QS holders based current share holding

___ percent to captains/crew divided among _____

Option A. Arbitration changes – MUST BE SPECIFIED

Option B. Discontinue arbitration program

Option 6. Change A share/B share split with TAC

___/___ for TACs greater than _____

___/___ for TACs greater than _____ and less than _____

___/___ for TACs greater than _____ and less than _____

___/___ for TACs less than _____

Western Aleutian Islands red king crab – South of 56°20'N latitude (100.0 percent South)

A share/B share split

Option 1. Status quo (90/10)

Option 2. 80/20

Incremental shifts of:

Option a. 5 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 3. 70/30

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option. Arbitration changes

Option 4. 50/50

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option. Arbitration changes – MUST BE SPECIFIED

Option 5. 0/100

Incremental shifts of:

Option a. 5 percent per year

Option b. 10 percent per year

Option c. 20 percent per year

Option d. 30 percent per year

Option e. 45 percent per year

QS allocation divided with allocation of:

___ percent to vessel owners divided among current QS holders based current share holding

___ percent to processors divided among current QS holders based current share holding

___ percent to captains/crew divided among _____

Option A. Arbitration changes – MUST BE SPECIFIED

Option B. Discontinue arbitration program

Option 6. Change A share/B share split with TAC

___/___ for TACs greater than _____

___/___ for TACs greater than _____ and less than _____
 ___/___ for TACs greater than _____ and less than _____
 ___/___ for TACs less than _____

TACs

Fisheries	IFQ			CDQ/Adak		
	05 06	06 07	07 08	05 06	06 07	07 08
Eastern Aleutian golden king crab	2,700,000	2,700,000	2,700,000	300,000	300,000	300,000
Western Aleutian golden king crab	2,430,000	2,430,000	2,430,000	270,000	270,000	270,000
Western Bering Sea <i>C. bairdi</i>	1,458,000	984,600	1,958,400	162,000	109,400	217,600
Eastern Bering Sea <i>C. bairdi</i>		1,687,500	3,100,500		1,875,000	344,500
Bering Sea <i>C. opilio</i>	33,465,600	32,909,400	56,730,600	3,718,400	3,656,600	6,303,400
Bristol Bay red king crab	16,496,100	13,974,300	18,344,700	1,832,900	1,552,700	2,038,300
Pribilof red and blue king crab	1,125,000*			125,000*		
St. Matthews blue king crab	3,600,000*			400,000*		

Source: ADFG news releases

* 1998 TAC divided 90 percent IFQ/10 percent CDQ.

Crab Advisory Committee Meeting Minutes March 2, 2008 Anchorage Hilton

Committee Members – Sam Cotten, Lenny Herzog, Dave Hambleton, Linda Freed, Florence Colburn, Rob Rogers, John Moller (ph), Frank Kelty, Simeon Swetsof, Ernie Weiss, Tim Henkel, Steve Branson, Kevin Kaldestad, Jerry Bongen

Staff – Mark Fina (NPFMC), Herman Savikko (ADFG), Stefanie Moreland (ADFG), Glenn Merrill (NMFS)

Public – Jeff Stephan, Kris Norosz, John Iani, Pat Hardina (ph), Linda Kozak, Steve Minor, Heather McCarty, Mateo Paz-Soldan, Jake Jacobsen, Mike Stanley, Joe Plesha, Shawn Dochterman, Dick Powell, Jeff Steele, Clem Tillion, Sandra Moller, Chuck McCallum (ph), Dick Tremaine, Keith Colburn (ph)

Minutes

Golden King Crab Fisheries

The committee reviewed the existing program requirements for the Aleutian Islands golden king crab fisheries. In the review of the issue, it was noted that the revision to the processing share caps (that exempts custom processing from the use caps) has not been implemented, and may address some of the problems in the fishery, once implemented. One person raised the issue of possible mismatch of Class A IFQ and IPQ. This anomaly arose this year because of the complexity of the A share/B share/IPQ issuances and should be addressed in future issuances by the agency to the extent feasible.

In reviewing the allocations in the Western Aleutian Islands golden king crab fishery, it was noted that 40 percent of the quota in the fishery is controlled by a single catcher processor. It was also noted that the catcher processor does not contribute to unharvested TAC in the fishery. It was also suggested that the catcher processor shares could be relevant to resolving any problem with the Adak economy that might be addressed by potential changes in the program.

The committee discussion suggested the following possible problems in the Western fishery:

- 1) Adak has suffered a loss of revenues from loss of processing.
- 2) Adak needs a substantial amount of processing in order to cover the cost of shipping the product out of the community. Even if, an arrangement is made to process the remaining IPQ in Adak, it may not be enough to cover the costs of shipping the product out. Adak needs access to all of the processing in the fishery to ensure shipping opportunities exist. If negotiated custom processing arrangements work, the Adak problem could be resolved this year. Currently there is no regular surface transportation shipping to Adak.
- 3) A single facility in the Western region has limited the availability of markets in the region of the fishery. This could change, if Atka opens a facility. Also, catcher processors could receive deliveries of A share landings. The opportunities for new facilities to enter the west region could change, under the new custom processing exemption from crab processing.
- 4) The 30 percent processor share use cap could inhibit processing arrangements. Specifically, a transfer of IPQ (rather than a custom processing arrangement) would not be permitted, but may be the only workable arrangement for certain processing opportunities in the west region. Adak representatives suggested that additional custom processing under the cap exemption is unlikely to address their problem, because Adak would rather lease shares. Others believe, at a minimum, the unharvested TAC problem might be addressed by the exemption.

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- 5) Market conditions in the first two years of the crab rationalization program have prevented full harvest of the TAC in the Western Aleutian Islands golden king crab fisheries.

Issues in the Eastern fishery are suggested to arise from concentration of processing share holdings. This concentration limits the market opportunities in the fishery and is believed to inhibit price negotiations and marketing efforts by processors. It was suggested that leasing of shares in the current year has had the desired effect on the market. The concentration, however, is argued to have had a limiting effect on market development, despite the leasing of shares to a processor that is believed to be developing new markets and paying a more competitive price. It was suggested that arbitration system is less effective in a fishery that has very few participants. It was also suggested that the arbitration system has had the desired effect on negotiations (driving ex vessel prices up for all processors). It was suggested that the number of processors is limited by the market and size of the fishery, rather than the processor shares in the fishery. It was suggested that consolidation of operations is something that both sectors should benefit from (not just harvesters).

Not applying for IPQ led to great concentration of processing shares in the Eastern fishery. It is possible to revise the system to have these IPQ not allocated and A shares convert to B shares, rather than reissue IPQ to other processors. It was suggested that the new entrant pushed the price up in this fishery for all fishermen, despite a presale of crab by one processor. Whether ex vessel prices suffered as a result of the presale is debated. It is argued that the arbitration system can address this concern.

In the Eastern fishery, the concentration of effort on the harvesting side has benefited that sector greatly. To assert that the processing sector is causing problems, given these great benefits is probably not appropriate. Also, the market conditions in the fishery have contributed to any problems in the golden king crab fisheries. This contribution of market conditions needs to be considered. The Eastern fishery is argued to not have the problems that are present in the Western fishery.

It was noted that the program (including the arbitration system) creates incentives for a processor to sell at the highest possible price. And that a processor the does not sell for the highest price might be forced by the arbitration system to pay a price based on a higher sale price than their own.

One suggested solution to problems in the Western fishery is to remove all processor shares from the Western fishery. It was suggested that proposed alternatives could be broadened to include the Eastern fishery and would include status quo (90/10), 50/50, and 0/100. The possibility of including a regionalization component in the Western region was also raised. Harvesters, generally, oppose a regionalization component.

It was suggested that any change in the A share/B share split include provision for compensation to processors. It was noted that a substantial amount of PQS has changed hands (including some acquisitions by CDQ groups), since inception of the program. This raises the issue of compensation for those who have acquired shares.

The committee reviewed the three proposals it receive previously (see attached). The proposal of Dave Hambleton and Phil Hanson includes a suggestion to allow custom processing provision to remain in effect for a period of time to determine whether the problems persist. If so, solutions could be developed, including reallocation or divestiture of shares are not utilized for a period of years, and reallocation of PQS, CPO, and CPC to address community concerns, conversion of West IFQ to B shares with possible regionalization and possible compensation to processors. It was pointed out that the west designation of shares could affect communities, which may need compensation to communities to address their concerns. It was suggested that harvesters might need compensation for price effects of western delivery

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requirements. It should be noted that the arbitration system might need modification, if western B shares are intended to be covered by that system.

Crew Issues

Tim Henkel suggested that his proposal receive further consideration. He also suggested that the conversion occur on a date certain, rather than on transfer. Any action in this respect should consider potential effects of C share caps on the available market for share holdings. The new C shares would be required to be held by a person meeting C share requirements (or could have different requirements associated with them). It was suggested that processors would be the only persons affected by this action who will not receive compensation out of this shift and that the reduction in the processor share pool should be compensated. It was suggested that the A share/B share split could be applied to these new C shares to protect processors. Also, communities protected by IPQ allocations would be affected by any change in the size of the IPQ pool. An alternative might be to regionalize the C shares to protect communities. It was suggested that communities that are home to crew are protected by C shares, so creation of C shares can operate as a community protection.

Any action to change the C share pool should allow current share holders that would be subject to this action adequate opportunity to transfer the shares to ensure that transfers can be at reasonable market prices (i.e., 3 to 5 years). The current proposal is for 30 percent of the QS pool being subject to the conversion to C shares. It was suggested that fewer shares be subject to the provision to reduce effects on persons who have purchased shares since implementation of the rationalization program, such as 3, 5, and 10 percent of the QS pool.

It is suggested that an alternative proposal should be considered to make a direct allocation to crew (in addition or as a substitution for the share redesignation). This proposal is also in addition to (and is a variation on) the proposal received at an earlier meeting to allocate 35 to 40 percent of the quota share pool to an organization that holds and uses those shares on behalf of crew in the fisheries. The use of both an allocation of C shares and an increase in the size of the C share pool could make up for negative effects on crew under the initial allocation. It was suggested that care should be taken to balance crew and vessel owner interests to maintain good crew/vessel owner relationships. A reasonable and moderate step to address crew issues (such as the change in designation to C shares) would aid crew and might be palatable to many vessel owners in the fishery.

Alternative proposals were suggested to 1) to dilute C shares by splitting the existing C share pool and distribute the new C shares to crew and 2) scaling of the C share pool with quota, to increase/decrease with quota in conjunction with TAC increases/decreases.

Owner on board were also discussed. Owner on board rules are argued to protect crew by decreasing the amount of leasing in the fishery. It was suggested that it may not be feasible to have all lease type charges removed prior to paying crew, with or without owner on board requirements. It was suggested that the issue is not the existence of leasing charges, but are those charges reasonable. As long as shares are traded, charges will be a necessity, even for owner on board participants, who will need to make loan payments to support their purchases. In addition, it was suggested that under the cooperative structure, the shares are currently managed by cooperatives in a manner that will likely result in share holders not being on board the vessel harvesting their crab. Requiring participation is important, but flexibility should be incorporated to ensure that shares are fishable and fished.

The agency expressed concern that a strict owner on board would greatly complicate administration of the program (see attached). The current tracking system would require structural changes to follow shares by QS holder. Landing reports will need revision to include own board tracking for C shares. Transfer of C

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share IFQ among cooperatives would require dual cooperative membership by the underlying C share QS holder to make owner on board requirements track share trading.

It was suggested that added restrictions on C shares will reduce their values in leases and complicate their use by cooperatives. These changes would work to the detriment of C share holders.

Community rights of first refusal

Several concerns were discussed concerning the weakness of the right of first refusal protection. One suggestion is to remove the ability to engage in intra-company transfers. It is unclear whether intra-company transfers could be exempted, since they are not a transfer. It was also suggested that the timeline for exercising the right is very tight for communities to position themselves to respond to the right of first refusal. Communities suggest that the timeline be 90 to 120 days to exercise the right. Some question whether the issue is as much access to capital (as time to make decisions). Financing options (such as federal or state community loans) could be considered to aid communities with share acquisitions.

Potential areas to revisit in the contract requirements (see attached) are:

- 1) delete the provision that lapses right of first refusal under (C)
- 2) extend the 60 day period (to exercise right) and 120 day period (to perform) to allow community more time to exercise right under (G)
- 3) the committee discussed the issue of compartmentalizing interests in shares to allow an effective right of first refusal, if a large transaction includes many assets other than the shares (particularly assets that are not in the community). Requiring a community to step in and acquire assets outside of the community may not be in the community's interest. This limits the effectiveness of the community's right.

The committee also discussed potential leasing arrangements to avoid divestiture requirements that might lead to shares being moved from the community of origin.

Emergency exemption from regionalization

A revised proposal was presented (see attachments). The revision acknowledges that the exemption would be temporary. It should be noted that the status quo is not clear; the agency may not be able to grant an exemption. Element 4 is revised from the previous proposal to require a compensatory delivery of shares in the region where the relief was granted. The provision includes a suggestion that the season be extended to allow for the compensatory delivery. The feasibility of this extension was discussed. A provision is also included to adjust allocations in the following year to ensure that compensating deliveries are made in the following year. The provision contemplates a pound for pound exchange. This could operate in lieu of tax exchanges across communities.

A major difficulty is in making the decision of when conditions merit the exemption. In many instances, conditions change quickly and are case specific based on conditions for each particular vessel. Ice conditions were noted to have been worse in the last couple of years. It was suggested that vessels are having to operate at an increased risk, because of the regional landing requirement. It was also noted that movement of processing in response to emergencies adds complications to processing. Processors need time to respond to the change in processing location. Accommodating a trip or two is possible, but large scale shifts in processing activity may not be accommodated by the processors. Some of the more drastic situations might be better addressed by a response of the industry to delay fishing and processing. The industry has taken these responses in the past.

Use of an intercooperative might be useful to address short term situations. Longer term problems, however, might be more difficult to address. At the level of a single cooperative, the ability of cooperatives to address coordination issues is limited.

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Dave Hambleton, Florence Colburn, Simeon Swetzof, and Lenny Herzog agreed to continue to work on the issue of an emergency exemption from regionalization and report back to the committee at its next meeting.

Revisions to the arbitration program

The arbitration organizations advised that they have forwarded a memo concerning a potential grant of immunity to arbitrators, market analysts, arbitration organizations, and third party data providers to Council staff and NOAA GC (attached).

The arbitration organizations also reviewed the paper previously submitted by the independent harvester arbitration organization (attached). The issues are:

- 1) the reporting requirements of the independent harvester arbitration organization are argued to be overly burdensome (the processor organization does not object to the change proposed)
- 2) the division of costs of the performance arbitration. The issue has not come up, but it is a concern that the costs of performance arbitration could be shared. It is uncertain whether the arbitrator could hire an expert to assist in assessing compliance with a performance requirement. It is unclear whether this would be covered under the current rule and whether the costs would be shared. It is also unclear whether this issue should be clarified in the rule. (the organizations will continue to work to address this issue)
- 3) the arbitration system is suggested to be complicated by the two different methods of accessing arbitration: a) the preseason timeline and 2) the lengthy season agreement. The independent harvester organization proposes a single method for accessing arbitration, which might allow greater flexibility. (the organizations agree to continue to develop an alternative structure to accommodate access to arbitration)
- 4) arbitrators should have the authority to decide jurisdiction/arbitrability (both organizations support a change in rules to clarify this authority)
- 5) a proposal to prevent the formula arbitrator and market analyst from testifying at a binding arbitration proceed is proposed to make those persons more objective (the processor organization does not have a position on this yet)
- 6) it is proposed that the arbitrator be required to presume against a person who does not present requested information (this is opposed by the processor arbitration organization – who believes the determination should be discretionary)
- 7) A general statement concerning the arbitration system and its operation are thought to be appropriate by the harvester organization. The processor association does not support this provision. The processor organization believes that some additional communication might benefit parties understanding of the system. This could be done informally, with both parties present and without written opinion. (the organization have agreed to continue to work on this statement).

Overall, the arbitration organizations have agreed to continue to work on these issues and report back to the committee prior to proposing any specific amendment package.

Attachments

Hambleton/Hanson Aleutian Islands golden king crab fishery proposal
Moller Aleutian Islands golden king crab fishery proposal
Stanley Aleutian Islands golden king crab fishery proposal
Owner on board management issues
Right of first refusal contract terms
Emergency relief from regionalization problem statement/terms/addendum
Arbitration immunity memo
Arbitration proposals

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Next Meeting

The next meeting will take place after the April Council meeting. The committee could meet to discuss elements and options that the Council wishes to consider.

Proposed Problem Statement and Alternatives/Options for Analysis

January, 2008

We believe that there are currently only two “Problems” that can be quantified and analyzed. They are:

- a. Western Aleutian Golden King Crab harvesting/processing. Crab was left in the water last year and there is some chance the same thing may happen again this year. It is not known if the Council’s recent action to create a custom processing us cap exemption for this fishery will solve the problem. Given the potential negative impact on the fleet and communities, this issue is deserving of further analysis.
- b. Community ROFR financing. More than under this program are relatively weak because they lack a financing mechanism community has expressed the opinion that the ROFR rights granted. A range of alternative financing options should be analyzed.

Two other issues have been dealt with by the Committee on a unanimous basis: first, that any level of IPQ will require a binding arbitration system; second, that the binding arbitration data problems be addressed by the established industry binding arbitration organizations with periodic monitoring by the Committee and Council.

All other “problems” identified in the Council’s draft Problem Statement should be deleted from the October Motion because there is no quantifiable evidence and/or existing data sets appropriate for analysis; recognizing that the 36 Month Review process will help identify those data gaps and processes for data collection necessary for those issues.

Hambleton/Hanson Proposal
Crab Committee Recommendation
Amended/Substitute “October Motion”
January 2008

The Council should adopt the following Problem Statement, and move forward the analysis and alternatives proposed by the Crab Advisory Committee in their December (2007) and January (2008) meetings.

Problem Statement

The Crab Rationalization program is viewed as having accomplished many of the goals established in the original Purpose and Needs statement¹; however, there are some unanticipated problems with the Community Protection measures and the Western Aleutian Golden King Crab fisheries.

The community “Right of First Refusal” granted in relation to Processor Quota Shares insures an Eligible Crab Community a significant portion of it’s historic share of crab landings, but some Eligible Crab Community Organizations may not have sufficient access to capital to exercise their ROFR rights. Addressing this problem may strengthen the community protection measures in this program.

The west-designated portion of the Western Aleutian Islands Golden King Crab fishery has suffered an under-harvest of the resource for two consecutive years; exacerbated by low market prices, inefficient processing use caps and other factors. A full analysis of recent Council actions and additional alternatives may lead to full utilization and stability in this fishery.

Elements of this Motion

Community Protection Elements

1. Loan program

1.1 A low-interest rate loan program consistent with MSA provisions, for Eligible Crab Community Organization (“ECCO”) purchases of QS or PQS², shall be established for QS or PQS purchases by ECCO’s using 25% of the Crab IFQ fee program funds collected.

1.2 Eligibility is restricted to Eligible Crab Community Organizations as defined in the current program under _____.

¹ See June 2002 Problem Statement attached

² QS/PQS Eligibility attached

West-Designated Western Aleutian Islands Golden King Crab

2. Full-utilization measures

2.1 Await full implementation of new custom processing use cap exemptions.

2.2 Forced divestiture if not utilized 3 years out of five

2.3 Reallocation of PQS, CP and CPO shares to more adequately address community concerns.

2.4 Convert west-designated IFQ shares to “B” shares

Option 1: with compensation to PQS holders

Option 2: without compensation to PQS holders

Sub-Option A: new “B” shares are not regionalized

Sub-Option B: new “B” shares are west-designated

June 2002
NPFMC Crab Rationalization
Purpose and Needs Statement

BSAI Crab Rationalization Problem Statement

Vessel owners, processors and coastal communities have all made investments in the crab fisheries, and capacity in these fisheries far exceeds available fishery resources. The BSAI crab stocks have also been highly variable and have suffered significant declines. Although three of these stocks are presently under rebuilding plans, the continuing race for fish frustrates conservation efforts. Additionally, the ability of crab harvesters and processors to diversify into other fisheries is severely limited and the economic viability of the crab industry is in jeopardy.

Harvesting and processing capacity has expanded to accommodate highly abbreviated seasons, and presently, significant portions of that capacity operate in an economically inefficient manner or are idle between seasons. Many of the concerns identified by the NPFMC at the beginning of the comprehensive rationalization process in 1992 still exist for the BSAI crab fisheries. Problems facing the fishery include:

*Resource conservation, utilization and management problems;
Bycatch and its' associated mortalities, and potential landing deadloss;
Excess harvesting and processing capacity, as well as low economic returns;
Lack of economic stability for harvesters, processors and coastal communities; and
High levels of occupational loss of life and injury.*

The problem facing the Council, in the continuing process of comprehensive rationalization, is to develop a management program which slows the race for fish, reduces bycatch and its associated mortalities, provides for conservation to increase the efficacy of crab rebuilding strategies, addresses the social and economic concerns of communities, maintains healthy harvesting and processing sectors and promotes efficiency and safety in the harvesting sector. Any such system should seek to achieve equity between the harvesting and processing sectors, including healthy, stable and competitive markets.

Proposal A – Hambleton/Hanson
Crab advisory committee minutes
March 2, 2008

(1) To be eligible to receive QS, PQS, IFQ, or IPQ by transfer, a person must first meet the requirements specified in the following table:

Quota Type	Eligible Person	Eligibility Requirements
(i) PQS	Any person	None.
(ii) IPQ	Any person	None.
(iii) CVO or CPO QS	(A) A person initially issued QS	No other eligibility requirements
	(B) An individual	who is a U.S. citizen with at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery.
	(C) A corporation, partnership, or other entity	with at least one individual member who is a U.S. citizen and who (1) owns at least 20 percent of the corporation, partnership, or other entity; and (2) has at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery.
	(D) An ECCO	that meets the eligibility requirements described under paragraph (j) of this section.
	(E) A CDQ group	No other eligibility requirements
(iv) CVO or CPO IFQ	All eligible persons for CVO or CPO QS	according to the requirements in paragraph (c)(1)(iii) of this section.
(v) CVC or CPC QS	An individual who is a U.S. citizen with:	(A) at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery; and (B) recent participation in a CR crab fishery in the 365 days prior to submission of the application for eligibility.
(vi) CVC or CPC IFQ	All eligible persons for CVC or CPC QS	according to the requirements in paragraph (c)(1)(v) of this section.

Proposal B – Moller

Crab advisory committee minutes

March 2, 2008

DRAFT PROBLEM STATEMENT FOR AI KING CRAB FISHERIES

The Aleutian Islands king crab fisheries (WAG) present a unique set of issue under the BSAI crab rationalization program due to their relatively small TACs, small numbers of harvesters and processors, and specific markets. These fisheries were generally stable prior to rationalization, but have experienced problems under the program, including inability to harvest and deliver the full TAC (WAG)

The 2002 action by the Council regarding WAI brown and red king crab:

A - Did not adequately consider the appropriate history basis for allocating Processor Quota in these fisheries

1- the WAI brown crab fishery was unique in that quota was allocated based on years where the fishery was significantly under-utilized, thus inflating the amount of quota allocated relative to actual use.

2- the allocation of PQs for WAI red king crab was arbitrary, WAI red king crab PQ was allocated pro-rata to WAG PQ, not based on processing investment or history in the fishery.

B - Did not adequately consider the requirements of National Standard 8 relative to Aleutian Island management area communities:

1- the community impacts of awarding IPQ based on years prior to Adak returning to civilian control,

2- opportunities for other communities in the region (e.g. Atka) to develop on shore crab processing in the future

C - Did not adequately consider the 303(b)(6) limited access provisions of the MSA in the context of allocating limited access processing privileges in the Aleutian Island crab fisheries:

1- "present participation" in the processing sector in Adak;

2- existing "investment" in crab processing in Adak;

3- "dependency" on crab processing in Adak;

D -The original analysis was further constrained by confidentiality rules from providing the Council with sufficient information on many of these factors which precluded the Council from making an informed decision on the impacts of IPQs for these two fisheries.

As a result:

A- Harvesting sector has been unable to harvest and deliver the full TAC of WAG crab and the fishery is once again under-utilized because harvesters have been prohibited from legally delivering regionalized crab in Adak.

B- Regionalization has been an inadequate and ineffective community protection measure, because PQs were allocated almost exclusively to "out of region" processors.

C -Crab processing in Adak has dropped from over 2 million pounds per year prior to implementation of crab rationalization to less than 20% of that level last season

It is time now to re-evaluate the appropriateness of Processor Quotas in the Aleutian Island King Crab fisheries."

OPTIONS

Western Aleutian Islands King Crab Elements

2. Western Aleutian Golden (WAG) King Crab options

2.1 Status Quo (Await full implementation of new custom processing use cap exemptions.)

2.2 Convert IFQ shares "A" shares to "B" shares

Sub-Option : new "B" shares retain west area designation

Proposal B – Moller
Crab advisory committee minutes
March 2, 2008

Sub-Option : new "B" shares are subject to onshore delivery requirement

2.3 Reallocation if not utilized 2 years out of five years

2.4 Reallocation of PQS, CP and CPO shares to more adequately address community concerns and processing investment

Sub-Option 1: with compensation to PQS holders

Sub-Option 2: without compensation to PQS holders

3. Western Aleutian Red (WAI) King Crab options

3.1 Status Quo

3.2 Convert IFQ shares "A" shares to "B" shares

Sub-Option : new "B" shares are subject to onshore delivery requirement

3.3 Reallocation of PQS, *CP and CPO* shares to more adequately address community concerns and processing investment

Sub-Option 1: with compensation to PQS holders

Sub-Option 2: without compensation to PQS holders

Golden King Crab Harvesters Association

Problem Statement

Aleutian Islands Golden King Crab

The Eastern Aleutian Islands golden king crab fishery (EAG) and the Western Aleutian Islands golden king crab fishery (WAG) present a unique set of issues under the BSAI crab rationalization program due to their relatively small TACs, small numbers of harvesters and processors, and specific markets. These fisheries were generally stable prior to rationalization, but have experienced problems under the program, including inability to harvest and deliver the full TAC (WAG) and significant consolidation of IPQ (EAG). The Council intends to consider the effects of the rationalization program in the EAG and WAG fisheries, with the intention of promoting (1) full harvest of the TAC, (2) participation by a sufficient number of viable processors to ensure competitive pricing, and (3) maximizing the market value of golden king crab.

Proposed Elements and Options

WAG

All quota share designated as “B” shares with no regional delivery requirement

EAG

All quota share designated as “B” shares with no regional delivery requirement

Attachment D

NMFS Management Issues for Tracking Strict "Owner Onboard" Crew Share IFQ March 2, 2008, Crab Committee Meeting

Until June 30, 2008, Catcher Vessel Crew (CVC) and Catcher/Processor Crew (CPC) quota share (QS) holders, also known as crew QS holders, can transfer (i.e., lease) the IFQ derived from that QS to any one who is eligible to receive crew IFQ. Crew QS holders can also assign their IFQ to a cooperative, and it can be fished by any person in the cooperative eligible to use crew IFQ. Most crew QS holders, more than 90 % in most fisheries, assigned their IFQ to cooperatives. With both of these provisions in place, crew QS holders are not required to be onboard the specific vessel that are vessel that are used to fish their IFQ.

With the existing regulations in place until 2008, and the fact that almost all crew QS holders are in cooperatives, NMFS did not create a specific mechanism to track the use of specific crew IFQ by a specific crew QS holder. Tracking crew IFQ to a specific crew QS holder would require several changes to the IFQ tracking system, and new regulations, which would take time and money to implement. They include:

- (1) A new catch accounting tracking system to specifically track specific pounds of crew IFQ to a specific crew QS even if that IFQ was assigned to a cooperative. Now, NMFS simply assigns an amount of CVC IFQ to a cooperative that is the sum of the IFQ derived from all crew QS holders assigning their IFQ to a cooperative. This would require revisions to our catch accounting and quota tracking system.
- (2) Vessel hired masters in cooperatives would need to provide a new report for each landing. NMFS would require the cooperative's hired master to list the specific crew IFQ was used for each landing, and each crew QS holder would likely need to sign the landing report (i.e., fish ticket) if their IFQ was used for that landing so that NMFS would have some record of who was onboard and could track crew IFQ to a specific crew QS holder for enforcement purposes. This would require changes to the interagency electronic reporting system, and would add additional complexity for tracking landings that may have multiple crew QS holders onboard.
- (3) Possible changes to both cooperative membership standards and IFQ transfer mechanism for crew IFQ assigned to a cooperative. NMFS would need the cooperative to designate the specific crew IFQ being transferred and may require that the receiving cooperative certify that the specific person to whom that IFQ is assigned is now going to be a member of a new cooperative. This would fundamentally change cooperative membership requirements to allow a person to be a member of more than one cooperative. Alternatively, NMFS would need to prohibit transfers of crew IFQ among cooperatives because a QS holder, including a crew QS holder, is currently prohibited from being a member of more than one cooperative.

Some of the implications of these changes include increased management costs which will be passed on to industry through the cost recovery program, likely additional staff requirements, and more complex reporting requirements.

Contract Terms for Right of First Refusal based on Public Law 108-199

- A. The right of first refusal will apply to sales of the following processing shares:
1. PQS and
 2. IPQs, if more than 20 percent of a PQS holder's community based IPQs (on a fishery by fishery basis) has been processed outside the community of origin by another company in 3 of the preceding 5 years.
- B. Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement.
- C. Intra-company transfers within a region are exempt from this provision. To be exempt from the first right of refusal, IPQs must be used by the same company. In the event that a company uses IPQs outside of the community of origin for a period of 3 consecutive years the right of first refusal on those processing shares (the IPQs and the underlying PQS) shall lapse. With respect to those processing shares, the right of first refusal will not exist in any community thereafter.
- D. Any sale of PQS for continued use in the community of origin will be exempt from the right of first refusal. A sale will be considered to be for use in the community of origin if the purchaser contracts with the community to:
1. use at least 80 percent of the annual IPQ allocation in the community for 2 of the following 5 years (on a fishery by fishery basis), and
 2. grant the community a right of first refusal on the PQS subject to the same terms and conditions required of the processor receiving the initial allocation of the PQS.
- E. All terms of any right of first refusal and contract entered into related to the right of first refusal will be enforced through civil contract law.
- F. A community group or CDQ group can waive any right of first refusal.
- G. The right of first refusal will be exercised by the CDQ group or community group by providing the seller within 60 days of receipt of a copy of the contract for sale of the processing shares:
1. notice of the intent to exercise and
 2. earnest money in the amount of 10 percent of the contract amount or \$500,000 whichever is less.
- The CDQ group or community group must perform all of the terms of the contract of sale within the longer of:
1. 120 days of receipt of the contract or
 2. in the time specified in the contract.
- H. The right of first refusal applies only to the community within which the processing history was earned. If the community of origin chooses not to exercise the right of first refusal on the sale of PQS that is not exempt under paragraph D, that PQS will no longer be subject to a right of first refusal.
- I. Any due diligence review conducted related to the exercise of a right of first refusal will be undertaken by a third party bound by a confidentiality agreement that protects any proprietary information from being released or made public.

2. GOA First Right of Refusal

For communities with at least three percent of the initial PQS allocation of any BSAI crab fishery based on history in the community that are in the area on the Gulf of Alaska north of 56°20'N latitude, groups representing qualified communities will have a first right of refusal to purchase processing quota shares which are being proposed to be transferred from unqualified communities in the identified Gulf of Alaska area.

The entity granted the right of first refusal and terms and method of establishing the right of first refusal will be the same as specified in the general right of first refusal.

ATTACHMENT F

Temporary Emergency Exemption from Regionalization Requirement

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BACKGROUND/PROBLEM STATEMENT:

Harbors in the Northern Region, as defined in the Crab Rationalization Program, are periodically closed by the advance of the Bering Sea ice pack. This phenomenon tends to coincide with the opilio crab season during the winter months and in some years has proven to be disruptive to the unfolding of the crab fishery as the ice pack prevents harvesters from entering harbors such as the Saint Paul Harbor to deliver to shore-based processors located in the community.

These events have been sufficient in number for the harvesting sector to request Council consideration of a temporary exemption from regionalization requirements. During discussions of the Council appointed Crab Advisory Committee, various industry representatives indicated that the need for a temporary exemption would not necessarily always be to the detriment of the Northern Region as natural events such as an earthquake or tsunami, or man-made disasters such as a oil-spill could lead to closure of Southern Region ports. As such, a well-defined temporary exemption could be a valuable tool to the industry under a number of potential scenarios.

It is also clear however that the ability of industry to respond to an ice event is driven in large part by the economics and size of the fishery. The two most recent ice events during the 2006 and 2007 opilio fisheries coincided with exceedingly low opilio TAC levels and in the latter year a fire that affected the Steller Sea floating processor. With smaller TACs the profitability of NR crab operations is limited and additional steps that could be taken to remedy an ice event, such as bringing a tug or ice breaker, may be deemed to be not economic.

During the derby-style, high TAC 90's before crab rationalization was in place, however, ice events were not an impediment to the pursuit of the fishery and the industry was capable of taking steps to ensure delivery of crab to St Paul based processors such as bringing a tug to clear a path to the harbor.

The attached Options & Alternatives attempt to address concerns expressed by the industry regarding the need for emergency provisions and at same time ensure that communities are protected. The proposal essentially establishes a "checklist" or set of requirements that must be attempted or fulfilled by the harvesting and processing sectors before an emergency can be legitimately declared and a temporary exemption is put into place.

Alternative 1:

Status Quo: emergency relief from the regionalization requirement may be granted at the discretion of the National Marine Fisheries Service.

Alternative 2:

The FMP will be amended to allow emergency exemption from the regionalization requirement under the following circumstances, and in the following manner:

IFQ may not be used to deliver crab, and IPQ may not be used to process crab, derived from QS based on activities in a region, except in the geographic boundaries of that region, except that IFQ may be used to deliver crab and IPQ may be used to process crab outside of the region for which the IFQ and IPQ were designated if an unavoidable circumstance prevents crab delivery and crab processing within that region.

Element 1:

An unavoidable circumstance exists if the specific intent to conduct delivery and processing for a crab QS species in that region was thwarted by a circumstance that was:

- (A) Unavoidable;
- (B) Unforeseen and reasonably unforeseeable to the IFQ and IPQ holders; and
- (C) The circumstance that prevented the IFQ permit holder from delivering crab and the IPQ holder from processing that crab in the designated region actually occurred.

Element 2:

The IFQ and IPQ permit holder must provide written verification to NMFS that they took all reasonable steps to overcome the circumstance that prevented the IFQ permit holder from delivering crab, and/or the IPQ permit holder from processing that crab in the designated region, including, but not limited to,

(A) for an IFQ permit holder:

- (i) Delivering the crab to another processor for processing, or custom processing, in the same region;
- (ii) Transferring quota to one or more IFQ permit holder(s) to provide for a later delivery in the designated region;

(B) for an IPQ permit holder:

- (i) Arranging with another processor to have the crab custom processed in the same region;
- (ii) Bringing in another processing platform if the intended receiving processing facility is not operational;
- (iii) Providing a vessel to ensure passage in and out of the harbor if necessary to maintain the processing operation.

Written verification to NMFS shall include the names and other contact information for those persons and/or entities contacted, and a description of the efforts undertaken in order to mitigate the circumstances, prior to requesting emergency relief.

Element 3:

Neither the IFQ nor the IPQ holder will be exempt from any regional designation that may apply once the initial unavoidable circumstance is resolved.

Element 4:

(A) If sufficient opportunity remains during the season, after the unavoidable circumstance is resolved, the total amount of IFQ crab that was delivered and IPQ crab that was processed outside of the designated region during the period of the unavoidable circumstance, is required to be delivered and processed in the region where the unavoidable circumstance earlier occurred.

(B) If insufficient time remains in the season to accomplish this compensatory delivery, NMFS/ADF&G may extend the season to allow for compensatory delivery.

Element 5:

In the event that the unavoidable circumstance can not be resolved to allow for compensatory delivery during that season, as in Element 4, then the amount of crab processed in that season (Season A) outside of the geographic region in which it was designated to be processed, shall be added to the subsequent season's (Season B's) quota share for the geographic region in which the unavoidable circumstance earlier occurred.

Element 6:

No emergency relief from regionalization shall be granted if it is determined that such relief might result in localized depletion of crab stocks.

Appendix A

(Regulation for emergency relief from the now-expired cooling-off period, used as a model for parts of the proposed new action)

CFR 680.42 (b) (4) Before July 1, 2007, IPQ for the BSS, BBR, PIK, SMB, and EAG crab QS fisheries may not be used to process crab derived from PQS based on activities in an ECC, except in the geographic boundaries established in paragraph (b)(4)(iv) of this section, except that, before July 1, 2007:

(ii) IPQ in excess of the amounts specified in paragraph (c)(7)(i) of this section may be used outside the ECC for which that IPQ is designated if an unavoidable circumstance prevents crab processing within that ECC. For the purposes of this section, an unavoidable circumstance exists if the specific intent to conduct processing for a crab QS species in that ECC was thwarted by a circumstance that was:

- (A) Unavoidable;
- (B) Unique to the IPQ permit holder, or to the processing facility used by the IPQ permit holder in the ECC;
- (C) Unforeseen and reasonably unforeseeable to the IPQ permit holder;
- (D) The circumstance that prevented the IPQ permit holder from processing crab in that ECC actually occurred; and
- (E) The IPQ permit holder took all reasonable steps to overcome the circumstance that prevented the IPQ permit holder from conducting processing for that crab fishery in the ECC.

(iii) This provision does not exempt any IPQ permit holder from any regional designation that may apply to that IPQ.

Addendum to Saint Paul Proposal – 03/02/2008

Tax Arrangements Among Communities to Minimize Impacts of Such Exemptions –

The Saint George/Saint Paul Model

A model that could be of use to Council, Staff, and Crab Advisory Committee members as they evaluate the scope of a temporary emergency exemption from regionalization and its impacts on communities, is the agreement in place between Saint George and Saint Paul regarding the rebate of crab-derived taxes from one community to another.

After Saint George's harbor failed in 2005, the processors that had been based there, namely SnoPac and Peter Pan, requested that they be allowed to relocate their processing operations to Saint Paul. Given the dependence of St George's economy on these operations and the longstanding ties between both communities, the City Council of the City of Saint Paul adopted a Resolution in response to a request from the City of Saint George agreeing to rebate to Saint George its 3% city sales tax derived from SnoPac and Peter Pan. This agreement has been in place for the past two years and both communities agreed that Saint Paul would deduct 10% of Saint George's share of its tax to cover for administrative expenses and use of City of Saint Paul financial personnel.

To keep track of Saint George's corresponding tax, both SnoPac and Peter Pan submit a sales tax return to the City of Saint Paul and on the back of the return they label it "Saint George quota." This agreement has been facilitated by the fact that both communities apply a similar 3% sales tax.

Representatives of other communities have expressed that this type of agreement would be logistically unfeasible given differing tax rates and politically unrealistic. While this may be true and Saint Paul is not including this model in its proposed Options & Alternatives for Temporary Relief from Regionalization, the Saint Paul representatives believe that this model nonetheless offers tools that could be of use to communities under emergency circumstances and could be pursued through private contractual agreement as both Saint George and Saint Paul have done.

BERING SEA ARBITRATION ORGANIZATION
ALASKA CRAB PROCESSORS ARBITRATION ORGANIZATION

February 29, 2008

Mr. Mark Fina, Senior Economist
North Pacific Fisheries Management Council
605 W. 4th
Suite 306
Anchorage, AK 99501-2252

Re: Quasi-Judicial and Quasi-Legislative Immunity for Arbitration Organizations

Dear Mark:

We support the North Pacific Fisheries Management Council (the "Council") taking action to grant immunity from suit and damages to those entities and individuals involved in the administration, implementation, and operation of the binding arbitration system (the "Arbitration System") that is primarily codified at *50 CFR 680.20 et seq.* (the "Arbitration Regulations") under the Crab Rationalization Program (the "CR Program").

A. The Arbitration Organizations and their Functions.

NMFS and the Council made the Arbitration System an integral component of the CR Program. In doing so, they mandated that the Arbitration System not only be industry funded, but also industry implemented and operated. Pursuant to the Arbitration Regulations, arbitration organizations for the harvesting sector and for the processing sector (collectively, the "Arbitration Organizations") must administer, implement, fund, and operate the Arbitration System for the benefit of the crab fishing industry. NMFS and the Council have vested resolution of arising issues and the day-to-day workings of the Arbitration System almost entirely to the Arbitration Organizations.

One constant challenge for the Arbitration Organizations is that the Arbitration Regulations only provide a general framework. The administrators, officers, and legal counsel for the Arbitration Organizations have to develop the particulars of the Arbitration System based on what they believe to be intent of the Council and NMFS. In addition, quite frequently and often on very short notice, the administrators, officers, and attorneys for the Arbitration Organizations have to decide and implement solutions to sudden developments, such as determining the validity and timing of sharematching and the timing to commence binding arbitration or to agree to lengthy season approach when NMFS has to re-issue the IFQ and IPQ for each crab fishing year.

This results in the Arbitration Organizations and their administrators, officers, and legal counsel engaging in quasi-agency policy-making, regulatory implementation, and regulatory interpretation. To preserve the neutrality of their quasi-legislative activities within the scope of the Arbitration System, the Arbitration Organizations and their administrators, officers, and

Mr. Mark Fina, Senior Economist
North Pacific Fisheries Management Council
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legal advisors should be afforded the same quasi-legislative absolute immunity from third party suit and damages afforded agency personnel.

The Arbitration Organizations also hire the contract arbitrators, formula arbitrator(s), market analyst(s), and third party data providers mandated by regulation. The Arbitration Organizations also have hired the third party data provider that has set up and operates the extremely successful IFQ/IPQ "sharematching" system. As with the Arbitration Organizations, these independent contractors perform duties mandated by regulation. Preservation of their independence and neutrality is critical to their effective and fair performance of their duties. They should also be afforded immunity from third party suit and damages for their activities within the scope of the Arbitration System.

The Council and the Secretary expressly built the neutrality of the Arbitration Organizations into the CR regulations. The Arbitration Organizations are expressly precluded from advocating on behalf of their members. *50 CFR 680.20(e)(2)(6)*. Moreover, preserving the neutrality of the Arbitration Organizations is essential to the good faith, fair, and effective administration and operation of the Arbitration System. Because significant money is usually involved and an adverse result and decision can result in significant loss of revenue, price negotiations between harvesters and processors are often contentious. Losses are bitterly received. Whether contracting and dealing with the formula price arbitrator or the contract arbitrators, or engaging in day-to-day policy development and regulatory interpretation, the Arbitration Organizations must be allowed to operate independently from the unfettered advocacy positions of its members and the threat of suit for damages if a participant merely disapproves.

B. Immunity from Third Party Claims Authorized for the Arbitration Organizations and their Administrators, Officers, Legal Counsel, and Independent Contractors.

There is substantial statutory and case law precedent to allow NMFS and the Council to grant immunity, whether quasi-judicial or quasi-legislative, from third party suit and damages to the Arbitration Organizations, and their administrators, officers, legal counsel, and independent contractors within the scope of their activities on behalf of the Arbitration System.

1. Judicial Immunity.

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, at 349. It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the

Mr. Mark Fina, Senior Economist
North Pacific Fisheries Management Council
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most intense feelings in the litigants. The judge should not have to fear that unsatisfied litigants may hound him with litigation. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

2. Arbitral Immunity Appropriate for Contract Arbitrators and Formula Price Arbitrators.

Judicial immunity has been extended to apply to analogous functions; such as administrative law judges and officials in prosecution, presenting evidence, and adjudication, and to arbitrators contracted to perform judicial services by regulation or mandate.

In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court held that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suit for damages." *Id.* at 513. The Court added that federal administrative law requires that agency adjudication maintain many of the safeguards that are available in the judicial process. *Id.* "Persons subject to [agency hearings] and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. *Id.* at 514.

Arbitrators have also been granted absolute immunity while acting in the scope of their duties. Because an arbitrator's role is functionally equivalent to a judge's role, courts have uniformly extended judicial and quasi-judicial immunity to arbitrators. *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (1990). (Defective notice and improper selection of arbitration panel were sufficiently associated with adjudicative phase arbitration to justify immunity.) Like judicial and quasi-judicial immunity, arbitral immunity is necessary to protect decision makers from undue influence, and the decision-making process from attack by dissatisfied litigants. *Id.* at 886.

Furthermore, to effectuate these underlying policies, arbitral immunity also extends beyond the arbitrators themselves to organizations that sponsor arbitrations. *Id.* at 886-7; *Shrader v. NASD, Inc.*, 855 F.Supp. 122, 123-4 (E.D.N.C. 1994). Without this extension, arbitral immunity would be almost meaningless because liability would simply be shifted from individual arbitrators to the sponsoring organizations. *Austern*, at 886. Arbitral immunity protects all acts within the scope of the arbitral process. *Id.*

In a case analogous to the Arbitration Organizations, *Ozark Air Lines, Inc. v. National Mediation Board*, 797 F.2d 557 (8th Cir. 1986), the court granted immunity. That case dealt with a dispute regarding a pilot's retirement benefits. *Id.* at 559. The retirement benefits were administered via a board that was mandated by the Railway Labor Act. 45 USC §181. *Id.* The Railway Labor Act provided that a board be established to resolve certain disputes. *Id.* The board was unable to resolve the dispute, and the National Mediation Board was called to arbitrate the dispute. *Id.* at 560. The

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court ruled that the National Mediation Board enjoyed arbitral immunity, reasoning that an order entered against the board would force it to decide the appropriateness of each request for an arbitrator and would “seriously interfere with NMB’s neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose.” *Id.* at 564. See also *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982) (“Extension of arbitral immunity to encompass boards which sponsor arbitration is natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusory.”) Examples of roles granted arbitral immunity include serving as a member of a special joint dispute resolution committee, *Larry v. Penn Truck Aids, Inc.*, 567 F.Supp. 1410, 1415-16 (E.D.Pa.1983), notifying and selecting the arbitration panel, *Austern*, 898 F.2d at 886, and the sponsoring of arbitration proceedings, *Corey*, 691 F.2d at 1211.

Arbitral immunity has also been granted by statute to arbitrators working pursuant to 28 U.S.C. §655, Alternative Dispute Resolution.

(c) Immunity. All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

The contract arbitrators and formula report arbitrator hired by the Arbitration Organizations clearly share “enough of the characteristics of the judicial process” to also be immune from third party claims for damages. The contract arbitrators actually hear and decide Last Best Offer arbitrations. The formula price arbitrator issues a price formula for each active fishery that is frequently a material component in price negotiations and decisions. As with judges, administrative law judges, and board arbitrators mandated by statute, the contract arbitrators and formula price arbitrator should be afforded immunity because failure to do so would “seriously interfere” with their neutrality in processor-harvester relations, run counter to NMFS’ and the Council’s policies in creating the Binding Arbitration system, and retard its regulatory purpose.

Furthermore, following the reasoning in *Ozark Air Lines* and *Corey*, the arbitral immunity afforded the contract arbitrators and the formula price arbitrator must also extend to the Arbitration Organizations, and their administrators, officers, and legal counsel that hire and manage the independent contractors... otherwise the immunity extended to the independent contractors would be “illusory.”

3. Immunity Appropriate for Quasi-Legislative Functions of Arbitration Organizations.

In addition to arbitral immunity, it is also clear that when an agency exercises legislative and quasi-legislative regulatory authority, action for money damages against agency members

Mr. Mark Fina, Senior Economist
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will not lie. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In *TRPA*, members of a regional planning authority's governing board were granted absolute immunity from federal damages liability since they were acting in a legislative capacity. *Id.* at 406. The Court explained:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."

341 U.S., at 377, 71 S.Ct., at 788.

This reasoning is equally applicable to federal, state, and regional legislators. Whatever potential damages liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of *TRPA* acting in a legislative capacity.

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 at 405. *See also Jaylee Brand, Inc. v. United States*, 721 F.2d 385, 395 (D.C. Cir. 1983), holding that legislation is a function of absolute immunity, with the immunity following the function and not the office.

As in *TRPA*, the Arbitration Organizations should be afforded quasi-legislative immunity. The duties assigned to the Arbitration Organizations would normally fall to the agency, in this case, NMFS. Pursuant to the unique regulatory mandate of the Arbitration Regulations, the Arbitration Organizations and their administrators, officers, legal counsel, and independent contractors in effect stand in the shoes of the agency for the general benefit of the crab industry, acting in a quasi-legislative capacity in administering, funding, implementing, and operating the Binding Arbitration system. Under these circumstances, it is only fair and appropriate that the Arbitration Organization and their administrators, officers, legal counsel and independent contractors be afforded the same immunity from suit and damages afforded to agency members.

4. Scope of Immunity.

Immunity protects all acts within the scope of the arbitral and quasi-legislative process. The scope of immunity protects the protected party unless (s)he acts in clear absence of all jurisdiction. *See, Tucker v. Outwater*, 118 F.3d 930, 933 (2nd Cir. 1997).¹ Nevertheless, any grant of immunity to the independent contractors of the Arbitration Organizations does not exculpate them from all liability, only from liability from the claims of third parties. Pursuant to the express terms of their contracts with its independent contractors, the Arbitration Organizations still have the ability to proceed against its independent contractors for breach.

It is significant, however, that the Arbitration Organizations' retained ability to proceed against its independent contractors for breach further highlights the Arbitration Organizations' need for immunity. No Arbitration Organization should be exposed to third party claims as a result of its decision whether to sue one of its independent contractors merely because a claimant disapproves of the actions of the independent contractor.

When applying the principles of absolute judicial and quasi-judicial immunity, together with those of legislative and quasi-legislative immunity and arbitral immunity, it is clear that policy favors immunity for those directly and indirectly engaged in a process. The development of the Arbitration System, for example, is not completed by a single actor, but is rather the product of the work of many. To be effective, immunity must be granted to all involved in the process.

The Council and NMFS have charged the Arbitration Organizations (and its administrators, officers, legal counsel, and independent contractors) with the duty to make the Arbitration System work. To do so, we must engage in quasi-arbitral and legislative activities...activities that the courts clearly find require neutrality and independence to successfully perform. To preserve neutrality and independence the Arbitration Organizations and its administrators, officers, legal counsel, and independent contractors have to be able to avoid "the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." Neutrality and independence can only be preserved through immunity from third party claims.

¹ Courts have refused immunity when an architect's actions, when acting as an independent arbitrator, were characterized as delay or failure to decide, *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir.1977), *cert. denied*, 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978), when the arbitrator was considered an "agent" of a party, *United States v. City of Hayward*, 36 F.3d 832, 838 (9th Cir.1994), *cert. denied*, 516 U.S. 813, 116 S.Ct. 65, 133 L.Ed.2d 27 (1995) (arbitrator determined to be an agent of City when city regulations mandated arbitration), and where the acts complained of were outside of the arbitrator's jurisdiction), *Kemner v. Dist. Council of Painting & Allied Trades No. 36*, 768 F.2d 1115, 1119-20 (9th Cir.1985).

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February 29, 2008
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Very truly yours,
BERING SEA ARBITRATION ORGANIZATION

By:
Erling Jacobsen, Executive Director

ALASKA CRAB PROCESSORS ARBITRATION
ORGANIZATION

By:
L. John Iani, President

cc: Glenn Merrill, NMFS

Bering Sea Arbitration Organization

4917 Leary Ave NW Seattle, WA 98107
Phone (206) 784-8948 email: bsao@gmail.com

January 7, 2008

Mark Fina, Senior Economist
North Pacific Fisheries Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

Sam Cotton, Chairman
Crab Advisory Committee

Re: Bering Sea Arbitration Organization's Comments on CR Program Binding
Arbitration System for the Crab Advisory Committee

Dear Mark and Sam:

On behalf of the unaffiliated BSAI crab quota share and individual fishing quota holders, the Bering Sea Arbitration Organization ("BSAO") hereby submits for consideration of the Crab Advisor Committee of the North Pacific Fisheries Management Council, comments and proposed solutions and clarifications to the binding arbitration system primarily codified at *50 CFR 680.20 et seq.*

A fundamental issue is the extent to which a crab binding arbitration proceeding should resemble a full-blown trial. Drawing on major league baseball arbitration, the Council adopted a last, best offer ("LBO") form of arbitration because it is quick, cost-effective, and final. Additionally, and most importantly, an LBO system promotes settlement. The arbitrator cannot compromise; but rather, must select one of the two offers. Parties settle to avoid the potentially more severe impact of an uncertain offer.

The BSAO supports the LBO system of binding arbitration. Unfortunately, over the past 2 years issues have arisen and we have discovered that the current regulations may not adequately specify the parameters for the last best offer proceeding and the authority of the arbitrator in that proceeding. This letter identifies and proposes solutions to many of those issues.

To facilitate your evaluation, this letter contains two sections. Section I identifies particular issues the BSAO has encountered, discussions of those issues, and proposed remedies for the Committee to consider.

Section II outlines two general remedies that may go a long way toward correcting a number of the problems we have encountered implementing the binding arbitration system.

SECTION I: Particular Issues and Remedies

BSAO Administration.

1. The Content/Timing of the Arbitration Organization Reports Needs to Be Adjusted.

Discussion: The BSAO should only be required to report its membership roster to RAM. Also, the timing and content of the report needs to be reconsidered. The regulations require information the Arbitration Organizations don't have and don't want to have. All information from the currently required BSAO report was already reported in the initial QS application and is reported in subsequent annual IFQ/IPQ applications. If necessary, Erling Jacobsen, the Executive Director of the BSAO, will provide more comprehensive comments.

2. The Council needs to clarify whether the "costs for arbitrating performance disputes" in 50 CFR 680.20(h)(10)(iv) includes the parties costs to arbitrate.

Discussion. The regulation is unclear and could mistakenly be read to have the arbitration system pay the costs of the parties to a performance dispute. Clearly, the cost of the contract arbitrator is intended to be charged against the general fees collected from the IFQ/IPQ holders. The Arbitration Organizations have to set the annual fee assessed the IFQ and IPQ holder to implement the binding arbitration system based on anticipated costs against the system. To fulfill that duty, the Arbitration Organizations need the Council to clarify whether the "costs for arbitrating performance disputes" includes other costs, including the costs of the parties to the performance dispute.

Correspondingly, it might be expedient and cost-effective to provide a regulatory mechanism that allows the parties to a performance dispute arising from a crab contract that includes a "true-up" under an agreed percentage pricing formula to have an independent third party auditor review the IPQ holder's confidential sales and financial information to determine whether the IPQ Holder has complied with its contract with the IFQ Holder. In the event the parties could not mutually agree to an independent auditor, each party could appoint an independent auditor and those two auditors could select the single independent auditor to review the confidential financial data. If the Council determines that the existing regulation does not include such costs and implements such a mechanism, it would seem fair and reasonable to include the costs of that single independent auditor amongst those paid by the general fees collected for the binding arbitration system.

3. The Council should consider removing artificial impediments that unnecessarily complicate and effectively restrict IFQ Holders' access to arbitration. See, generally, 50CFR 680.20(h)(3)

Discussion: Many of the jurisdictional, arbitrability and other issues regarding implementation of the binding arbitration system arise because of the labyrinth surrounding access to arbitration.

The Council should remove the artificial impediments to initiating arbitration and should allow IFQ Holders to initiate arbitrations at any time during that crab fishing year. There would be no practical need for different kinds of arbitration approaches. Mutual agreement for Lengthy Season approach would be unnecessary if an IFQ Holder can initiate arbitration before or after commencement of season. The timing of the arbitration

decision could be based on the date of initiation. This would allow pre-season or post-season arbitrations as desired by the IFQ holder without the unnecessary complexity/restrictions of the current program.

The current arbitration structure was configured in response to issues (ie: last man standing, timing and preparation, etc.) that were adequately resolved by inclusion of the "lengthy season approach". In practice, we can see no advantage to harvesters or processors by any of the different approaches. Combining all "approaches" to arbitration eliminates confusing timing issues and achieves the same result in a more efficient manner.

4. Arbitrators Must Have the Authority to Decide on Jurisdiction/Arbitrability. See, 50 CFR 680.20(h)(1).

Discussion: The BSAO agrees with the Comment #2 of the ACPAO Memo that the arbitrator needs to have the power and authority to decide jurisdiction and arbitrability (the issue of whether the issue/case falls within the binding arbitration regulations).

As with the LBO decisions, the arbitrator's jurisdictional ruling needs to be issued without legal opinion or comment. The LBO arbitration system is predicated on prompt and efficient operation...prompt decisions/holding down costs. The decisions or rulings of arbitrators need to be binding. Therefore, as with LBO decisions and other procedural rulings, the decisions/rulings are not, and must not be, appealable. How many appeals should be allowed before an arbitrator's decision becomes "binding"? Allowing recourse to appeal would burden the program with additional time and expense and may open the door to take arbitration program decisions outside the intended (contracted) venues (with additional expense to parties?). Even if appeals were limited to hearing by contracted arbitrators, it is not in the best long-term interest of the program. It may also be used by IPQ holders to effectively annul the IFQ holder's current right to select an arbitrator from among the contracted arbitrators.

It is significant to note that these issues have previously primarily arisen in the context of whether an arbitration has been timely commenced. As discussed in Comment #7 above, that problem would be resolved if an IFQ Holder could initiate a binding arbitration at any time in the crab fishing year.

5. Market Analyst/Formula Arbitrator should not testify or comment in arbitrations.

Discussion. Neither the Market Analyst nor the Formula Arbitrator should be allowed to testify or provide comments in arbitrations. It is imperative and integral to the integrity of the system that the Market Analyst and Formula Arbitrator remain independent and above any appearance of preference. The reports are non-binding and any party to an arbitration can dispute the contents of any report.

Additionally, any attempts to influence the report or the factors considered in the reports by either processors or harvester needs to be prohibited. The processors seem to wish to turn the arbitrations into mini-trials, contrary to the intent in implementing LBO arbitration. The parties can make any arguments it needs based on the language in the reports.

6. Arbitrator shall presume against Party refusing to provide requested information. See, 50 CFR 680.20(h)(4)(iv).

Discussion: The regulations at 50 CFR 680.20(h)(4)(iv) currently allow a party to refuse to provide requested information to the arbitrator that the arbitrator believes would be useful in reaching a final decision. The regulations should be revised to allow the arbitrator to presume that the requested evidence would not support the party refusing to provide the requested information. Absent such authority, the arbitrations could be unfairly skewed, particularly if the requested information is not available to the other party. Absent such authority, parties could withhold damaging information without penalty. This issue is particularly significant in performance disputes, suggesting perhaps the practicality of independent auditors as discussed in Comment #4 above.

SECTION II: General Remedies.

A. Adopt General Statement of Intent.

The Council could adopt a general "Statement of Intent" to guide those persons subject to, implementing, and applying the regulations concerning the Binding Arbitration System codified at 50 CFR 680.20 et seq. We have learned the hard way that the current regulations are silent or unclear on a number of issues and that regulatory silence has been used to act contrary to the Council's intent. Some of the problems encountered are clearcut and can be simply and expressly clarified in the regulations. However, it is impossible to predict all of the issues that may arise and impractical for the Council to address each issue on an "ad hoc" basis. In those instances, with the "Statement of Intent", the Council could provide guidance to IFQ and IPQ holders, arbitration organizations, contract arbitrators, formula arbitrators, market analysts, third party data providers, and other interested parties in interpreting regulations and filling in the gaps in issues where the regulations are silent or unclear.

The Council could include a Statement of Intent in a new subsection (3) to 50 CFR 680.20(a) under the heading "Applicability."

The BSAO respectfully proposes the following text:

The binding arbitration system shall be conducted in a simple, timely, and cost-effective manner. Arbitration decisions shall be final and only identify the prevailing last best offer, without formal or informal comments. Arbitration evidence and materials shall remain confidential. Contract arbitrators shall have authority to make final and binding oral procedural, evidentiary, jurisdictional, and other rulings incident to the proceeding that shall be applicable only to that proceeding. To preserve the integrity of the system, contract arbitrators, formula arbitrators, and market analysts shall remain independent and shall discourage and disregard contacts not expressly authorized pursuant to the regulations, their contract(s) with the arbitration organizations, or the joint instructions of the arbitration organizations.

Very truly yours,
BERING SEA ARBITRATION ORGANIZATION

By: Erling Jacobsen, Executive Director

RECEIVED
MAR 13 2008

N.P.F.M.C.

**CITY OF KODIAK
RESOLUTION NUMBER 08-04**

A RESOLUTION OF THE COUNCIL OF THE CITY OF KODIAK REQUESTING NORTH PACIFIC FISHERY MANAGEMENT COUNCIL CONSIDERATION OF KODIAK COMMUNITY CONCERNS IN THE PENDING ANALYSIS OF THE BSAI CRAB RATIONALIZATION PROGRAM

WHEREAS, the City of Kodiak is dependent on our working waterfront—crew members, skippers, boat owners, processing plants and their workers; and

WHEREAS, the City of Kodiak's support sector is in turn dependent on a healthy working waterfront; and

WHEREAS, each fishery and gear type is important to the overall health of our community's economy, and the loss of access to any fishery causes negative impacts on the whole economy, as the community observed after the implementation of the BSAI crab rationalization program; and

WHEREAS, the leasing of individual fishing quota and the continued consolidation of the BSAI crab fishing fleet has resulted in a reduction of the historical value of the fishery to active participants; and

WHEREAS, the North Pacific Fishery Management Council (Council) has initiated an analysis of the 90/10 A share/B share split for review at the October 2008 meeting; and

WHEREAS, the City of Kodiak strongly agrees with the Council's statement in the draft purpose and need statement that "the optimal A share/B share split has not been analytically determined, nor was a clear analytical evaluation for the original 90/10 share split ever presented"; and

WHEREAS, the City of Kodiak supports the effort of the Council to move forward with this analysis by finalizing the draft purpose and need statement adopted at the Council's October 2007 meeting; and

WHEREAS, the City of Kodiak suggests strengthening the purpose and need statement by acknowledging that "any change to the existing 90/10 A share/B share split will have a direct impact on communities and crew, in addition to processors and harvesters, and these impacts should also be analyzed.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Kodiak, Alaska, that the North Pacific Fishery Management Council is urged to finalize the purpose and needs statement and develop and adopt a preliminary elements and options document for an analysis of the 90/10 A share/B share split at the April 2008 meeting.

BE IT FURTHER RESOLVED by the Council of the City of Kodiak that the elements and options document should include for analysis:

- A one-pie allocation (0/100 A share/B share split).
- A variable A share/B share split based on TAC levels.
- The implications of share leasing under each of the A share/B share splits analyzed.
- The consideration of allocation of C shares to crew for each A share/B share split analyzed, with the size of the allocation sufficient to benefit all active participants in the fishery.



CITY OF KODIAK

Casalyne Floyd
MAYOR

ATTEST:

Delva Mauler
CITY CLERK

Adopted: February 28, 2008

Maria Painter
3901 Woodland Dr.
Kodiak, AK 99615

03/26/08

MAR 26 2008

I am submitting this statement for review by Council members, the executive director, NOAA General Counsel, staff, Advisory Panel, Scientific & Statistical Committee and for the public, at the April 1st - 7th, 2008 meeting.

Under New or Continuing Business
C-2 BSAI Crab Management

(b) Refine problem statement and elements/options for analysis of 90/10 modification.

My name is Maria Painter of Kodiak, Alaska. I am a crab vessel owner and a Quota Share holder.

When the crab rationalization was adopted, the Councils statement of intent was to protect the interest of all participants. That protection was also intended for harvesters.

The 10% B share allocation does not provide negotiating leverage to harvesters. We are not allowed to sell our product on the free-market, we are forced to sell only to a few large buyers. By increasing the B shares to a minimum of 50% (50/50 split), there will be competition among all processors and therefore giving harvesters/small entities, fair negotiating leverage.

Crab fishermen are still fishing in inclement weather that compromises their safety, because of the time constraints the processors force on them. This again is due to the 90/10 split. This does not comply with the National Standard 10; "promote the safety of human life at sea".

The councils intended effect of the 90/10 split was to achieve equity between the harvester and processor sectors; for health, stability and competitive markets.

The "inextricably linked system" is so complex and over analyzed to the point of jumble that small entities/harvesters are without help.

In order to protect the interest of all, including the harvester, and to allow a stable and competitive market, the Council will need modify the A/B share split to at least a 50/50 split allocation.

Thank you,

Maria Painter

Source NPFMC

**PACIFIC NORTHWEST CRAB INDUSTRY ADVISORY
COMMITTEE (PNCIAC)**

c/o 4209 21st Ave. West, Ste. 403
Seattle, Washington 98199
360 440 4737
steve@wafro.com

March 21, 2008

Mr. Eric A. Olson, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

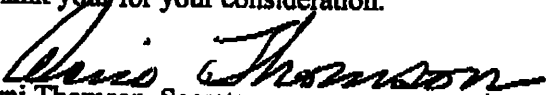
RE: Agenda Item C-2 Crab Management

Dear Eric:

I wish to submit the PNCIAC minutes from their meeting of February 28th, 2008. The meeting was called to review and address the Council's motion from the February meeting regarding Economic Data Reports (EDRs) and to make recommendations on proposals addressed at the March Triennial Board of Fisheries Statewide Shellfish Meeting.

I respectfully request that a representative of the PNCIAC have the opportunity to briefly present the PNCIAC motion and resolution regarding EDRs under Agenda item C-2 to the Advisory Panel and to the NPFMC.

Thank you for your consideration.


Arni Thomson, Secretary
PNCIAC

RECEIVED
MAR 21 2008
N.P.F.M.C.

**PACIFIC NORTHWEST CRAB INDUSTRY ADVISORY
COMMITTEE (PNCIAC)**

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February 28, 2008

PNCIAC Meeting Minutes from February 28, 2008.

Committee area and species: Bering Sea and Aleutian Islands, king and tanner crab

Committee present: Steve Minor, Chair, NPCA; Vic Scheibert, Trident Sfds.; Lance Farr, Kevleen K; Phil Hanson, UNISEA; Garry Loncon, Royal Aleutian Sfds. (via teleconference); Rob Rogers, Icicle Sfds.; Kevin Kaldestad, Mariner Boats; Keith Colburn, Wizard; Arni Thomson, Secretary, ACC; Absent: Tom Suryan, fishing crab; Gary Painter, Gary Stewart.

NMFS: Via teleconference, Brian Garber-Yonts, on the issue of EDRs for NPFMC; Heather Lazrus, NMFS/PSMFC, on crew data analysis issues.

Industry present: Dale Schwarzmiller, Peter Pan Sfds.; Paul Duffy and Louis Lefferrier, Pro Surveyor; Edward Poulsen, Sea Boats Coop; Margo Posten, MSDH/CBSFA; Mark Gleason, NPCA; Jim Stone, Ocean Hunter; Ken Tippett, Alaska Boat Co.; Shawn C. Doctermann, Crewmen's Association; Bing Henkel, Erla N; Doug Wells, Baranof.

Minutes:

1. Review and discussion of the NPFMC February motion on Economic Data Reports (EDRs):

Chairman Minor introduced the topic to the committee and Mr. Garber-Yonts. Minor noted that at their February meeting, the North Pacific Fishery Management Council (NPFMC) recommended that "... staff fully complete the metadata table and the analysts complete a public review of the metadata (including meetings with the industry and public) and report back to the Council on the output of the process."

Based on this recommendation, PNCIAC contacted Ron Felthoven and Brian Garber-Yonts of NMFS/AFSC to establish a process for industry review and input into the EDR metadata process. Garber-Yonts attended the PNCIAC meeting by teleconference, and based on this meeting, PNCIAC unanimously passed a resolution establishing a collaborative meeting and evaluation process with AFSC.

PNCIAC also appointed a sub-committee to focus on this issue, which includes Edward Poulsen, Steve Minor, Doug Wells, Brett Reasor (UNISEA) and Kevin Kaldestad. All sub-committee meetings will be open to the public, and we will try to provide reasonable advance notice.

PNCIAC motion/resolution adopted unanimous as follows:

Whereas, at their February meeting, the North Pacific Fishery Management Council (NPFMC) recommended that "... staff fully complete the metadata table and the analysts complete a public review of the metadata (including meetings with the industry and public) and report back to the Council on the output of the process," and

Whereas, the Pacific Northwest Crab Industry Advisory Committee (PNCIAC) is the duly-constituted industry advisory committee to the Council, with representatives from all sectors of the crab industry, and

Whereas, the Economic Data Reporting process is a permanent feature of the crab rationalization program, and the data collected and developed through the EDR process is intended for policy review and policy setting purposes;

Now therefore the PNCIAC adopts and recommends the following:

1. That, consistent with Council direction, a public meeting between PNCIAC and staff be convened upon completion of the draft metadata table, to inform PNCIAC and other industry members about the draft table, underlying assumptions and related audit results;
2. That immediately following that meeting a public review and comment period of no less than 45 days be established to provide feedback to staff;
3. That the staff evaluate the comments and recommendations provided by PNCIAC and the public, and incorporate those comments and recommendations where appropriate as a "second draft" to the metadata table;
4. That upon completion of the second draft, PNCIAC will organize a public meeting for a staff presentation of the revised metadata table;
5. It is anticipated that final comments and recommendations resulting from this process will be provided to the Council by PNCIAC after the presentation of the second draft.

2. Review of Board of Fisheries BSAI crab proposals:

Proposal 368: Support, unanimous, concur with ADFG staff comments, develop regulations for post-delivery transfers of CDQ crab that are consistent with the NPFMC approved federal regulation allowing for post-delivery transfers of IFQ crab.

Proposal 369: Support, unanimous, concur with ADFG staff comments that this proposal is needed to give ADF&G the latitude needed to assure adequate observer data is collected to help characterize the rationalized Bering Sea *C. bairdi* Tanner crab fishery.

Proposal 370: Support, unanimous, concur with ADFG staff comments, relieves vessel operators or agents from having to purchase a CFEC interim use card in order to register for rationalized king crab fisheries.

Proposal 371: Support, unanimous, concur with ADFG staff comments, same rationale as #370, applies to rationalized tanner crab fisheries.

In regards to the following Bering Sea king and tanner crab gear related proposals #372-#379, PNCLAC wishes to preface its comments by stating that it views all these proposals as being interrelated and the committee recognizes ADFG and DPS conservation, management and enforcement concerns. In addition, the committee wishes to express its intent to work within the Board of Fisheries committee process to hopefully work out compromises that will balance conservation, management and enforcement concerns with industry concerns to improve the economic efficiency of harvesting operations, namely to reduce expenditures on fuel.

Proposal 372: Neutral, unanimous, work with BOF and ADFG in committee.

Proposal 373: Neutral, unanimous, work with BOF and ADFG in committee.

Additional comment: During the course of discussions, the committee heard comments from the public concerning the current prohibition on directed fishing for *C. Bairdi* East of 163 degrees West and that this could result in foregone harvests in the future as the bairdi resource increases in abundance. (Current regulation only allows for incidental catch of bairdi in this area, while directed fishing for red king crab.) PNCLAC hopes for discussion with BOF and ADFG in committee.

Proposal 374: Support, unanimous, work with BOF and ADFG, DPS in committee to develop affidavit process that would satisfy ADFG concerns about gear sharing authorization, after a vessel is no longer validly registered in a fishery.

Proposal 375: Neutral, unanimous, work with BOF and ADFG, DPS in committee to resolve related concerns about the 14 day restriction on gear sharing.

Proposals 376 and 377: Support, unanimous, work with BOF and ADFG in regards to concerns about their proposal 373 regarding concurrent seasons for Western Bering Sea tanner crab harvest with snow and king crab harvests.

Proposals 378 and 379: Support, one objection, will provide economic benefits to harvesters in terms of cost savings on bait.

Proposal 380: Support, unanimous, need to develop future management plan for Pribilof red king crab in the event of a harvestable surplus being available. Work with BOF and ADFG in committee to develop additional protectionist measures available in the rationalized fisheries program that will address conservation concerns for depressed blue king crab stocks.

Proposal 381: Support, unanimous, work with BOF and ADFG in committee to reach a compromise on revising the TAC that would allow for access to a harvestable surplus, while not impeding the rebuilding of blue king crab.

Proposal 382: Support, unanimous to increase the size of cotton thread, work with BOF and ADFG in committee to reach a compromise on the size of cotton thread. PNCIAC recognizes conditions of heavy tides and stresses on the gear have a bigger impact in the Aleutian Islands, than the Bering Sea.

Proposal 383: Support, unanimous, work with BOF and ADFG in committee to address industry concerns about the need to develop and implement a harvest strategy that allows the flexibility for an increase in the AIGKC TAC. PNCIAC members reviewed current scientific papers and heard public testimony about CPUE, stock abundance and improved fishing practices in the rationalized fishery indicating that a revision of the harvest strategy and TAC is warranted.

Proposal 384: Support, unanimous, work with BOF and ADFG on a compromise extension of the 14 day restriction on gear storage in the AIGKC fishery, recognizing that different circumstances exist in this fishery than the Bering Sea rationalized crab fisheries.

Respectfully submitted,


Steve Minor, Chair
Pacific Northwest Crab Industry Advisory Committee

**PACIFIC NORTHWEST CRAB INDUSTRY ADVISORY
COMMITTEE (PNCIAC)**

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Seattle, Washington 98199
360 440 4737
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March 18, 2008

Mr. Eric Olson, Chairman
Mr. Chris Oliver, Executive Director
North Pacific Fishery Management Council

Sent Via Fax and E-mail

**Report to the North Pacific Fishery Management Council on Recommendations to
Improve Economic Data Reporting (EDR) Process**

Gentlemen,

In accordance with the Council's direction¹ at the February meeting, the PNCIAC met on February 28th with Brian Garber-Yonts and the general public to discuss the Economic Data Reporting (EDR) process, specifically the development of the metadata table and related documentation.

At that meeting, PNCIAC was provided a tentative schedule by Dr. Garber-Yonts and appointed an industry sub-committee to head up the review process. The sub-committee includes Kevin Kaldestad, Ed Paulson, Doug Wells, Brett Reasor and Steve Minor. These actions were formalized through a PNCIAC resolution with the concurrence of Dr. Garber-Yonts. See attached.

At the PNCIAC meeting a number of issues and questions were raised by both PNCIAC members and the public, a few of which include:

1. Concerns about data reliability both between data sets and across years;
2. The guidelines for determining what data is usable, what data should be rejected and what data may be used in a qualified manner;
3. How inconsistencies in industry accounting practices will be reconciled in the data sets, for instance some business owners prorate costs across fisheries while other owners track specific costs by fishery - another example: some vessel owners expense major items like engine repair while others amortize this expense;
4. Revenue reporting standards need to be established. PNCIAC believes that some revenue reporting is being done based on actual settlements including retroactive payments, while other revenue reporting is being done based on projections because of EDR and accounting deadlines;
5. A number of participants expressed concern about EDR methodology because reports and financials are generally based on the calendar year, but business transactions, revenue sharing and fishing seasons are defined by a "crab year" that runs from July 1 to June 30 of the following year, and

¹ Agenda Item C-1(b): The Council recommends that staff fully complete the metadata table and that analysts complete a public review of the metadata (including meetings with the industry and public) and report back to the Council on the output of that process.

6. Industry's experience to date with the EDR process raises a concern that there is no clear and consistent method established for collecting and allocating fixed costs, nor is there an established method for discriminating between crab-only businesses and multi-species operations.

These are just a few of the many questions and concerns raised at our February 28 meeting. We look forward to the release of metadata table and supporting documentation, and a thorough public and industry review process.

The process and schedule as discussed with Dr. Garber-Yonts will be:

- That on or about March 21, the draft metadata table and supporting documents will be provided to PNCIAC and the general public;
- That upon receipt of those documents PNCIAC will notice it's next meeting in the Federal Register, and convene it's sub-committee to begin it's review process;
- That at the PNCIAC meeting (anticipated to be in late April) PNCIAC will meet with staff and provide them with PNCIAC's comments, questions and concerns regarding the draft metadata table;
- That staff will review PNCIAC comments and recommendations, incorporating those that are pertinent and responding to those that may not be, and prepare a second draft metadata table for PNCIAC and general public review;
- It is PNCIAC's expectation that the EDR data (including the metadata table) will not be used until this review process is completed, and the metadata table is approved by the Council.

The Council recently adopted new crab over-fishing definitions after a similar public review process; which afforded industry time for positive input, an improved analysis and a better understanding of the new regulations for everyone. We want to thank the Council for the same opportunity provided industry and the public to provide input on the formation of the EDR metadata table.

Sincerely,


Steven K. Minor, Chair
PNCIAC

PNCIAC Resolution
Adopted Unanimously, February 28, 2008

Whereas, at their February meeting, the North Pacific Fishery Management Council (NPFMC) recommended that "... staff fully complete the metadata table and the analysts complete a public review of the metadata (including meetings with the industry and public) and report back to the Council on the output of the process," and

Whereas, the Pacific Northwest Crab Industry Advisory Committee (PNCIAC) is the duly-constituted industry advisory committee to the Council, with representatives from all sectors of the crab industry, and

Whereas, the Economic Data Reporting process is a permanent feature of the crab rationalization program, and the data collected and developed through the EDR process is intended for policy review and policy setting purposes;

Now therefore the PNCIAC adopts and recommends the following:

- 1. That, consistent with Council direction, a public meeting between PNCIAC and staff be convened upon completion of the draft metadata table, to inform PNCIAC and other industry members about the draft table, underlying assumptions and related audit results;**
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- 3. That the staff evaluate the comments and recommendations provided by PNCIAC and the public, and incorporate those comments and recommendations where appropriate as a "second draft" to the metadata table;**
- 4. That upon completion of the second draft, PNCIAC will organize a public meeting for a staff presentation of the revised metadata table;**
- 5. It is anticipated that final comments and recommendations resulting from this process will be provided to the Council by PNCIAC after the presentation of the second draft.**

PNCIAC
Pacific Northwest Crab Industry Advisory Committee

Report to the North Pacific Fishery Management Council

March 18, 2008

Mr. Eric Olsen
Mr. Chris Oliver
North Pacific Fishery Management Council

Sent Via Fax and E-mail

Gentlemen,

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3. How inconsistencies in industry accounting practices will be reconciled in the data sets, for instance some business owners prorate costs across fisheries while other owners track specific costs by fishery - another example: some vessel owners expense major items like engine repair while others amortize this expense;
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5. A number of participants expressed concern about EDR methodology because reports and financials are generally based on the calendar year, but business transactions, revenue sharing and fishing seasons are defined by a "crab year" that runs from July 1 to June 30 of the following year; and
6. Industry's experience to date with the EDR process raises a concern that there is no clear and consistent method established for collecting and allocating fixed costs, nor is there an established method for discriminating between crab-only businesses and multi-species operations.

These are just a few of the many questions and concerns raised at our February 28 meeting. We look forward to the release of metadata table and supporting documentation, and a thorough public and industry review process.

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Steven K. Minor, Chair
PNCIAC

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Adopted Unanimously, February 28, 2008

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MAR 25 2008

March 25, 2008

Mr. Eric Olson, Chairman
North Pacific Fishery Management Council
Anchorage, Alaska 99501

Re: Agenda Item C-2(b), BSAI Crab Management

Chairman Olson,

I am writing you today concerning issues recently raised in regard to the Eastern Aleutian Islands Golden King Crab fishery ("EAG").

To support their position that the EAG fishery should be made a "pure IFQ or B-share" fishery, some harvesters have consistently put forward the position that "... (t)hese fisheries were generally stable prior to rationalization¹..." and that it should be essentially removed from the program by converting it to a B-share only fishery. The only "problem" they identify is "... significant consolidation of the IPQ."²

Even a cursory examination of the evidence shows these statements to be false. We therefore ask that the Council take no action to change the EAG fishery.

1. The Eastern / Golden King Crab fishery was not stable prior to rationalization. Quite the contrary, the evidence we present below shows that the EAG fishery, and the EAG IFQ holders in particular are some of the largest beneficiaries of the BSAI crab rationalization program.

The Fleet has consolidated by 80% or more: The fleet that harvests EAG has consolidated down from an average of fifteen to nineteen vessels per year just prior to rationalization, to just three vessels this past season. **This is a fleet reduction of more than 80%, far more than the controversial consolidation of the Red King Crab and Opilio fleets. See Chart One.**

¹ Mike Stanley in correspondence to Crab Advisory Committee and to the Council, January/February 2007.

² Mike Stanley in correspondence to Crab Advisory Committee and to the Council, January/February 2007.

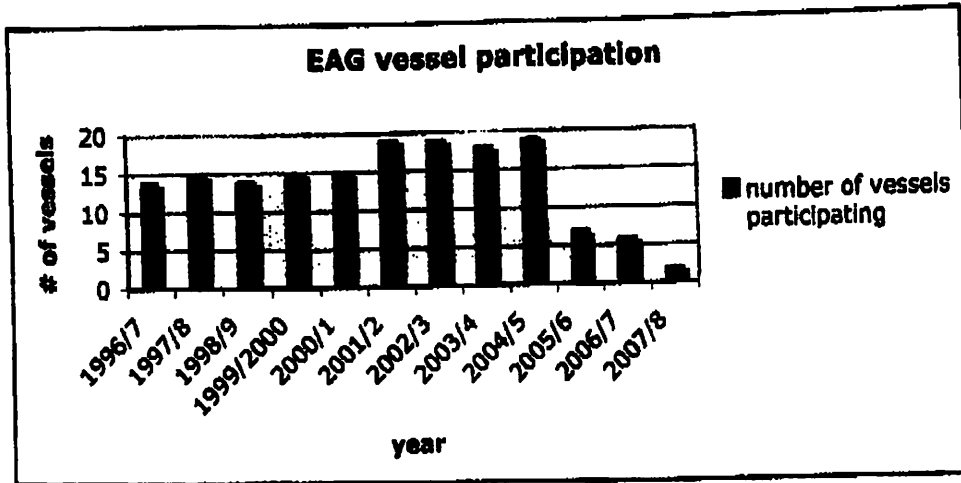


Chart One: Consolidation of the EAG Fleet

Rationalization ended a bitter "race for fish": In the last few years prior to rationalization, the EAG fleet was engaged in continuous debate about grounds preemption and pot limits. There was a dramatic and well-documented increase in the number of pots deployed by several vessels to "protect" their grounds. This abrupt end to this intense race for fish was the result of rationalization. It is amply illustrated in *Chart Two* below, which shows that pre-rationalization seasons had been reduced to just a few days; while active fishing in the rationalized environment now extends 250 days.

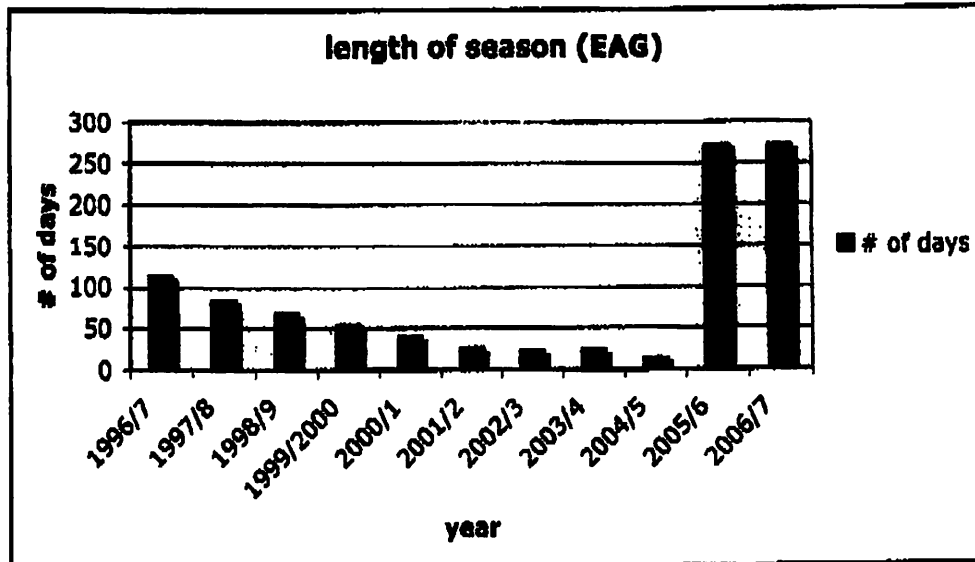


Chart Two: Fishing days pre- and post-rationalization

Landings per vessel have increased significantly under rationalization: maximizing efficiency and economic returns for IFQ holders. Just prior to rationalization, the fleet was approaching just one landing per vessel. This is the classic "race for fish" profile that often leads to rationalization – as it did for this fishery. Average landings now exceed five per vessel, due to dramatic fleet consolidation and extended fishing periods. See Chart Three.

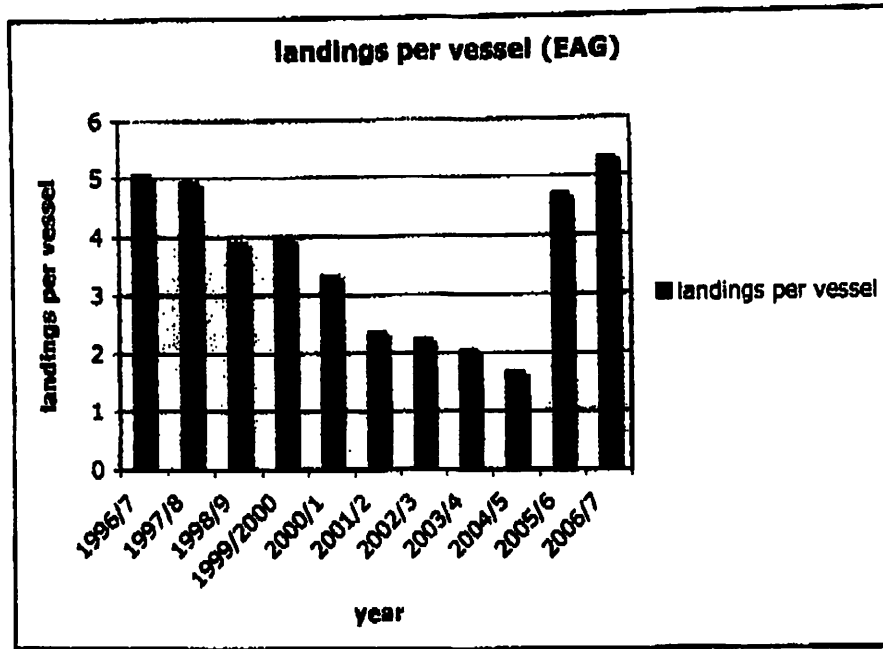


Chart Three: Landings per vessel, pre- and post-rationalization

CPUE's³ have also risen dramatically as a result of rationalization. The CPUE rate for this fishery has seen such a dramatic improvement under rationalization, the Board of Fish recently agreed to raise the TAC by 5% largely using CPUE as a substitute for a current survey. There is no doubt we should all benefit from the increase in TAC, and take comfort in the reduced stress on the stocks because of the longer soak times and reduced handling mortality; but this is also again an illustration of just how significant the EAG fleet's gains have been under this program. See Chart Four.

³ Catch Per Unit Effort.

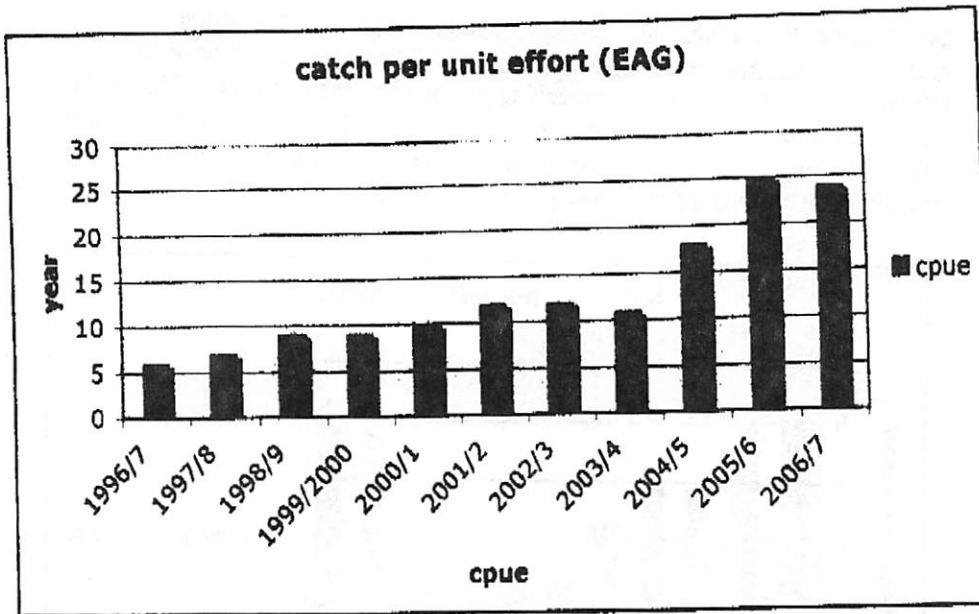


Chart Four. CPUE's both pre- and post-rationalization.

2. Consolidation of IPQ has been overstated, and there has been no measurable (negative) impact on the harvest sector. This seems like an odd claim when the most recent season resulted in:
 - A. A consolidated three-vessel fleet delivering to three different processing plants.
 - B. The rise of a new processor without prior PQS ownership in this fishery, who competitively leased IPQ to acquire A share crab and bought B/C share crab as well. This processor bought and marketed approximately 30% of the TAC in 2007/8. We would in fact argue that the new processor's leasing of IPQ from Icicle Seafoods, QSL and others gave him the foundation to compete aggressively for B/C share crab.
 - C. There were no binding arbitration events. As far as we know all final settlements have been paid without dispute.
 - D. The harvest sector partnered with the processing sector to ask the Council for a change in the custom processing use caps for this fishery to achieve even more efficiency for the industry (the Council has taken final action on this request and the custom processing use cap is now 60%). In light of this joint effort and the Council's action, the claim that there is now a problem because of "significant consolidation" seems confusing.

Finally, it should be noted that most of the IFQ and PQS in this fishery has changed hands since the program was implemented. In particular, please note that CDQ groups are now heavily invested in both sectors. This seems like an important milestone for those groups and Alaska in general.

In summary, I think that the evidence points to the EAG fleet as now one of the most consolidated, efficient and operationally effective --- all as a result of the crab rationalization program. A significant new processing entrant and a recovering market, combined with the Board of Fish decision to raise the TAC based on the improved CPUE's and better fishing practices that are a direct result of rationalization, should result in even better IFQ-owner returns in the near future. Those harvesters advocating change have not identified a real problem, and we do not think the evidence presented here illustrates anything other than a harvest sector that has benefited tremendously in the few short years since implementation.

Sincerely



Steven K. Minor
Managing Partner

North Pacific Fishery Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

RECEIVED
MAR 11 2008

N.P.F.M.C.

March 11, 2008

Mr. Secretary, Chairman Eric Olson, & NPFMC members,

RE: North Pacific Crab Rationalization FMP — Addressing Crewmember Rights

As you are fully aware, the past, present and future crewmen of the Bering Sea & Aleutian Islands (BS/AI) crab fisheries have been economically harmed as a result of not being initially allocated harvest shares in the CR Crab program.

A thorough legal review is needed to explain why the Crab Rationalization FMP varies so much, regarding crew rights, from Sustainable Fisheries Act (and other legal) requirements. This is especially true in light of the fact that rights of one segment of the 'vessel operators', the skippers (by 3% C-class shares), was legally provided for in part.

In fact, we are deeply affronted that not only were SFA requirements inadequately met by the FMP, but the Council and Secretary failed when National Research Council (NRC) and National Academy of Science recommendations were not reflected in 'the preferred alternative'. After all, we are 3 years into a program that has disenfranchised over 1,000 crewmen, and promoted lost compensation in the vessel operators/crew component in the neighborhood of \$40-50,000,000. This intentional economic marginalization brought about the virtual removal of access for new crew entrants and opportunities for existing participants to ascend in the North Pacific crab fisheries.

As a result of being disregarded as a stakeholders group in past FMP changes, *The Crewman's Association* took a special interest as the North Pacific Fisheries Management Council performed its 18-month overview, and undertakes the 3-year review. **One of the most outstanding problems to date is that our repeated attempts have yet to be met with a Council motion creating an agenda item in order to give crewmember concerns a regulatory placeholder in the Crab Rationalization review(s).**

The Council should stop dragging its flippers and immediately provide a regulatory placeholder in the BS/AI Crab Rationalization FMP to specifically address reallocation of crewmen historical participation rights to remedy the unjustifiable program design. Because including a few crewmen on a committee that handles other distinct but off-track topics, such as the 90/10 (A/B) share split and related program aspects, is completely inadequate for redressing the real problem. Likewise, addressing a wholly inadequate crew loan program that is years away carries its own insulting sting. Not only is \$3.5 million a mere fraction of the \$100 million or more required, crewmen should not have to buy back in to a fishery they historically participated in, often for decades. It ignores the human capital investment; and in the words of Abraham Lincoln:

"Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is superior to capital, and deserves the much higher consideration."

Moreover, while others know there is no existing placeholder (with no problem statement and purpose and needs statement centered on this specific issue, so that alternative may subsequently be outlined), The Crewmen's Association is still being pressured to submit "proposals". Making that all the more ridiculous is the fact that no historical data (from EDR reports, etc.) has yet been shared by NOAA economists, so that crew leaders can fully evaluate historical participation rights and submit meaningful requests or proposals for redress of the harms delivered by the FMP to date. The original alternatives included in May of 2002 mentioned a maximum of 20%, a far cry from the actual historical economic participation of, more likely, between 35% and 40% for all vessel operators (skippers, engineers, deckhands).

However, not yet submitting proposals does not mean that the crewmen are not expressing their economic rights — especially those outlined in the Sustainable Fisheries Act (SFA). Crewmen expect these rights to be upheld by a proper reallocation process regarding the directed access privilege crab quotas. Yes, this does mean that the vessel owners' quotas will be reduced — yet crew quotas will obviously be fished on these same vessels, by and large.

At the February 2008 NPFMC meeting in Seattle, we submitted public comment regarding SFA directives that were integrated in the May 2002 Bering Sea Crab program alternatives — Public Review Draft: (excerpted below, with bolding, underlines and italics added)

1.1.2.5 Sustainable Fisheries Act of 1996 (SFA):

{See page 8 in the May 2002 BSCR Program Alternatives}

Clarifications on IFQs —

The SFA clarified that IFQs (1) shall be considered permits, (2) **may be revoked or limited at any time** in accordance with procedures under the MSA, (3) **shall not confer the right of compensation to the holder if revoked or limited**, and (4) shall not create a private property right to the fish before the fish are harvested.

Requirement for the New IFO Programs —

(A) **establish procedures and requirements for review and revision of the terms of any such program (including any revisions that may be necessary once a national policy with respect to individual fishing quota programs is implemented), and, if appropriate, for the renewal, reallocation, or *re-issuance of individual fishing quotas***;

(C) **provides for a fair and equitable ... initial allocation of individual fishing quotas prevents any person from acquiring an excess share of the individual fishing quotas issued, and consider the allocation of a portion of the annual harvest in the fishery for entry-level fisherman, small vessel owners, and crewmembers who do not qualify for individual fishing quotas.**

Note: This not only implies that historically participating crewmembers will be included in the greater allocation of IFQs, but that those who crew and vessel owners do/did not qualify for historical or other rule-based allocations shall be accommodated by an allocation of a portion of harvests annually. Neither of those things has been done except for the token 3% skipper C-shares. This also coincides with Advisory Panel efforts to outline rights based on sea time and/or other elements of actual historical fishing vessel operation as a function

of fishermen at-sea, in 'participation' of the prosecution of crab seasons. This human capital right is a stark contrast to the cold monetary economics of rewarding only investment capital in the hands of distant vessel owners and other non-participants.

3.2.6.2. Stewardship {page 164}

The NRC report discusses ...Another component of stewardship is who owns the quota. Due to the ownership structure of the BSAI crab fisheries, the majority of the quota will be issued to vessel owners who do not fish. Proponents of the initial allocation of skipper/crew shares and owner-on-board provisions advocate that these options would improve stewardship because fishers will have ownership in the resource.

3.3.2 Initial Allocation of QS (or Cooperative shares) {page 193}

National Research Council Report Recommendations

The NRC report on IFQs, "Sharing the Fish", advises that an initial allocation should widely distribute shares to avoid granting windfalls to a few participants in the fishery.Share distribution should consider investments of time and capital (human) in the development of the fishery. Crew exposed to safety risks might also be considered to have invested in the fishery. A broad distribution might consider the distribution of shares to skippers, crews and processors.

Catch history is frequently relied on for determining the distribution of shares because it is perceived to be a fair measure of participation. Allocation based on catch history, however, can have unintended or onerous consequence.

4.2 section 303 (a)(9)-Fisheries Impact Statement {page 423}

Under the alternatives, allocations would be based on historical participation of eligible participants.

The statement above was not adhered to as all crewmen of the CR Crab program were historical participants and were eligible since all vessels over 20 tons are required by law to have contracts for their crewmen as listed by:

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Section 10602 Recovery of wages and shares of fish under agreement: and section 10603 Seamen's duty to notify employer regarding illness, disability and injury.

Note: 'Gifting' the investor/boat owners with 97% of the IFQs did not fit the requirements of National Standard #4: {refer to page 17 &18 of NS 36 page document}

Sec. 600.325 Allocations:

(c) Allocation of fishing privileges. An FMP may contain management measures that allocate fishing privileges if such measures are necessary or helpful in furthering legitimate objectives or in achieving the OY, and if the measures conform with paragraphs (c) (3) (i) through (c) (3) (iii) of this section.

(1) Definition. An "allocation" or assignment" of fishing privileges is a direct and deliberate distribution of the opportunity to participate in a fishery among identifiable, discrete user groups, or individuals. Any management measure (or lack of measurement)

has incidental allocative effects, but **only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of Standard 4.**

Excerpt from NS 4: Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; ...and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

It has been a month since the Seattle NPFMC meeting, giving ample time for the Council and the Secretary to explore the SFA and how it was not fully applied to the CR Crab program with regards to crewmen and community protections. Consequently, we respectfully ask that all of the Council members and the Secretary please respond to this email with due diligence. Please keep in mind these points made in early (and current) testimonies to the Council and Secretary by crab crewmembers and communities:

- The quotas are selling as if property rights, yet these resources are public commons, and international treaties surely disallow grants of dominance to specified corporations in global trade within resource industries by any nation.
- The exorbitant crab quota lease rates offer room for readjustment; and high rents in the realm of 60% to 70% demonstrate the de facto property taking;
- The council's 2002-03 economic analysis was not released in a timely fashion;
- Analysis of whether or not to do crab and other 'rationalizations' was not prepared and sent to the Congress in a timely manner, as required by law;
- The Senate Appropriations Committee usurped jurisdictional authority from the Commerce Committee and violated other proper legislative due process;
- The June 2002 minority report predicted most of the negative consequences (e.g. unnecessarily complex regulations; not addressing resource conservation goals; artificially allocating market shares; constituting economic protection of competitors not competition itself; accelerating unstoppable consolidation, and granting excessive power to foreign entities over a public resource);
- A two-year dramatic price decline occurred in king crab and opilio crab prices; and no subsequent analysis nor Justice Department review has been undertaken;
- With no definition of fishermen or harvesters in the MSA to guide allocations, the rights of vessel operators as participants, and their historical investments of human capital, were arbitrarily and capriciously dismissed;
- The 1-2-3 pie concepts are imperfect economic theory without practicable substantiation in the real world, especially since foreign-controlled economic structures and concomitant cross-border profit laundering strategies were wholly ignored; and clear legal solutions such as FCMA seller rights and other alternatives were not analyzed;
- Lengthier seasons weaken sellers and increased inefficiencies in plant worker revenues and imposed costs on fleets for standby time and other factors;
- There has been a lack of promised value-added production in crab, which is also a flaw demonstrated during the first year of the Rockfish Pilot Program.

- Crews, plant workers and communities have no official say in arbitration, yet suffer losses and costs, whereas the Council's chosen standard of focus on preserving the division of revenues (not rents) between only processors and vessel owners forms a basis for rights to negotiation should, for example, efficiency gains not accrue to the sector creating those productivity/cost gains.

It should be equally valid for crews and others to have legal recourse through arbitration to losses or harms that arguably accrue as inequitable gains by others at their expense. Thankfully, the experimental nature of the Crab Rationalization FMP and the Council's ability to modify, reallocate and otherwise adjust or dismantle the BS/AI Crab management regime offers a forum, if only the council will put forth a motion for an FMP regulatory placeholder for these specific concerns (apart from 90/10 analysis).

' Surely a fair allocation of historical participation rights and economic rewards to the vessel operators — skippers and crewmembers who are independent businesses — could be attainable at the Council level. Otherwise, you're giving crewmembers no other recourse but judicial review. However, filing a lawsuit in order to take steps to resolve our disenfranchisement resulting from this onerous FMP program is an option we are prepared to undertake.

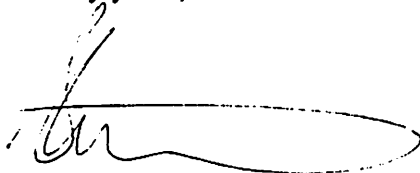
We hope that the NPFMC and the Secretary will immediately take steps to repair this program: since it was never allowed Due Process in the U.S. Senate Commerce Committee and in the Subcommittee on Oceans, Fisheries and Coast Guard, as well as at the U.S. House Natural Resource Committee and its Subcommittee on Fisheries.

Thank you for the opportunity to present our problems with a cumbersome and unfair program that did not fulfill its assurances, as the chairman of the NPFMC promised in a Council letter to Congress on August 5, 2002:

"Rationalization will improve economic conditions substantially, for all sectors of the industry. Community concerns and the need to provide for economic protections for hired crew will be addressed." — David Benton, NPFMC Chair

Respectfully, it is time do to so. We look forward to your correspondence so that this matter can be resolved forthwith.

Sincerely yours,



Shawn C. Dochtermann
Secretary-Crewman's Association
PO Box 3886
Kodiak, Alaska
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 Fax: (907) 592-4262
 Email: rwhitehead@adaktu.net

March 18, 2008

Dear Paul Padgett,

Your letter, dated March 17th, 2008, stated that "the crab rationalization program did not harm our community". That is as far from the truth as your nearest shore plant 450 nautical miles from here.

As you can clearly see from the enclosed table below, provided by the State Of Alaska, our tax dropped significantly the year the crab plan was implemented (2005/2006). You might ask our Fire Chief, who we were forced to lay-off, if he believes this. If still not satisfied then check with our full time police officer who was also laid-off. As a result of the crab rationalization program, the city of Adak was forced to eliminate 75% of its employees. I have requested that our shore based processor, Adak Fisheries, on which you place the blame for our demise, to respond on its own behalf. However it is a fact, Mr. Padgett, that the Crab Plan effectively reduced Adak's ability to legally buy and process from above 2million lbs of crab annually to less than one quarter of that. This came as a result of the illogical way the NPFMC choose the qualifying years for IPQ's, and there is no way Adak Fisheries could have circumvented the laws by "taking advantage of the system" as you are stating.

from "SHARED TAXES AND FEES - ANNUAL REPORT" - STATE OF ALASKA							
Municipality	FY2002	FY 2003	FY 2004	FY2005	FY2006	Difference 2005 to 2006	% change
Adak	\$262,144	\$364,304	\$388,450	\$301,108	\$140,837	-\$160,271	-53.2%
Akutan	\$545,619	\$599,706	\$643,898	\$644,267	\$761,019	\$116,752	18.1%
Unalaska	\$6,600,476	\$5,381,214	\$6,870,075	\$6,492,111	\$7,693,414	\$1,201,303	18.5%

● Page 2

March 18, 2008

More important it is the many people who have established their lives here that we are fighting for. You are threatening the jobs many family fathers and mothers have with Adak Fisheries or other entities and services which are indirectly dependent on Adak Fisheries and fish landings. The local school went from having 20 students to 11 students directly resulting from the loss of jobs due to crab rationalization. Our community realizes that Cod has become our last life-line after the crab was taken away from this region and brought to the Bering Sea. Additional processing capacity was freed up as a result of the crab plan and other fisheries being rationalized. Even though the Aleutian Islands cod is genetically different and separate species from the Bering Sea it is still managed as one stock through a combined BS/AI fishery management plan. As fishing effort increased in the BS, this made the cod fishery in the AI and Adak almost moot since the fishery now closes the same week as the cod traditionally arrive in Adak, the first week of March. To compensate for this and help relieve Adak, the State assisted in creating a State water fishery with a minimum amount of cod needed to support Adak. It is this Adak relief fishery that you are now targeting.

During the federal closure, after noticing the significant decline in deliveries of p-cod to Adak, I visited with some of the captains to find out why the Adak fleet was no longer delivering to Adak's local shore-side processor. The answer that I received from a captain of the B&N boats, the most important supplier to Adak during all years, was that you owned and/or controlled their fleet. I further understand from other "independent" captains that if these vessels did not sell to the Independence they would lose their markets with Trident in other locations not only in Alaska but outside as well. You refer to these boats as an "independent" fleet, but it seems accurate to refer to them all as the "Independence fleet". These vessels, which for many years delivered faithfully to Adak's local shore side processor, now mysteriously quit all in one year. Were they ordered to deliver their fish to the Independence or face irreparable consequences?

Because of this Trident's monopoly on the p-cod fisheries the community of Adak is in jeopardy of folding. It is your action this year which has almost killed our community.

You have brought this community to a desperate situation, and a state of emergency exists out here as a result of your directives.

There is no doubt that you, from your base in Seattle WA, have built an empire in the State of Alaska. To your bottom line processing AI P-Cod has very little impact, but to us it is our life-line. Although Adak Fisheries keeps the plant open for the small boats and local residents during the summer season, it makes the majority of its income during A-season and then relies and survives upon that for the rest of the year. Do you have plans to process halibut, black cod, and p-cod during slow summer and fall this year on the Independence if Adak Fisheries no longer can justify to stay open during those months, or are you here just to skim the cream off the top and then move on to your more profitable fisheries such as herring and salmon in other parts of

● Page 3

March 18, 2008

Do you remember when Adak Fisheries applied last year to the Council under the provisions of the AFA to be allowed to bring a floater into the Bering Sea to buy Pollock at St. Paul, a community with no Pollock processing? Trident testified that this would harm Bering Sea communities and processing companies, but you still did the same thing you testified against. If you understood this then you harmed us with purpose.

Sincerely,



Rod Whitehead, mayor of Adak

CC Governor Palin

Sen. Stevens

Sen. Murkowski

Congressman Young

North Pacific Fishery Management Council
604 West 4th Avenue Suite #306
Anchorage, Alaska 99501

187th Plenary Session – April 1-7, 2008
Hilton Hotel Anchorage, Alaska

Public Comment: Crewman's Association

RE: C-2 (b) BSAI Crab Management

By: Mr. Shawn C. Dochtermann
Kodiak, Alaska
Tel: (907) 486-8777

MAR 2 2008

Mr. Secretary, Chairman Eric Olson, & NPFMC members,

RE: North Pacific Crab Rationalization FMP — Addressing Crewmember Rights

As you are fully aware, the past, present and future crewmen of the Bering Sea & Aleutian Islands (BS/AI) crab fisheries have been economically harmed as a result of not being initially allocated harvest shares in the CR Crab program.

A thorough legal review is needed to explain why the Crab Rationalization FMP varies so much, regarding crew rights, from Sustainable Fisheries Act (and other legal) requirements. This is especially true in light of the fact that rights of one segment of the 'vessel operators', the skippers (by 3% C-class shares), was legally provided for in part.

In fact, we are deeply affronted that not only were SFA requirements inadequately met by the FMP, but the Council and Secretary failed when National Research Council (NRC) and National Academy of Science recommendations were not reflected in 'the preferred alternative'. After all, we are 3 years into a program that has disenfranchised over 1,000 crewmen, and promoted lost compensation in the vessel operators/crew component in the neighborhood of \$40-50,000,000. This intentional economic marginalization brought about the virtual removal of access for new crew entrants and opportunities for existing participants to ascend in the North Pacific crab fisheries.

As a result of being disregarded as a stakeholders group in past FMP changes, *The Crewman's Association* took a special interest as the North Pacific Fisheries Management Council performed its 18-month overview, and undertakes the 3-year review. One of the most outstanding problems to date is that our repeated attempts have yet to be met with a Council motion creating an agenda item in order to give crewmember concerns a regulatory placeholder in the Crab Rationalization review(s).

The Council should stop dragging its flippers and immediately provide a regulatory placeholder in the BS/AI Crab Rationalization FMP to specifically address reallocation of crewmen historical participation rights to remedy the unjustifiable program design. Because including a few crewmen on a committee that handles other distinct but off-track topics, such as the 90/10 (A/B) share split and related program aspects, is completely inadequate for redressing the real problem. Likewise, addressing a wholly inadequate crew loan program that is years away carries its own insulting sting. Not only is \$3.5 million a mere fraction of the \$100 million or more required, crewmen should not have to buy back in to a fishery they historically participated in, often for decades. It ignores the human capital investment; and in the words of Abraham Lincoln:

"Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is superior to capital, and deserves the much higher consideration."

Moreover, while others know there is no existing placeholder (with no problem statement and purpose and needs statement centered on this specific issue, so that alternative may subsequently be outlined), The Crewmen's Association is still being pressured to submit "proposals". Making that all the more ridiculous is the fact that no historical data (from EDR reports, etc.) has yet been shared by NOAA economists, so that crew leaders can fully evaluate historical participation rights and submit meaningful requests or proposals for redress of the harms delivered by the FMP to date. The original alternatives included in May of 2002 mentioned a maximum of 20%, a far cry from the actual historical economic participation of, more likely, between 35% and 40% for all vessel operators (skippers, engineers, deckhands).

However, not yet submitting proposals does not mean that the crewmen are not expressing their economic rights — especially those outlined in the Sustainable Fisheries Act (SFA). Crewmen expect these rights to be upheld by a proper reallocation process regarding the directed access privilege crab quotas. Yes, this does mean that the vessel owners' quotas will be reduced — yet crew quotas will obviously be fished on these same vessels, by and large.

At the February 2008 NPFMC meeting in Seattle, we submitted public comment regarding SFA directives that were integrated in the May 2002 Bering Sea Crab program alternatives — Public Review Draft: (excerpted below, with bolding, underlines and italics added)

1.1.2.5 Sustainable Fisheries Act of 1996 (SFA):

{See page 8 in the May 2002 BSCR Program Alternatives}

Clarifications on IFQs —

The SFA clarified that IFQs (1) shall be considered permits, (2) may be revoked or limited at any time in accordance with procedures under the MSA, (3) shall not confer the right of compensation to the holder if revoked or limited, and (4) shall not create a private property right to the fish before the fish are harvested.

Requirement for the New IFO Programs —

(A) establish procedures and requirements for review and revision of the terms of any such program (including any revisions that may be necessary once a national

policy with respect to individual fishing quota programs is implemented), **and, if appropriate**, for the renewal, **reallocation**, or re-issuance of individual fishing quotas;

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Note: This not only implies that historically participating crewmembers will be included in the greater allocation of IFQs, but that those who crew and vessel owners do/did not qualify for historical or other rule-based allocations shall be accommodated by an allocation of a portion of harvests annually. Neither of those things has been done except for the token 3% skipper C-shares. This also coincides with Advisory Panel efforts to outline rights based on sea time and/or other elements of actual historical fishing vessel operation as a function of fishermen at-sea, in 'participation' of the prosecution of crab seasons. This human capital right is a stark contrast to the cold monetary economics of rewarding only investment capital in the hands of distant vessel owners and other non-participants.

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competition itself; accelerating unstoppable consolidation, and granting excessive power to foreign entities over a public resource);

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We hope that the NPFMC and the Secretary will immediately take steps to repair this program: since it was never allowed Due Process in the U.S. Senate Commerce Committee and in the Subcommittee on Oceans, Fisheries and Coast Guard, as well as at the U.S. House Natural Resource Committee and its Subcommittee on Fisheries.

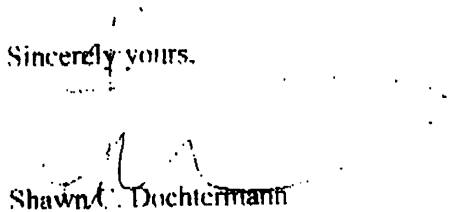
Thank you for the opportunity to present our problems with a cumbersome and unfair program that did not fulfill its assurances, as the chairman of the NPFMC promised in a Council letter to Congress on August 5, 2002:

"Rationalization will improve economic conditions substantially, for all sectors of the industry. Community concerns and the need to provide for economic protections for hired crew will be addressed." — David Benton, NPFMC Chair

Respectfully, it is time do to so

The Crewman's Association has taken the time to bring the following facts forward and we strive to restore the historical compensation and rights due vessel operators who risk their lives every day harvesting the North Pacific crab stocks.

Sincerely yours,



Shawn C. Dochtermann
Secretary-Crewman's Association
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United States Senate
 COMMITTEE ON COMMERCE, SCIENCE,
 AND TRANSPORTATION
 WASHINGTON, DC 20510-0125
 September 5, 2003

Senator Stevens, Chairman
 Committee on Appropriations
 S-128 Capitol Building
 Washington, DC 20510-6025

Dear Senator Stevens:

We are aware of your support for the Bering Sea and Aleutian Islands crab fisheries rationalization plan, which includes controversial provisions for allocating individual processor quotas (IPQs). We are requesting your cooperation in ensuring that any Senate action on this plan and other fisheries authorizations be handled by the Commerce Committee, which has jurisdiction over this subject matter.

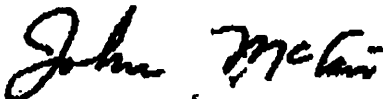
As we learned during the May 20, 2003 Commerce Committee hearing, which you chaired, on the Bering Sea/Aleutian Island Crab Rationalization Plan, this proposed program raises a number of very serious issues regarding the processes through which ex-vessel crab prices are determined and competition is maintained in the processing sector.


Furthermore, on August 27, 2003 R. Hewitt Paté, Assistant Attorney General of the U.S. Department of Justice Antitrust Division, wrote a letter to James R. Walpole, General Counsel of the National Oceanic and Atmospheric Administration (NOAA), in which he opposed the IPQ provisions of the crab plan, stating "processor quotas are not justified by any such beneficial competitive purpose" and that "The Department urges NOAA to oppose IPQ."

If approved by Congress, the IPQ provisions of the proposed crab rationalization plan would significantly change U.S. fisheries policy. Considering the magnitude of this change and the many grave concerns with the economic justification for this plan, we respectfully suggest that the Commerce Committee should continue its oversight of this matter. Until the above concerns are addressed to the satisfaction of the Committee and the Department of Justice, we must strenuously oppose any effort to approve IPQs through the Appropriations Committee.

We appreciate your consideration of our request to allow the Commerce Committee to continue its investigation of IPQs. We look forward to working with you on this and other fisheries legislative issues of common concern.

Sincerely,


 John S. McCain
 Chairman


 Olympia Snowe
 Chairman, Subcommittee on Oceans,
 Fisheries, and Coast Guard

Senator Ted Stevens

U.S. Senate
Washington, D.C. 20510

November 10, 2003

Dear Senator Stevens:

As President Pro Tempore of the Senate, you know as well as anyone in the Senate, and better than most, the value and importance of adherence to Senate procedures and process. Also, as one of the primary authors of the Sustainable Fisheries Act in 1996 and outspoken advocate for the use of the Fishery Management Council process for managing America's fish resources, you know the importance of public participation in the fishery management process. I was surprised, therefore, to hear at a meeting in Washington this past week that you are attempting to circumvent the established rules of the Senate and provisions of the Sustainable Fisheries Act with a stealth rider on the Commerce, Justice, State Appropriations Bill. Such an action seems unworthy of the Senator whose name carries the very Magnuson Stevens Fishery Conservation and Management Act that you helped to amend with the Sustainable Fisheries Act barely half a dozen years ago.

There are serious problems with your proposal that is designated as Title IX of the CJS Appropriations Bill, problems that I would have assumed that you would have recognized and avoided. Since these problems still have not been addressed, even after very broad coalitions of fishermen, conservationists, scientists and your fellow members of Congress pointed them out, I must assume that your busy schedule has not allowed you to fully consider them. In summary fashion then, these are the problems with Title IX that can only be addressed by removing the entire title and allowing the processes that you so frequently endorse to be followed in the North Pacific as they are in the rest of the United States:

1. The limitation on funding for implementation of the Essential Fish Habitat requirements is a denial of the public process that is currently underway in the North Pacific Fishery Management Council.
2. That same limitation denies even the possibility for the very scientific research that you insist is necessary for the Council to do its work fairly and appropriately.
3. That same limitation virtually guarantees the continued destruction of deep sea coral gardens that the head of Fisheries for the National Oceanographic and Atmospheric Administration has determined to be Habitat Areas of Particular Concern warranting special protection.
4. The provision that creates a cabal of processors which are granted exclusive rights to receive and process North Pacific crab resources was found to be anti-competitive by the Justice Department and to be potentially in violation of Anti-trust laws.
5. That provision for "Processor Quotas" or PQs would create the very kind of combination in restraint of free trade that the National Research Council, in the report "Sharing the Fish", said was unnecessary even if an IFQ system for fishermen were to be established.

6. The inclusion of a section of the rider favoring a corporation that your son lobbies for and on whose board of directors your son sits presents an unfortunate but undeniable perception of a very raw and disturbing conflict of interest.

7. The provision to institutionalize a destructive bottom trawling fishery for Aleutian Rockfish at the very time that the National Research Council findings on the damaging impacts of trawling on habitat are being considered by the councils and the courts is counterproductive and unnecessarily violates reasonable conservation principles.

8. The provision that opens thousands of acres of ocean floor, that have been closed to fishing for the past several years in order to protect endangered Steller sea lions, flies in the face of the caution that you have so frequently praised as a conservative approach to fisheries management in the North Pacific.

Any reasonable reading of the clear language of your proposal leads inexorably to the conclusion that these are not incidental or coincidental problems with your Title IX rider but the clear and intended results of it.

Please rethink and reconsider your position on this matter and allow the Senate process and the public process to proceed by withdrawing the Title IX and proceeding with the CJS Appropriations bill.

Sincerely,
Ralph Nader
P.O. Box 19312
Washington, D.C. 20036

Ad Hoc Crab Coalition
Alaska and the Pacific Northwest

March 18, 2008

Mr. Eric A. Olson, Chairman
North Pacific Fishery Management Council
Anchorage, Alaska 99501-2252

Agenda Item C-2(b): BSAI Crab Mgt, Crab Problem Statement

Chairman Olson:

Nearly one year ago, Council staff completed the "18 Month Review" of the Bering Sea crab rationalization program. The 18 Month Review was specifically focused on the A/B share split and any unintended consequences arising from that aspect of the "Three Pie Voluntary Cooperative" unanimously approved by the Council in 2002, and authorized by Congressional legislation.

The 18-Month Review did not identify any significant or unanticipated consequences resulting from the A/B share split.

During this same time period there have been at least five (5) other studies and/or reports looking at the same set of issues. Some of these studies (listed below) have been specifically commissioned based on the assumption that there were severe, unintended consequences as a result of the A/B share split. To date, none of these studies have been able to document any significant or unanticipated consequences resulting from the original program design. These studies include:

1. "Selected Economic Impacts of Crab Rationalization on Kodiak", 2006, Gunnar Knapp, Univ. of Alaska. Results: There may have been an impact on crew jobs; there is no clear evidence yet of any major effect of crab rationalization on marine supply and service businesses.
2. NPFMC's "18-Month Review". April 2007. A few important conclusions were drawn out in this analysis -- specifically, that C shares followed general landing patterns and therefore posed no (economic) risk to processors. This lead to the Council taking action to maintain C shares as unrestricted shares within the program. Beyond that there are no significant or unintended impacts conclusively identified that would justify a modification of the A/B share split.

Crab-Dependent Communities

City of Saint Paul
City of Akutan
City of Unalaska

CDO Organizations

Coastal Villages Region Fund
Central Bering Sea Fishermen's Association

Crab Harvesting Cooperatives/Associations

Alaska Crab Harvesting Coop
Alaska Fisherman's Crab Coop
Alaska King Crab Harvesters Coop
Aleutian Island Coop
Crab Producers and Harvesters Coop
Fishing Associates Coop
KBO Crab Coop
Mariner Crab Coop
Professional Crab Harvesters Coop
R&B Crab Coop
Sea Boat Coop
Trident Coop
Alaska Crab Coalition

NPFMC Crab Advisory Committee Members

Simeon Swetsov, St. Paul
Frank Keltz, Unalaska Dutch Harbor
Rob Rogers, Icicle Seafoods
Dave Hambleton, Trident Seafoods
Phil Hanson, UniSea
Kevin Kaldestad, Mariner Coop
Leonard Herzog, Alaska King Crab Coop

Processors

Alyeska Seafoods
Icicle Seafoods
Peter Pan Seafoods
SnoPac Seafoods
Trident Seafoods
UniSea Inc
Westward Seafoods
YardArm Knot

Kanaga Island Fisheries
MVs Baranof and Courageous

3. The "Nickerson Study", 2007. This was a study commissioned by some of the harvesters specifically to identify if there were problems with the A/B share split that would justify a change to benefit the harvest sector. It found no significant quantifiable impacts that would justify a change to the A/B share split.
4. The "Overages/Deadloss" analysis based on aggregated landings data, representing approximately 90% of all landings during the 2006/7 Bristol Bay Red King Crab and Opilio seasons, 2007. Prepared by the North Pacific Crab Association at the request of the Crab Advisory Committee, in response to concerns about the "unintended use of B shares" for overage and deadloss accounting. This was supplemented by Council staff deadloss analysis. No significant or unanticipated use of B or C shares to cover overages and deadloss identified.
5. "Economic and Social Impacts of BSAI Crab Rationalization on the Communities of King Cove, Akutan and False Pass." Gunnar Knapp/Marie Lowe (UAA). 2007. Though the study does identify some concerns about "...short-term direct economic impacts (resulting in) a loss of crab fishing jobs and a decline in the use of the King Cove large boat harbor by crab vessels" these are not A/B share split issues. By the same token, "... city fisheries tax data do not suggest that crab rationalization had any significant effect on King Cove crab landings." *The A/B share split in fact protects KC's historic share of crab landings.*

In addition to the specific analysis undertaken for each of these studies, the Council has consistently heard from a majority of the industry and crab-dependent communities that the program is working as intended, and in many cases the program has restored stability to individual communities and businesses that were recently in extreme financial difficulty.

In addition, the Council has undertaken at least eight program amendments since inception, including amendments to the arbitration process, custom processing use caps, post delivery transfers and bairdi management. It is surprising how little controversy there has been surrounding these significant and potentially allocative actions. We believe this is another sign as to how well this program is working, and the willingness of all participants to work out the fixes necessary for any new program.

Therefore our Coalition, which represents a significant majority of crab IFQ holders, crab-dependent communities and crab PQS holders, as well as two of the CDQ organizations most heavily invested in this industry, remains convinced that the current program is generally meeting the goals established by the Council in the June 2002 Motion, as well as the intent of the US Congress.

The October 2007 Motion is not based on any "problem" that has arisen out of the numerous studies and analyses conducted by both Council staff and other professionals. As result, the undersigned believe that a review of the program as proposed in the October 2007 motion is not based on a sound factual and procedural basis and is destabilizing the considerable investments made by the industry and crab-dependent communities. We therefore continue to support the status quo program, and targeted amendment process that has worked so well to date.

Thank you for your consideration,

Ad Hoc Crab Coalition

**The A/B Share Split (90/10) & the Implications of
Changing the Split for Kodiak**

*Submitted to the
North Pacific Fishery Management Council*
Agenda Item C-2(b) Crab Problem Statement

Ad Hoc Crab Coalition
March, 2008

Crab-Dependent Communities

City of Saint Paul
City of Akutan
City of Unalaska

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YardArm Knot

Kanaga Island Fisheries

MVs Baranof and Courageous

The A/B Share Split (90/10) & the Implications of Changing the Split for Kodiak

Purpose

The argument has been made that the current A/B Share Split (90/10) limits the amount of unrestricted crab quota available for competition on the open market. Those advocating this position further state that if the A/B split were to change to 80/20 or 70/30, thereby increasing the pool of B/C share quota, Kodiak would be well positioned to compete for a greater share of the unrestricted quota than what is currently available to them. This raises four questions, which this paper will attempt to answer:

- Under the current A/B split (90/10) what is the quantity of unrestricted quota available for competition on the open market?
- How successful has Kodiak been in attracting unrestricted quota under the status quo? Why or why not?
- What ex-vessel price incentives would need to be in place in order for Kodiak to be more competitive and thus more likely to attract additional landings, regardless of the A/B share split?
- What community protection measures are currently available to Kodiak, and are they working?

A/B Split Under the Status Quo

In 2007/8 the Total Allowable Catch (TAC) for Bristol Bay Red King Crab was 20,383,000 lbs. After subtracting 2,038,300 lbs for the CDQ allocation, there were 18,344,700 lbs assigned to the IFQ fishery. Of this, 528,407 lbs were designated C shares and 1,697,931 lbs were designated B shares. B, C and CDQ shares are "pure

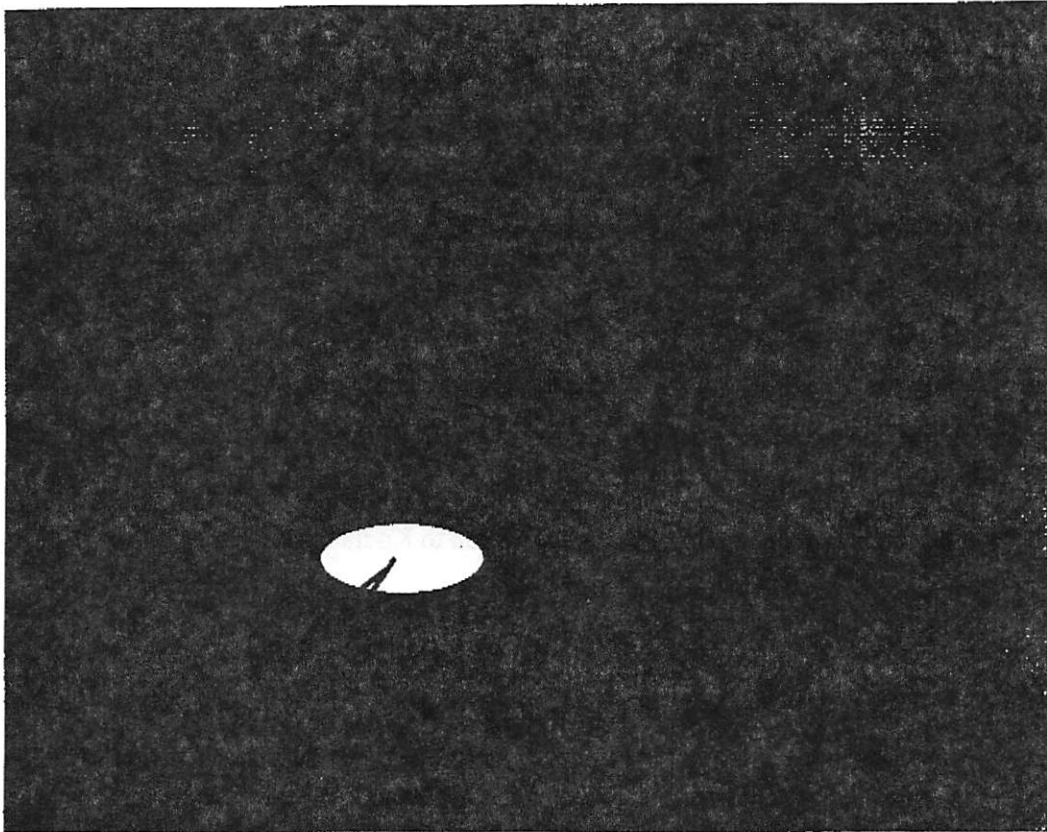
IFQ's" that can be delivered to any processor and any port. The total unrestricted quota available for competitive bid amounted to 4,264,638 lbs., or 20.9% of the TAC. These values are reflected in table 1 below:

	Sector	Share Type	Pounds
TAC			20,383,000
<i>Unrestricted</i>	CDQ		2,038,300
<i>Unrestricted</i>	CVC	C	528,407
<i>Unrestricted</i>	CVO	B	1,697,931
<i>Total Unrestricted</i>			4,264,638
<i>C/P Share</i>			826,955
<i>Restricted</i>	CVO	A	15,281,406
<i>Total Restricted</i>			15,281,406

Table 1: Unrestricted Quota under status quo

Success in Attracting B/C Share Deliveries to Kodiak

For the purpose of this analysis we will assume an average load of 170,000 lbs of crab. To deliver this crab to Kodiak, instead of Dutch Harbor, would require an additional 144 hours of running time (roundtrip). Assuming fuel consumption of 33.33 gallons/hour, with fuel at \$3.50 per gallon, this would translate to \$16,800 in fuel costs, in addition to what they would have been if delivering this same load of crab to Dutch Harbor. P&I expenditure would increase by \$792 (assuming \$132/day for a six man crew) and the grocery bill would increase by \$900 (assuming \$150/day for a six man crew). This amounts to an additional \$18,492 in total costs to deliver this load of crab to Kodiak rather than Dutch Harbor. Keep in mind however, this figure should also include costs associated with vessel wear & tear, deadloss, and lost fishing time, but we do not have that data at this time. While it is difficult to directly measure these additional costs, it is safe to assume that they are part of a vessel owner's cost assumption when deciding whether to make the run to Kodiak.



	Kodiak vs. Dutch Harbor
Transit hours (roundtrip)	144
Fuel (33.33gal/hr @ \$3.50/gal)	\$16,800
P&I (\$132/day for 6 man crew)	\$792
Groceries (\$150/day for 6 man crew)	\$900
Wear & tear on vessel	?
Lost fishing time	?
Dead loss	?
Additional Costs, RT to Kodiak	\$ 18,492.00 +
Ex-Vessel Premium Required	Greater than 11 cents/pnd

Table 2: Incremental Costs for Kodiak Delivery, vs. Dutch Harbor

Actual ex-vessel prices offered in Kodiak have not approached this \$0.11 ex-vessel premium (analysis below). Nonetheless, Kodiak has seen it's share of Red King Crab landings increase under the crab rationalization program, from their historic average of 3% of the TAC to almost 5% of the TAC in 2007.

This seems counter-intuitive, until you consider that Kodiak landings are protected by the combination of the current A/B share split, which guarantees each community receives at least 90% of it's historic average (the A share component of the 90/10 split). But when it comes to competing for the B, C and CDQ component of the 90/10 split; the incremental costs for a vessel to run to Kodiak place Kodiak at a significant competitive disadvantage.

Ex-Vessel Price Incentives

According to the assumptions made in this analysis, processors at Kodiak would need to pay a price premium of at least \$0.11/lb above the price paid in Dutch Harbor for harvesters to *simply break-even*. Table 3 below reflects the prices paid in 2007. Note that Kodiak processors did not offer a sufficiently competitive B or C ex-vessel price, when considering the additional costs that a vessel owner would incur in making the run to Kodiak.

Processor	Kodiak B/C Deliveries	Dutch Harbor B/C Deliveries
<i>Alaska Fresh</i>	\$4.65	
<i>APS</i>	\$4.60	
<i>Ocean Beauty</i>	\$4.65	
<i>Alyeska</i>		\$4.65
<i>Harbor Crown</i>		\$4.65
<i>Westward</i>		\$4.54

Table 3: 2007 Bristol Bay Red King Crab Prices paid for delivery to Dutch Harbor and Kodiak

As evidenced by the 2007 Bristol Bay Red King Crab landings analysis in Table 4 below, in the absence of a competitive ex-vessel price, the majority of Kodiak landings are a direct result of the *guaranteed* 90/10 split, which represents just under 66% of the community's entire share of this fishery for 2007. By comparison, Kodiak landed just 7.4% of the total B,C and CDO (unrestricted) shares. It is apparent that the community has not suffered from the A/B split, but instead finds itself unable to regularly offer a competitive ex-vessel price that offsets the costs associated with delivering the open access shares available to all communities and processors. Increasing the size of the B/C share pool will not increase Kodiak's ability to compete; quite the opposite, it will likely drain more crab away from Kodiak due to the lack of price competition and loss of the protection afforded by the 90/10 landing requirement.

Kodiak Landings 2007 BBRKC	
Total Landings	921,140
Alaska Fresh IPQ/A Share	320,687
APS (NPS) IPQ/A Share	<u>285,301</u>
Total Guaranteed IPQ/A Share Landings	605,988
IPQ/A Share Landings as %	65.8%
Est B/C Share Landings	315,152
Share of total Unrestricted IPQ	7.4%

Table 4: Analysis of actual Bristol Bay Red King Crab landings, Kodiak, 2007.

Community Protections

Under the 90/10 split Kodiak continues to receive 90% of their historic share of the fishery (after deducting CDQ). In fact, landings delivered to Kodiak have increased from 3% of the GHJ (pre-rationalization) to almost 5% of the TAC (post-rationalization).

It should also be noted that the Council previously gave Kodiak some additional program benefits and considerations:

- Kodiak was given the exclusive right to “sweep up” several small PQS allocations that were actually earned in other communities, but determined to be too small to support continued processing in those communities.
- The Bairdi fishery was not “regionalized” at the request of Kodiak, so that they would have a greater opportunity to compete for landings from these fisheries.
- Both Opilio and Bristol Bay Red King Crab fisheries have been designed to be “pure IPQ” fisheries at higher TAC levels by the imposition of a PQS/IPQ cap of 20,000,000 pounds for Bristol Bay Red King Crab and 175,000,000 pounds for Opilio. These caps were imposed in part to allow Kodiak to compete for crab at the corresponding TAC levels.

Furthermore, recent Council action has allowed Kodiak ROFR-tagged IPQ to be custom-processed in that community regardless of ownership (this provision also applies to other ECC’s). Clearly, under the current 90/10 A/B split, Kodiak is receiving the community protections envisioned during the design of the Rationalization program.


Conclusion

While the argument has been made that a change in the 90/10 split may benefit Kodiak by increasing the B/C share crab available for delivery to their port, this argument has been shown to be without merit. Under the current status quo, Kodiak is guaranteed to receive crab that accounts for at least 90% of their historic landings. Our analysis shows that this “guaranteed” share, represented by A share crab, constitutes the bulk of Kodiak’s landings even though there is a large, competitive B/C share market in excess of 4 million pounds also available to Kodiak processors. Therefore, an increase in the

B/C share pool is likely to result in less crab being landed in Kodiak, rather than more crab.

While it is true that increasing the amount of B/C shares would allow harvesters greater flexibility in determining where to deliver their crab, current evidence supports the position that Kodiak will likely *lose* crab at lower A/B share splits (say 80/20) because of the significant incremental costs that vessel owners incur to travel to Kodiak. Due to these high costs (relative to Dutch Harbor), in all likelihood a change in the 90/10 split would *decrease* the amount of crab being delivered to Kodiak. Without a significant ex-vessel premium, harvesters will not likely take on the costs and risks associated with increased deadloss, additional fuel/grocery/P&I insurance costs, lost fishing time and increased wear & tear on their vessels and crew to deliver to Kodiak.

The ex-vessel price premiums outlined in this paper only reflect the *break-even price* needed for delivery to Kodiak. Given that fishery participants are in the business to do more than simply *break-even*, it is likely that an even greater premium than we've outlined would be required to lure crab away from Dutch Harbor to Kodiak. In the absence of this additional ex-vessel price incentive, Kodiak would likely suffer with a change to the 90/10 split.

	<p>Corporate Offices 800 E. Dimond Blvd., Suite 3-400 Anchorage, AK 99515-2043 Phone: 907-561-3400 Fax: 907-561-3401</p>
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March 18, 2008

Eric Olson, Chairman
 North Pacific Fishery Management Council
 605 W 4th Ave Suite 306
 Anchorage, Alaska 99501

Re: C-2(b) - Crab 90/10 Adjustments

Dear Eric,

On behalf of Adak Fisheries, we ask that the Council consider the special circumstance of the WAG crab fishery when selecting options to go forward for further consideration relative to changes in the 90/10 and to consider fast tracking such changes.

The impacts of crab rationalization on the community of Adak, were not predicted in the EIS and thus the Council, at the time of the original decision, was uninformed as to what share of the WAG brown crab was being processed in Adak and what its loss would mean to our community.

Even now, many in the public remain uninformed. In fact the president of Trident Seafoods wrote a letter to our Mayor claiming that the Crab Rationalization contained "an incentive to increase deliveries of crab to Adak" and provisions "to stimulate economic activities in the region." (the mayor's response is attached.)

Some things to keep in mind when considering revising 90/10 for WAG crab -

- 1- Adak's crab landings in the 5 years prior to the implementation of the program, including years before the Council recommended the program to Congress, averaged 1.7M lbs (and over 2M lbs in some years) out of a total GHLL of 2.7M lbs. That represented about 64% (and as much as 75%) of the total quota.
- 2- While the city did receive 10% of the overall quota, Adak Fisheries received less than 3% of the IPQ. The drop from 64% to 13% was NOT an economic stimulus for Adak.
- 3- 50% IPQ that was regionalized. However, there has been a 30% use cap per facility/entity, thus we are limited to 0.34M lbs of IPQ crab (inclusive of our own 0.08M lbs and any possible

custom processing) plus the city's 0.27M lbs, or about 0.6 M lbs, which is about 1/3rd of what we did prior to rationalization. These limits are NOT an incentive to increase deliveries.

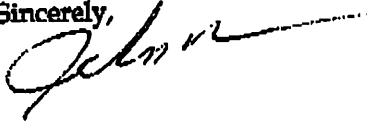
4- The pending changes to allow increased "custom processing" don't guarantee any crab to Adak. It is unlikely that any more than the 50% of the IPQ that is regionalized would be subject to custom processing. Keep in mind that 50% of the IPQ is only about 0.5M lbs, or 20% of the WAG TAC. Again, Adak was processing 64% of the WAG TAC before rationalization. Custom processing is no substitute for being able to freely buy crab.

Rationalization of the processing sector WAG crab has not worked for the benefit of the community most dependent on WAG crab.

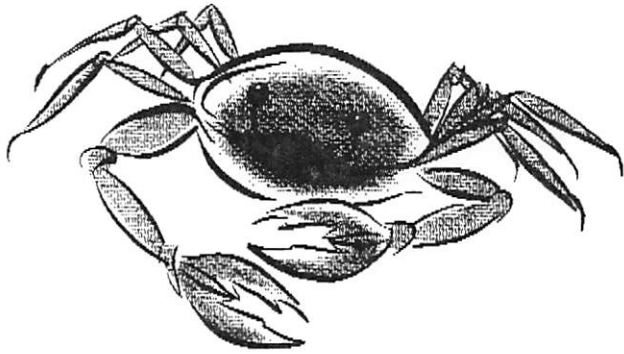
Nor have the restrictions on being able to sell WAG crab to Adak worked for the harvesters. It has increased running time expenses, while decreasing quality and safety by requiring an extra 800 mile trip from the grounds to Dutch Harbor and back.

We ask the Council to move forward on revising 90/10, and to include the options in Attachment B to the crab committee minutes.

Sincerely,



John Moller
Adak Fisheries



March 24, 2008

**Mr. Eric Olson, Chair
North Pacific Fishery Management Council
Anchorage, Alaska 99510**

Mr. Olson,

This letter is being written to document our concerns regarding the ice conditions occurring in the North region near St Paul. We are required to deliver our crab in the North at St Paul. During the ongoing Opilio season the ice conditions made the trip to St. Paul extremely unsafe. At the present time we are unable to deliver in St Paul and are standing down until the ice conditions dissipate. We would like the council to recognize how extremely important it is to have a relief plan from delivering in the North if the ice conditions jeopardize the safety of crew, vessels and the environment. Under the current program we had to re-route our vessels to the South for our deliveries because we could not deliver in the North due to the ice. We also had to exhaust all of our B and C shares during those deliveries. Those B/C shares were intended to be delivered to Kodiak, so the impact of the ice also adversely affected the community of Kodiak and other open market processors.

Regards,

Quota Share Owner and Vessel Operator/Owners:

**Mike Woodley
Bill Prout
Tyler Schmeil
Phil Fogle
Rick Turvey
Norm Lenon**

PO Box 8413, Kodiak, AK 99615, 907-486-2287

Crab Advisory Committee Meeting Minutes March 2, 2008 Anchorage Hilton

Committee Members – Sam Cotten, Lenny Herzog, Dave Hambleton, Linda Freed, Florence Colburn, Rob Rogers, John Moller (ph), Frank Kelty, Simeon Swetzof, Ernie Weiss, Tim Henkel, Steve Branson, Kevin Kaldestad, Jerry Bongen

Staff – Mark Fina (NPFMC), Herman Savikko (ADFG), Stefanie Moreland (ADFG), Glenn Merrill (NMFS)

Public – Jeff Stephan, Kris Norosz, John Iani, Pat Hardina (ph), Linda Kozak, Steve Minor, Heather McCarty, Mateo Paz-Soldan, Jake Jacobsen, Mike Stanley, Joe Plesha, Shawn Dochterman, Dick Powell, Jeff Steele, Clem Tillion, Sandra Moller, Chuck McCallum (ph), Dick Tremaine, Keith Colburn (ph)

Minutes

Golden King Crab Fisheries

The committee reviewed the existing program requirements for the Aleutian Islands golden king crab fisheries. In the review of the issue, it was noted that the revision to the processing share caps (that exempts custom processing from the use caps) has not been implemented, and may address some of the problems in the fishery, once implemented. One person raised the issue of possible mismatch of Class A IFQ and IPQ. This anomaly arose this year because of the complexity of the A share/B share/IPQ issuances and should be addressed in future issuances by the agency to the extent feasible.

In reviewing the allocations in the Western Aleutian Islands golden king crab fishery, it was noted that 40 percent of the quota in the fishery is controlled by a single catcher processor. It was also noted that the catcher processor does not contribute to unharvested TAC in the fishery. It was also suggested that the catcher processor shares could be relevant to resolving any problem with the Adak economy that might be addressed by potential changes in the program.

The committee discussion suggested the following possible problems in the Western fishery:

- 1) Adak has suffered a loss of revenues from loss of processing.
- 2) Adak needs a substantial amount of processing in order to cover the cost of shipping the product out of the community. Even if, an arrangement is made to process the remaining IPQ in Adak, it may not be enough to cover the costs of shipping the product out. Adak needs access to all of the processing in the fishery to ensure shipping opportunities exist. If negotiated custom processing arrangements work, the Adak problem could be resolved this year. Currently there is no regular surface transportation shipping to Adak.
- 3) A single facility in the Western region has limited the availability of markets in the region of the fishery. This could change, if Atka opens a facility. Also, catcher processors could receive deliveries of A share landings. The opportunities for new facilities to enter the west region could change, under the new custom processing exemption from crab processing.
- 4) The 30 percent processor share use cap could inhibit processing arrangements. Specifically, a transfer of IPQ (rather than a custom processing arrangement) would not be permitted, but may be the only workable arrangement for certain processing opportunities in the west region. Adak representatives suggested that additional custom processing under the cap exemption is unlikely to address their problem, because Adak would rather lease shares. Others believe, at a minimum, the unharvested TAC problem might be addressed by the exemption.

DRAFT

- 5) Market conditions in the first two years of the crab rationalization program have prevented full harvest of the TAC in the Western Aleutian Islands golden king crab fisheries.

Issues in the Eastern fishery are suggested to arise from concentration of processing share holdings. This concentration limits the market opportunities in the fishery and is believed to inhibit price negotiations and marketing efforts by processors. It was suggested that leasing of shares in the current year has had the desired effect on the market. The concentration, however, is argued to have had a limiting effect on market development, despite the leasing of shares to a processor that is believed to be developing new markets and paying a more competitive price. It was suggested that arbitration system is less effective in a fishery that has very few participants. It was also suggested that the arbitration system has had the desired effect on negotiations (driving ex vessel prices up for all processors). It was suggested that the number of processors is limited by the market and size of the fishery, rather than the processor shares in the fishery. It was suggested that consolidation of operations is something that both sectors should benefit from (not just harvesters).

Not applying for IPQ led to great concentration of processing shares in the Eastern fishery. It is possible to revise the system to have these IPQ not allocated and A shares convert to B shares, rather than reissue IPQ to other processors. It was suggested that the new entrant pushed the price up in this fishery for all fishermen, despite a presale of crab by one processor. Whether ex vessel prices suffered as a result of the presale is debated. It is argued that the arbitration system can address this concern.

In the Eastern fishery, the concentration of effort on the harvesting side has benefited that sector greatly. To assert that the processing sector is causing problems, given these great benefits is probably not appropriate. Also, the market conditions in the fishery have contributed to any problems in the golden king crab fisheries. This contribution of market conditions needs to be considered. The Eastern fishery is argued to not have the problems that are present in the Western fishery.

It was noted that the program (including the arbitration system) creates incentives for a processor to sell at the highest possible price. And that a processor the does not sell for the highest price might be forced by the arbitration system to pay a price based on a higher sale price than their own.

One suggested solution to problems in the Western fishery is to remove all processor shares from the Western fishery. It was suggested that proposed alternatives could be broadened to include the Eastern fishery and would include status quo (90/10), 50/50, and 0/100. The possibility of including a regionalization component in the Western region was also raised. Harvesters, generally, oppose a regionalization component.

It was suggested that any change in the A share/B share split include provision for compensation to processors. It was noted that a substantial amount of PQS has changed hands (including some acquisitions by CDQ groups), since inception of the program. This raises the issue of compensation for those who have acquired shares.

The committee reviewed the three proposals it receive previously (see attached). The proposal of Dave Hambleton and Phil Hanson includes a suggestion to allow custom processing provision to remain in effect for a period of time to determine whether the problems persist. If so, solutions could be developed, including reallocation or divestiture of shares are not utilized for a period of years, and reallocation of PQS, CPO, and CPC to address community concerns, conversion of West IFQ to B shares with possible regionalization and possible compensation to processors. It was pointed out that the west designation of shares could affect communities, which may need compensation to communities to address their concerns. It was suggested that harvesters might need compensation for price effects of western delivery

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requirements. It should be noted that the arbitration system might need modification, if western B shares are intended to be covered by that system.

Crew Issues

Tim Henkel suggested that his proposal receive further consideration. He also suggested that the conversion occur on a date certain, rather than on transfer. Any action in this respect should consider potential effects of C share caps on the available market for share holdings. The new C shares would be required to be held by a person meeting C share requirements (or could have different requirements associated with them). It was suggested that processors would be the only persons affected by this action who will not receive compensation out of this shift and that the reduction in the processor share pool should be compensated. It was suggested that the A share/B share split could be applied to these new C shares to protect processors. Also, communities protected by IPQ allocations would be affected by any change in the size of the IPQ pool. An alternative might be to regionalize the C shares to protect communities. It was suggested that communities that are home to crew are protected by C shares, so creation of C shares can operate as a community protection.

Any action to change the C share pool should allow current share holders that would be subject to this action adequate opportunity to transfer the shares to ensure that transfers can be at reasonable market prices (i.e., 3 to 5 years). The current proposal is for 30 percent of the QS pool being subject to the conversion to C shares. It was suggested that fewer shares be subject to the provision to reduce effects on persons who have purchased shares since implementation of the rationalization program, such as 3, 5, and 10 percent of the QS pool.

It is suggested that an alternative proposal should be considered to make a direct allocation to crew (in addition or as a substitution for the share redesignation). This proposal is also in addition to (and is a variation on) the proposal received at an earlier meeting to allocate 35 to 40 percent of the quota share pool to an organization that holds and uses those shares on behalf of crew in the fisheries. The use of both an allocation of C shares and an increase in the size of the C share pool could make up for negative effects on crew under the initial allocation. It was suggested that care should be taken to balance crew and vessel owner interests to maintain good crew/vessel owner relationships. A reasonable and moderate step to address crew issues (such as the change in designation to C shares) would aid crew and might be palatable to many vessel owners in the fishery.

Alternative proposals were suggested to 1) to dilute C shares by splitting the existing C share pool and distribute the new C shares to crew and 2) scaling of the C share pool with quota, to increase/decrease with quota in conjunction with TAC increases/decreases.

Owner on board were also discussed. Owner on board rules are argued to protect crew by decreasing the amount of leasing in the fishery. It was suggested that it may not be feasible to have all lease type charges removed prior to paying crew, with or without owner on board requirements. It was suggested that the issue is not the existence of leasing charges, but are those charges reasonable. As long as shares are traded, charges will be a necessity, even for owner on board participants, who will need to make loan payments to support their purchases. In addition, it was suggested that under the cooperative structure, the shares are currently managed by cooperatives in a manner that will likely result in share holders not being on board the vessel harvesting their crab. Requiring participation is important, but flexibility should be incorporated to ensure that shares are fishable and fished.

The agency expressed concern that a strict owner on board would greatly complicate administration of the program (see attached). The current tracking system would require structural changes to follow shares by QS holder. Landing reports will need revision to include own board tracking for C shares. Transfer of C

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share IFQ among cooperatives would require dual cooperative membership by the underlying C share QS holder to make owner on board requirements track share trading.

It was suggested that added restrictions on C shares will reduce their values in leases and complicate their use by cooperatives. These changes would work to the detriment of C share holders.

Community rights of first refusal

Several concerns were discussed concerning the weakness of the right of first refusal protection. One suggestion is to remove the ability to engage in intra-company transfers. It is unclear whether intra-company transfers could be exempted, since they are not a transfer. It was also suggested that the timeline for exercising the right is very tight for communities to position themselves to respond to the right of first refusal. Communities suggest that the timeline be 90 to 120 days to exercise the right. Some question whether the issue is as much access to capital (as time to make decisions). Financing options (such as federal or state community loans) could be considered to aid communities with share acquisitions.

Potential areas to revisit in the contract requirements (see attached) are:

- 1) delete the provision that lapses right of first refusal under (C)
- 2) extend the 60 day period (to exercise right) and 120 day period (to perform) to allow community more time to exercise right under (G)
- 3) the committee discussed the issue of compartmentalizing interests in shares to allow an effective right of first refusal, if a large transaction includes many assets other than the shares (particularly assets that are not in the community). Requiring a community to step in and acquire assets outside of the community may not be in the community's interest. This limits the effectiveness of the community's right.

The committee also discussed potential leasing arrangements to avoid divestiture requirements that might lead to shares being moved from the community of origin.

Emergency exemption from regionalization

A revised proposal was presented (see attachments). The revision acknowledges that the exemption would be temporary. It should be noted that the status quo is not clear; the agency may not be able to grant an exemption. Element 4 is revised from the previous proposal to require a compensatory delivery of shares in the region where the relief was granted. The provision includes a suggestion that the season be extended to allow for the compensatory delivery. The feasibility of this extension was discussed. A provision is also included to adjust allocations in the following year to ensure that compensating deliveries are made in the following year. The provision contemplates a pound for pound exchange. This could operate in lieu of tax exchanges across communities.

A major difficulty is in making the decision of when conditions merit the exemption. In many instances, conditions change quickly and are case specific based on conditions for each particular vessel. Ice conditions were noted to have been worse in the last couple of years. It was suggested that vessels are having to operate at an increased risk, because of the regional landing requirement. It was also noted that movement of processing in response to emergencies adds complications to processing. Processors need time to respond to the change in processing location. Accommodating a trip or two is possible, but large scale shifts in processing activity may not be accommodated by the processors. Some of the more drastic situations might be better addressed by a response of the industry to delay fishing and processing. The industry has taken these responses in the past.

Use of an intercooperative might be useful to address short term situations. Longer term problems, however, might be more difficult to address. At the level of a single cooperative, the ability of cooperatives to address coordination issues is limited.

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Dave Hambleton, Florence Colburn, Simeon Swetzof, and Lenny Herzog agreed to continue to work on the issue of an emergency exemption from regionalization and report back to the committee at its next meeting.

Revisions to the arbitration program

The arbitration organizations advised that they have forwarded a memo concerning a potential grant of immunity to arbitrators, market analysts, arbitration organizations, and third party data providers to Council staff and NOAA GC (attached).

The arbitration organizations also reviewed the paper previously submitted by the independent harvester arbitration organization (attached). The issues are:

- 1) the reporting requirements of the independent harvester arbitration organization are argued to be overly burdensome (the processor organization does not object to the change proposed)
- 2) the division of costs of the performance arbitration. The issue has not come up, but it is a concern that the costs of performance arbitration could be shared. It is uncertain whether the arbitrator could hire an expert to assist in assessing compliance with a performance requirement. It is unclear whether this would be covered under the current rule and whether the costs would be shared. It is also unclear whether this issue should be clarified in the rule. (the organizations will continue to work to address this issue)
- 3) the arbitration system is suggested to be complicated by the two different methods of accessing arbitration: a) the preseason timeline and 2) the lengthy season agreement. The independent harvester organization proposes a single method for accessing arbitration, which might allow greater flexibility. (the organizations agree to continue to develop an alternative structure to accommodate access to arbitration)
- 4) arbitrators should have the authority to decide jurisdiction/arbitrability (both organizations support a change in rules to clarify this authority)
- 5) a proposal to prevent the formula arbitrator and market analyst from testifying at a binding arbitration proceed is proposed to make those persons more objective (the processor organization does not have a position on this yet)
- 6) it is proposed that the arbitrator be required to presume against a person who does not present requested information (this is opposed by the processor arbitration organization – who believes the determination should be discretionary)
- 7) A general statement concerning the arbitration system and its operation are thought to be appropriate by the harvester organization. The processor association does not support this provision. The processor organization believes that some additional communication might benefit parties understanding of the system. This could be done informally, with both parties present and without written opinion. (the organization have agreed to continue to work on this statement).

Overall, the arbitration organizations have agreed to continue to work on these issues and report back to the committee prior to proposing any specific amendment package.

Attachments

Hambleton/Hanson Aleutian Islands golden king crab fishery proposal
Moller Aleutian Islands golden king crab fishery proposal
Stanley Aleutian Islands golden king crab fishery proposal
Owner on board management issues
Right of first refusal contract terms
Emergency relief from regionalization problem statement/terms/addendum
Arbitration immunity memo
Arbitration proposals

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Next Meeting

The next meeting will take place after the April Council meeting. The committee could meet to discuss elements and options that the Council wishes to consider.

Proposed Problem Statement and Alternatives/Options for Analysis

January, 2008

We believe that there are currently only two “Problems” that can be quantified and analyzed. They are:

- a. Western Aleutian Golden King Crab harvesting/processing. Crab was left in the water last year and there is some chance the same thing may happen again this year. It is not known if the Council’s recent action to create a custom processing us cap exemption for this fishery will solve the problem. Given the potential negative impact on the fleet and communities, this issue is deserving of further analysis.
- b. Community ROFR financing. More than under this program are relatively weak because they lack a financing mechanism community has expressed the opinion that the ROFR rights granted. A range of alternative financing options should be analyzed.

Two other issues have been dealt with by the Committee on a unanimous basis: first, that any level of IPQ will require a binding arbitration system; second, that the binding arbitration data problems be addressed by the established industry binding arbitration organizations with periodic monitoring by the Committee and Council.

All other “problems” identified in the Council’s draft Problem Statement should be deleted from the October Motion because there is no quantifiable evidence and/or existing data sets appropriate for analysis; recognizing that the 36 Month Review process will help identify those data gaps and processes for data collection necessary for those issues.

Hambleton/Hanson Proposal
Crab Committee Recommendation
Amended/Substitute “October Motion”
January 2008

The Council should adopt the following Problem Statement, and move forward the analysis and alternatives proposed by the Crab Advisory Committee in their December (2007) and January (2008) meetings.

Problem Statement

The Crab Rationalization program is viewed as having accomplished many of the goals established in the original Purpose and Needs statement¹; however, there are some unanticipated problems with the Community Protection measures and the Western Aleutian Golden King Crab fisheries.

The community “Right of First Refusal” granted in relation to Processor Quota Shares insures an Eligible Crab Community a significant portion of it’s historic share of crab landings, but some Eligible Crab Community Organizations may not have sufficient access to capital to exercise their ROFR rights. Addressing this problem may strengthen the community protection measures in this program.

The west-designated portion of the Western Aleutian Islands Golden King Crab fishery has suffered an under-harvest of the resource for two consecutive years; exacerbated by low market prices, inefficient processing use caps and other factors. A full analysis of recent Council actions and additional alternatives may lead to full utilization and stability in this fishery.

Elements of this Motion

Community Protection Elements

1. Loan program

1.1 A low-interest rate loan program consistent with MSA provisions, for Eligible Crab Community Organization (“ECCO”) purchases of QS or PQS², shall be established for QS or PQS purchases by ECCO’s using 25% of the Crab IFQ fee program funds collected.

1.2 Eligibility is restricted to Eligible Crab Community Organizations as defined in the current program under _____.

¹ See June 2002 Problem Statement attached

² QS/PQS Eligibility attached

West-Designated Western Aleutian Islands Golden King Crab

2. Full-utilization measures

2.1 Await full implementation of new custom processing use cap exemptions.

2.2 Forced divestiture if not utilized 3 years out of five

2.3 Reallocation of PQS, CP and CPO shares to more adequately address community concerns.

2.4 Convert west-designated IFQ shares to “B” shares

Option 1: with compensation to PQS holders

Option 2: without compensation to PQS holders

Sub-Option A: new “B” shares are not regionalized

Sub-Option B: new “B” shares are west-designated

June 2002
NPFMC Crab Rationalization
Purpose and Needs Statement

BSAI Crab Rationalization Problem Statement

Vessel owners, processors and coastal communities have all made investments in the crab fisheries, and capacity in these fisheries far exceeds available fishery resources. The BSAI crab stocks have also been highly variable and have suffered significant declines. Although three of these stocks are presently under rebuilding plans, the continuing race for fish frustrates conservation efforts. Additionally, the ability of crab harvesters and processors to diversify into other fisheries is severely limited and the economic viability of the crab industry is in jeopardy.

Harvesting and processing capacity has expanded to accommodate highly abbreviated seasons, and presently, significant portions of that capacity operate in an economically inefficient manner or are idle between seasons. Many of the concerns identified by the NPFMC at the beginning of the comprehensive rationalization process in 1992 still exist for the BSAI crab fisheries. Problems facing the fishery include:

*Resource conservation, utilization and management problems;
Bycatch and its' associated mortalities, and potential landing deadloss;
Excess harvesting and processing capacity, as well as low economic returns;
Lack of economic stability for harvesters, processors and coastal communities; and
High levels of occupational loss of life and injury.*

The problem facing the Council, in the continuing process of comprehensive rationalization, is to develop a management program which slows the race for fish, reduces bycatch and its associated mortalities, provides for conservation to increase the efficacy of crab rebuilding strategies, addresses the social and economic concerns of communities, maintains healthy harvesting and processing sectors and promotes efficiency and safety in the harvesting sector. Any such system should seek to achieve equity between the harvesting and processing sectors, including healthy, stable and competitive markets.

Proposal A – Hambleton/Hanson
Crab advisory committee minutes
March 2, 2008

(1) To be eligible to receive QS, PQS, IFQ, or IPQ by transfer, a person must first meet the requirements specified in the following table:

Quota Type	Eligible Person	Eligibility Requirements
(i) PQS	Any person	None.
(ii) IPQ	Any person	None.
(iii) CVO or CPO QS	(A) A person initially issued QS	No other eligibility requirements
	(B) An individual	who is a U.S. citizen with at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery.
	(C) A corporation, partnership, or other entity	with at least one individual member who is a U.S. citizen and who (1) owns at least 20 percent of the corporation, partnership, or other entity; and (2) has at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery.
	(D) An ECCO	that meets the eligibility requirements described under paragraph (j) of this section.
	(E) A CDQ group	No other eligibility requirements
(iv) CVO or CPO IFQ	All eligible persons for CVO or CPO QS	according to the requirements in paragraph (c)(1)(iii) of this section.
(v) CVC or CPC QS	An individual who is a U.S. citizen with:	(A) at least 150 days of sea time as part of a harvesting crew in any U.S. commercial fishery; and (B) recent participation in a CR crab fishery in the 365 days prior to submission of the application for eligibility.
(vi) CVC or CPC IFQ	All eligible persons for CVC or CPC QS	according to the requirements in paragraph (c)(1)(v) of this section.

Proposal B – Moller

Crab advisory committee minutes

March 2, 2008

DRAFT PROBLEM STATEMENT FOR AI KING CRAB FISHERIES

The Aleutian Islands king crab fisheries (WAG) present a unique set of issue under the BSAI crab rationalization program due to their relatively small TACs, small numbers of harvesters and processors, and specific markets. These fisheries were generally stable prior to rationalization, but have experienced problems under the program, including inability to harvest and deliver the full TAC (WAG)

The 2002 action by the Council regarding WAI brown and red king crab:

A - Did not adequately consider the appropriate history basis for allocating Processor Quota in these fisheries

- 1- the WAI brown crab fishery was unique in that quota was allocated based on years where the fishery was significantly under-utilized, thus inflating the amount of quota allocated relative to actual use.
- 2- the allocation of PQs for WAI red king crab was arbitrary, WAI red king crab PQ was allocated pro-rata to WAG PQ, not based on processing investment or history in the fishery.

B - Did not adequately consider the requirements of National Standard 8 relative to Aleutian Island management area communities:

- 1- the community impacts of awarding IPQ based on years prior to Adak returning to civilian control,
- 2- opportunities for other communities in the region (e.g. Atka) to develop on shore crab processing in the future

C - Did not adequately consider the 303(b)(6) limited access provisions of the MSA in the context of allocating limited access processing privileges in the Aleutian Island crab fisheries:

- 1- "present participation" in the processing sector in Adak;
- 2- existing "investment" in crab processing in Adak;
- 3- "dependency" on crab processing in Adak;

D -The original analysis was further constrained by confidentiality rules from providing the Council with sufficient information on many of these factors which precluded the Council from making an informed decision on the impacts of IPQs for these two fisheries.

As a result:

A- Harvesting sector has been unable to harvest and deliver the full TAC of WAG crab and the fishery is once again under-utilized because harvesters have been prohibited from legally delivering regionalized crab in Adak.

B- Regionalization has been an inadequate and ineffective community protection measure, because PQs were allocated almost exclusively to "out of region" processors.

C -Crab processing in Adak has dropped from over 2 million pounds per year prior to implementation of crab rationalization to less than 20% of that level last season

It is time now to re-evaluate the appropriateness of Processor Quotas in the Aleutian Island King Crab fisheries."

OPTIONS

Western Aleutian Islands King Crab Elements

2. Western Aleutian Golden (WAG) King Crab options

2.1 Status Quo (Await full implementation of new custom processing use cap exemptions.)

2.2 Convert IFQ shares "A" shares to "B" shares

Sub-Option : new "B" shares retain west area designation

Proposal B – Moller

Crab advisory committee minutes

March 2, 2008

Sub-Option : new "B" shares are subject to onshore delivery requirement

2.3 Reallocation if not utilized 2 years out of five years

2.4 Reallocation of PQS, CP and CPO shares to more adequately address community concerns and processing investment

Sub-Option 1: with compensation to PQS holders

Sub-Option 2: without compensation to PQS holders

3. Western Aleutian Red (WAI) King Crab options

3.1 Status Quo

3.2 Convert IFQ shares "A" shares to "B" shares

Sub-Option : new "B" shares are subject to onshore delivery requirement

3.3 Reallocation of PQS, CP and CPO shares to more adequately address community concerns and processing investment

Sub-Option 1: with compensation to PQS holders

Sub-Option 2: without compensation to PQS holders

Golden King Crab Harvesters Association

Problem Statement

Aleutian Islands Golden King Crab

The Eastern Aleutian Islands golden king crab fishery (EAG) and the Western Aleutian Islands golden king crab fishery (WAG) present a unique set of issues under the BSAI crab rationalization program due to their relatively small TACs, small numbers of harvesters and processors, and specific markets. These fisheries were generally stable prior to rationalization, but have experienced problems under the program, including inability to harvest and deliver the full TAC (WAG) and significant consolidation of IPQ (EAG). The Council intends to consider the effects of the rationalization program in the EAG and WAG fisheries, with the intention of promoting (1) full harvest of the TAC, (2) participation by a sufficient number of viable processors to ensure competitive pricing, and (3) maximizing the market value of golden king crab.

Proposed Elements and Options

WAG

All quota share designated as “B” shares with no regional delivery requirement

EAG

All quota share designated as “B” shares with no regional delivery requirement

Attachment D

NMFS Management Issues for Tracking Strict "Owner Onboard" Crew Share IFQ March 2, 2008, Crab Committee Meeting

Until June 30, 2008, Catcher Vessel Crew (CVC) and Catcher/Processor Crew (CPC) quota share (QS) holders, also known as crew QS holders, can transfer (i.e., lease) the IFQ derived from that QS to any one who is eligible to receive crew IFQ. Crew QS holders can also assign their IFQ to a cooperative, and it can be fished by any person in the cooperative eligible to use crew IFQ. Most crew QS holders, more than 90 % in most fisheries, assigned their IFQ to cooperatives. With both of these provisions in place, crew QS holders are not required to be onboard the specific vessel that are vessel that are used to fish their IFQ.

With the existing regulations in place until 2008, and the fact that almost all crew QS holders are in cooperatives, NMFS did not create a specific mechanism to track the use of specific crew IFQ by a specific crew QS holder. Tracking crew IFQ to a specific crew QS holder would require several changes to the IFQ tracking system, and new regulations, which would take time and money to implement. They include:

- (1) A new catch accounting tracking system to specifically track specific pounds of crew IFQ to a specific crew QS even if that IFQ was assigned to a cooperative. Now, NMFS simply assigns an amount of CVC IFQ to a cooperative that is the sum of the IFQ derived from all crew QS holders assigning their IFQ to a cooperative. This would require revisions to our catch accounting and quota tracking system.
- (2) Vessel hired masters in cooperatives would need to provide a new report for each landing. NMFS would require the cooperative's hired master to list the specific crew IFQ was used for each landing, and each crew QS holder would likely need to sign the landing report (i.e., fish ticket) if their IFQ was used for that landing so that NMFS would have some record of who was onboard and could track crew IFQ to a specific crew QS holder for enforcement purposes. This would require changes to the interagency electronic reporting system, and would add additional complexity for tracking landings that may have multiple crew QS holders onboard.
- (3) Possible changes to both cooperative membership standards and IFQ transfer mechanism for crew IFQ assigned to a cooperative. NMFS would need the cooperative to designate the specific crew IFQ being transferred and may require that the receiving cooperative certify that the specific person to whom that IFQ is assigned is now going to be a member of a new cooperative. This would fundamentally change cooperative membership requirements to allow a person to be a member of more than one cooperative. Alternatively, NMFS would need to prohibit transfers of crew IFQ among cooperatives because a QS holder, including a crew QS holder, is currently prohibited from being a member of more than one cooperative.

Some of the implications of these changes include increased management costs which will be passed on to industry through the cost recovery program, likely additional staff requirements, and more complex reporting requirements.

Contract Terms for Right of First Refusal based on Public Law 108-199

- A. The right of first refusal will apply to sales of the following processing shares:
1. PQS and
 2. IPQs, if more than 20 percent of a PQS holder's community based IPQs (on a fishery by fishery basis) has been processed outside the community of origin by another company in 3 of the preceding 5 years.
- B. Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement.
- C. Intra-company transfers within a region are exempt from this provision. To be exempt from the first right of refusal, IPQs must be used by the same company. In the event that a company uses IPQs outside of the community of origin for a period of 3 consecutive years the right of first refusal on those processing shares (the IPQs and the underlying PQS) shall lapse. With respect to those processing shares, the right of first refusal will not exist in any community thereafter.
- D. Any sale of PQS for continued use in the community of origin will be exempt from the right of first refusal. A sale will be considered to be for use in the community of origin if the purchaser contracts with the community to:
1. use at least 80 percent of the annual IPQ allocation in the community for 2 of the following 5 years (on a fishery by fishery basis), and
 2. grant the community a right of first refusal on the PQS subject to the same terms and conditions required of the processor receiving the initial allocation of the PQS.
- E. All terms of any right of first refusal and contract entered into related to the right of first refusal will be enforced through civil contract law.
- F. A community group or CDQ group can waive any right of first refusal.
- G. The right of first refusal will be exercised by the CDQ group or community group by providing the seller within 60 days of receipt of a copy of the contract for sale of the processing shares:
1. notice of the intent to exercise and
 2. earnest money in the amount of 10 percent of the contract amount or \$500,000 whichever is less.
- The CDQ group or community group must perform all of the terms of the contract of sale within the longer of:
1. 120 days of receipt of the contract or
 2. in the time specified in the contract.
- H. The right of first refusal applies only to the community within which the processing history was earned. If the community of origin chooses not to exercise the right of first refusal on the sale of PQS that is not exempt under paragraph D, that PQS will no longer be subject to a right of first refusal.
- I. Any due diligence review conducted related to the exercise of a right of first refusal will be undertaken by a third party bound by a confidentiality agreement that protects any proprietary information from being released or made public.

2. GOA First Right of Refusal

For communities with at least three percent of the initial PQS allocation of any BSAI crab fishery based on history in the community that are in the area on the Gulf of Alaska north of 56°20'N latitude, groups representing qualified communities will have a first right of refusal to purchase processing quota shares which are being proposed to be transferred from unqualified communities in the identified Gulf of Alaska area.

The entity granted the right of first refusal and terms and method of establishing the right of first refusal will be the same as specified in the general right of first refusal.

ATTACHMENT F

Temporary Emergency Exemption from Regionalization Requirement

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BACKGROUND/PROBLEM STATEMENT:

Harbors in the Northern Region, as defined in the Crab Rationalization Program, are periodically closed by the advance of the Bering Sea ice pack. This phenomenon tends to coincide with the opilio crab season during the winter months and in some years has proven to be disruptive to the unfolding of the crab fishery as the ice pack prevents harvesters from entering harbors such as the Saint Paul Harbor to deliver to shore-based processors located in the community.

These events have been sufficient in number for the harvesting sector to request Council consideration of a temporary exemption from regionalization requirements. During discussions of the Council appointed Crab Advisory Committee, various industry representatives indicated that the need for a temporary exemption would not necessarily always be to the detriment of the Northern Region as natural events such as an earthquake or tsunami, or man-made disasters such as a oil-spill could lead to closure of Southern Region ports. As such, a well-defined temporary exemption could be a valuable tool to the industry under a number of potential scenarios.

It is also clear however that the ability of industry to respond to an ice event is driven in large part by the economics and size of the fishery. The two most recent ice events during the 2006 and 2007 opilio fisheries coincided with exceedingly low opilio TAC levels and in the latter year a fire that affected the Steller Sea floating processor. With smaller TACs the profitability of NR crab operations is limited and additional steps that could be taken to remedy an ice event, such as bringing a tug or ice breaker, may be deemed to be not economic.

During the derby-style, high TAC 90's before crab rationalization was in place, however, ice events were not an impediment to the pursuit of the fishery and the industry was capable of taking steps to ensure delivery of crab to St Paul based processors such as bringing a tug to clear a path to the harbor.

The attached Options & Alternatives attempt to address concerns expressed by the industry regarding the need for emergency provisions and at same time ensure that communities are protected. The proposal essentially establishes a "checklist" or set of requirements that must be attempted or fulfilled by the harvesting and processing sectors before an emergency can be legitimately declared and a temporary exemption is put into place.

Alternative 1:

Status Quo: emergency relief from the regionalization requirement may be granted at the discretion of the National Marine Fisheries Service.

Alternative 2:

The FMP will be amended to allow emergency exemption from the regionalization requirement under the following circumstances, and in the following manner:

IFQ may not be used to deliver crab, and IPQ may not be used to process crab, derived from QS based on activities in a region, except in the geographic boundaries of that region, except that IFQ may be used to deliver crab and IPQ may be used to process crab outside of the region for which the IFQ and IPQ were designated if an unavoidable circumstance prevents crab delivery and crab processing within that region.

Element 1:

An unavoidable circumstance exists if the specific intent to conduct delivery and processing for a crab QS species in that region was thwarted by a circumstance that was:

- (A) Unavoidable;
- (B) Unforeseen and reasonably unforeseeable to the IFQ and IPQ holders; and
- (C) The circumstance that prevented the IFQ permit holder from delivering crab and the IPQ holder from processing that crab in the designated region actually occurred.

Element 2:

The IFQ and IPQ permit holder must provide written verification to NMFS that they took all reasonable steps to overcome the circumstance that prevented the IFQ permit holder from delivering crab, and/or the IPQ permit holder from processing that crab in the designated region, including, but not limited to,

(A) for an IFQ permit holder:

- (i) Delivering the crab to another processor for processing, or custom processing, in the same region;
- (ii) Transferring quota to one or more IFQ permit holder(s) to provide for a later delivery in the designated region;

(B) for an IPQ permit holder:

- (i) Arranging with another processor to have the crab custom processed in the same region;
- (ii) Bringing in another processing platform if the intended receiving processing facility is not operational;
- (iii) Providing a vessel to ensure passage in and out of the harbor if necessary to maintain the processing operation.

Written verification to NMFS shall include the names and other contact information for those persons and/or entities contacted, and a description of the efforts undertaken in order to mitigate the circumstances, prior to requesting emergency relief.

Element 3:

Neither the IFQ nor the IPQ holder will be exempt from any regional designation that may apply once the initial unavoidable circumstance is resolved.

Element 4:

(A) If sufficient opportunity remains during the season, after the unavoidable circumstance is resolved, the total amount of IFQ crab that was delivered and IPQ crab that was processed outside of the designated region during the period of the unavoidable circumstance, is required to be delivered and processed in the region where the unavoidable circumstance earlier occurred.

(B) If insufficient time remains in the season to accomplish this compensatory delivery, NMFS/ADF&G may extend the season to allow for compensatory delivery.

Element 5:

In the event that the unavoidable circumstance can not be resolved to allow for compensatory delivery during that season, as in Element 4, then the amount of crab processed in that season (Season A) outside of the geographic region in which it was designated to be processed, shall be added to the subsequent season's (Season B's) quota share for the geographic region in which the unavoidable circumstance earlier occurred.

Element 6:

No emergency relief from regionalization shall be granted if it is determined that such relief might result in localized depletion of crab stocks.

Appendix A

(Regulation for emergency relief from the now-expired cooling-off period, used as a model for parts of the proposed new action)

CFR 680.42 (b) (4) Before July 1, 2007, IPQ for the BSS, BBR, PIK, SMB, and EAG crab QS fisheries may not be used to process crab derived from PQS based on activities in an ECC, except in the geographic boundaries established in paragraph (b)(4)(iv) of this section, except that, before July 1, 2007:

(ii) IPQ in excess of the amounts specified in paragraph (c)(7)(i) of this section may be used outside the ECC for which that IPQ is designated if an unavoidable circumstance prevents crab processing within that ECC. For the purposes of this section, an unavoidable circumstance exists if the specific intent to conduct processing for a crab QS species in that ECC was thwarted by a circumstance that was:

- (A) Unavoidable;
- (B) Unique to the IPQ permit holder, or to the processing facility used by the IPQ permit holder in the ECC;
- (C) Unforeseen and reasonably unforeseeable to the IPQ permit holder;
- (D) The circumstance that prevented the IPQ permit holder from processing crab in that ECC actually occurred; and
- (E) The IPQ permit holder took all reasonable steps to overcome the circumstance that prevented the IPQ permit holder from conducting processing for that crab fishery in the ECC.

(iii) This provision does not exempt any IPQ permit holder from any regional designation that may apply to that IPQ.

Addendum to Saint Paul Proposal – 03/02/2008

Tax Arrangements Among Communities to Minimize Impacts of Such Exemptions –

The Saint George/Saint Paul Model

A model that could be of use to Council, Staff, and Crab Advisory Committee members as they evaluate the scope of a temporary emergency exemption from regionalization and its impacts on communities, is the agreement in place between Saint George and Saint Paul regarding the rebate of crab-derived taxes from one community to another.

After Saint George's harbor failed in 2005, the processors that had been based there, namely SnoPac and Peter Pan, requested that they be allowed to relocate their processing operations to Saint Paul. Given the dependence of St George's economy on these operations and the longstanding ties between both communities, the City Council of the City of Saint Paul adopted a Resolution in response to a request from the City of Saint George agreeing to rebate to Saint George its 3% city sales tax derived from SnoPac and Peter Pan. This agreement has been in place for the past two years and both communities agreed that Saint Paul would deduct 10% of Saint George's share of its tax to cover for administrative expenses and use of City of Saint Paul financial personnel.

To keep track of Saint George's corresponding tax, both SnoPac and Peter Pan submit a sales tax return to the City of Saint Paul and on the back of the return they label it "Saint George quota." This agreement has been facilitated by the fact that both communities apply a similar 3% sales tax.

Representatives of other communities have expressed that this type of agreement would be logistically unfeasible given differing tax rates and politically unrealistic. While this may be true and Saint Paul is not including this model in its proposed Options & Alternatives for Temporary Relief from Regionalization, the Saint Paul representatives believe that this model nonetheless offers tools that could be of use to communities under emergency circumstances and could be pursued through private contractual agreement as both Saint George and Saint Paul have done.

BERING SEA ARBITRATION ORGANIZATION
ALASKA CRAB PROCESSORS ARBITRATION ORGANIZATION

February 29, 2008

Mr. Mark Fina, Senior Economist
North Pacific Fisheries Management Council
605 W. 4th
Suite 306
Anchorage, AK 99501-2252

Re: Quasi-Judicial and Quasi-Legislative Immunity for Arbitration Organizations

Dear Mark:

We support the North Pacific Fisheries Management Council (the "Council") taking action to grant immunity from suit and damages to those entities and individuals involved in the administration, implementation, and operation of the binding arbitration system (the "Arbitration System") that is primarily codified at *50 CFR 680.20 et seq.* (the "Arbitration Regulations") under the Crab Rationalization Program (the "CR Program").

A. The Arbitration Organizations and their Functions.

NMFS and the Council made the Arbitration System an integral component of the CR Program. In doing so, they mandated that the Arbitration System not only be industry funded, but also industry implemented and operated. Pursuant to the Arbitration Regulations, arbitration organizations for the harvesting sector and for the processing sector (collectively, the "Arbitration Organizations") must administer, implement, fund, and operate the Arbitration System for the benefit of the crab fishing industry. NMFS and the Council have vested resolution of arising issues and the day-to-day workings of the Arbitration System almost entirely to the Arbitration Organizations.

One constant challenge for the Arbitration Organizations is that the Arbitration Regulations only provide a general framework. The administrators, officers, and legal counsel for the Arbitration Organizations have to develop the particulars of the Arbitration System based on what they believe to be intent of the Council and NMFS. In addition, quite frequently and often on very short notice, the administrators, officers, and attorneys for the Arbitration Organizations have to decide and implement solutions to sudden developments, such as determining the validity and timing of sharematching and the timing to commence binding arbitration or to agree to lengthy season approach when NMFS has to re-issue the IFQ and IPQ for each crab fishing year.

This results in the Arbitration Organizations and their administrators, officers, and legal counsel engaging in quasi-agency policy-making, regulatory implementation, and regulatory interpretation. To preserve the neutrality of their quasi-legislative activities within the scope of the Arbitration System, the Arbitration Organizations and their administrators, officers, and

legal advisors should be afforded the same quasi-legislative absolute immunity from third party suit and damages afforded agency personnel.

The Arbitration Organizations also hire the contract arbitrators, formula arbitrator(s), market analyst(s), and third party data providers mandated by regulation. The Arbitration Organizations also have hired the third party data provider that has set up and operates the extremely successful IFQ/IPQ "sharematching" system. As with the Arbitration Organizations, these independent contractors perform duties mandated by regulation. Preservation of their independence and neutrality is critical to their effective and fair performance of their duties. They should also be afforded immunity from third party suit and damages for their activities within the scope of the Arbitration System.

The Council and the Secretary expressly built the neutrality of the Arbitration Organizations into the CR regulations. The Arbitration Organizations are expressly precluded from advocating on behalf of their members. *50 CFR 680.20(e)(2)(6)*. Moreover, preserving the neutrality of the Arbitration Organizations is essential to the good faith, fair, and effective administration and operation of the Arbitration System. Because significant money is usually involved and an adverse result and decision can result in significant loss of revenue, price negotiations between harvesters and processors are often contentious. Losses are bitterly received. Whether contracting and dealing with the formula price arbitrator or the contract arbitrators, or engaging in day-to-day policy development and regulatory interpretation, the Arbitration Organizations must be allowed to operate independently from the unfettered advocacy positions of its members and the threat of suit for damages if a participant merely disapproves.

B. Immunity from Third Party Claims Authorized for the Arbitration Organizations and their Administrators, Officers, Legal Counsel, and Independent Contractors.

There is substantial statutory and case law precedent to allow NMFS and the Council to grant immunity, whether quasi-judicial or quasi-legislative, from third party suit and damages to the Arbitration Organizations, and their administrators, officers, legal counsel, and independent contractors within the scope of their activities on behalf of the Arbitration System.

1. Judicial Immunity.

Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v. Fisher*, 13 Wall. 335, 20 L.Ed. 646 (1872). This immunity "is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868), quoted in *Bradley v. Fisher*, at 349. It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the

most intense feelings in the litigants. The judge should not have to fear that unsatisfied litigants may hound him with litigation. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967).

2. Arbitral Immunity Appropriate for Contract Arbitrators and Formula Price Arbitrators.

Judicial immunity has been extended to apply to analogous functions; such as administrative law judges and officials in prosecution, presenting evidence, and adjudication, and to arbitrators contracted to perform judicial services by regulation or mandate.

In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court held that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suit for damages." *Id.* at 513. The Court added that federal administrative law requires that agency adjudication maintain many of the safeguards that are available in the judicial process. *Id.* "Persons subject to [agency hearings] and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. *Id.* at 514.

Arbitrators have also been granted absolute immunity while acting in the scope of their duties. Because an arbitrator's role is functionally equivalent to a judge's role, courts have uniformly extended judicial and quasi-judicial immunity to arbitrators. *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (1990). (Defective notice and improper selection of arbitration panel were sufficiently associated with adjudicative phase arbitration to justify immunity.) Like judicial and quasi-judicial immunity, arbitral immunity is necessary to protect decision makers from undue influence, and the decision-making process from attack by dissatisfied litigants. *Id.* at 886.

Furthermore, to effectuate these underlying policies, arbitral immunity also extends beyond the arbitrators themselves to organizations that sponsor arbitrations. *Id.* at 886-7; *Shrader v. NASD, Inc.*, 855 F.Supp. 122, 123-4 (E.D.N.C. 1994). Without this extension, arbitral immunity would be almost meaningless because liability would simply be shifted from individual arbitrators to the sponsoring organizations. *Austern*, at 886. Arbitral immunity protects all acts within the scope of the arbitral process. *Id.*

In a case analogous to the Arbitration Organizations, *Ozark Air Lines, Inc. v. National Mediation Board*, 797 F.2d 557 (8th Cir. 1986), the court granted immunity. That case dealt with a dispute regarding a pilot's retirement benefits. *Id.* at 559. The retirement benefits were administered via a board that was mandated by the Railway Labor Act. 45 USC §181. *Id.* The Railway Labor Act provided that a board be established to resolve certain disputes. *Id.* The board was unable to resolve the dispute, and the National Mediation Board was called to arbitrate the dispute. *Id.* at 560. The

Mr. Mark Fina, Senior Economist
North Pacific Fisheries Management Council
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court ruled that the National Mediation Board enjoyed arbitral immunity, reasoning that an order entered against the board would force it to decide the appropriateness of each request for an arbitrator and would “seriously interfere with NMB’s neutrality in labor-management relations, run counter to Congressional policies in creating NMB, and retard its statutory purpose.” *Id.* at 564. See also *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982) (“Extension of arbitral immunity to encompass boards which sponsor arbitration is natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusory.”) Examples of roles granted arbitral immunity include serving as a member of a special joint dispute resolution committee, *Larry v. Penn Truck Aids, Inc.*, 567 F.Supp. 1410, 1415-16 (E.D.Pa.1983), notifying and selecting the arbitration panel, *Austern*, 898 F.2d at 886, and the sponsoring of arbitration proceedings, *Corey*, 691 F.2d at 1211.

Arbitral immunity has also been granted by statute to arbitrators working pursuant to 28 U.S.C. §655, Alternative Dispute Resolution.

(c) Immunity. All individuals serving as arbitrators in an alternative dispute resolution program under this chapter are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

The contract arbitrators and formula report arbitrator hired by the Arbitration Organizations clearly share “enough of the characteristics of the judicial process” to also be immune from third party claims for damages. The contract arbitrators actually hear and decide Last Best Offer arbitrations. The formula price arbitrator issues a price formula for each active fishery that is frequently a material component in price negotiations and decisions. As with judges, administrative law judges, and board arbitrators mandated by statute, the contract arbitrators and formula price arbitrator should be afforded immunity because failure to do so would “seriously interfere” with their neutrality in processor-harvester relations, run counter to NMFS’ and the Council’s policies in creating the Binding Arbitration system, and retard its regulatory purpose.

Furthermore, following the reasoning in *Ozark Air Lines* and *Corey*, the arbitral immunity afforded the contract arbitrators and the formula price arbitrator must also extend to the Arbitration Organizations, and their administrators, officers, and legal counsel that hire and manage the independent contractors... otherwise the immunity extended to the independent contractors would be “illusory.”

3. Immunity Appropriate for Quasi-Legislative Functions of Arbitration Organizations.

In addition to arbitral immunity, it is also clear that when an agency exercises legislative and quasi-legislative regulatory authority, action for money damages against agency members

Mr. Mark Fina, Senior Economist
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will not lie. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In *TRPA*, members of a regional planning authority's governing board were granted absolute immunity from federal damages liability since they were acting in a legislative capacity. *Id.* at 406. The Court explained:

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."

341 U.S., at 377, 71 S.Ct., at 788.

This reasoning is equally applicable to federal, state, and regional legislators. Whatever potential damages liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of *TRPA* acting in a legislative capacity.

Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 at 405. See also *Jaylee Brand, Inc. v. United States*, 721 F.2d 385, 395 (D.C. Cir. 1983), holding that legislation is a function of absolute immunity, with the immunity following the function and not the office.

As in *TRPA*, the Arbitration Organizations should be afforded quasi-legislative immunity. The duties assigned to the Arbitration Organizations would normally fall to the agency, in this case, NMFS. Pursuant to the unique regulatory mandate of the Arbitration Regulations, the Arbitration Organizations and their administrators, officers, legal counsel, and independent contractors in effect stand in the shoes of the agency for the general benefit of the crab industry, acting in a quasi-legislative capacity in administering, funding, implementing, and operating the Binding Arbitration system. Under these circumstances, it is only fair and appropriate that the Arbitration Organization and their administrators, officers, legal counsel and independent contractors be afforded the same immunity from suit and damages afforded to agency members.

4. Scope of Immunity.

Immunity protects all acts within the scope of the arbitral and quasi-legislative process. The scope of immunity protects the protected party unless (s)he acts in clear absence of all jurisdiction. *See, Tucker v. Outwater*, 118 F.3d 930, 933 (2nd Cir. 1997).¹ Nevertheless, any grant of immunity to the independent contractors of the Arbitration Organizations does not exculpate them from all liability, only from liability from the claims of third parties. Pursuant to the express terms of their contracts with its independent contractors, the Arbitration Organizations still have the ability to proceed against its independent contractors for breach.

It is significant, however, that the Arbitration Organizations' retained ability to proceed against its independent contractors for breach further highlights the Arbitration Organizations' need for immunity. No Arbitration Organization should be exposed to third party claims as a result of its decision whether to sue one of its independent contractors merely because a claimant disapproves of the actions of the independent contractor.

When applying the principles of absolute judicial and quasi-judicial immunity, together with those of legislative and quasi-legislative immunity and arbitral immunity, it is clear that policy favors immunity for those directly and indirectly engaged in a process. The development of the Arbitration System, for example, is not completed by a single actor, but is rather the product of the work of many. To be effective, immunity must be granted to all involved in the process.

The Council and NMFS have charged the Arbitration Organizations (and its administrators, officers, legal counsel, and independent contractors) with the duty to make the Arbitration System work. To do so, we must engage in quasi-arbitral and legislative activities...activities that the courts clearly find require neutrality and independence to successfully perform. To preserve neutrality and independence the Arbitration Organizations and its administrators, officers, legal counsel, and independent contractors have to be able to avoid "the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." Neutrality and independence can only be preserved through immunity from third party claims.

¹ Courts have refused immunity when an architect's actions, when acting as an independent arbitrator, were characterized as delay or failure to decide, *E.C. Ernst, Inc. v. Manhattan Construction Co. of Texas*, 551 F.2d 1026, 1033 (5th Cir.1977), *cert. denied*, 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769 (1978), when the arbitrator was considered an "agent" of a party, *United States v. City of Hayward*, 36 F.3d 832, 838 (9th Cir.1994), *cert. denied*, 516 U.S. 813, 116 S.Ct. 65, 133 L.Ed.2d 27 (1995) (arbitrator determined to be an agent of City when city regulations mandated arbitration), and where the acts complained of were outside of the arbitrator's jurisdiction), *Kemner v. Dist. Council of Painting & Allied Trades No. 36*, 768 F.2d 1115, 1119-20 (9th Cir.1985).

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Very truly yours,
BERING SEA ARBITRATION ORGANIZATION

By:
Erling Jacobsen, Executive Director

ALASKA CRAB PROCESSORS ARBITRATION
ORGANIZATION

By:
L. John Iani, President

cc: Glenn Merrill, NMFS

Bering Sea Arbitration Organization

4917 Leary Ave NW Seattle, WA 98107
Phone (206) 784-8948 email: bsao@gmail.com

January 7, 2008

Mark Fina, Senior Economist
North Pacific Fisheries Management Council
605 West 4th, Suite 306
Anchorage, Alaska 99501-2252

Sam Cotton, Chairman
Crab Advisory Committee

Re: Bering Sea Arbitration Organization's Comments on CR Program Binding
Arbitration System for the Crab Advisory Committee

Dear Mark and Sam:

On behalf of the unaffiliated BSAI crab quota share and individual fishing quota holders, the Bering Sea Arbitration Organization ("BSAO") hereby submits for consideration of the Crab Advisor Committee of the North Pacific Fisheries Management Council, comments and proposed solutions and clarifications to the binding arbitration system primarily codified at *50 CFR 680.20 et seq.*

A fundamental issue is the extent to which a crab binding arbitration proceeding should resemble a full-blown trial. Drawing on major league baseball arbitration, the Council adopted a last, best offer ("LBO") form of arbitration because it is quick, cost-effective, and final. Additionally, and most importantly, an LBO system promotes settlement. The arbitrator cannot compromise; but rather, must select one of the two offers. Parties settle to avoid the potentially more severe impact of an uncertain offer.

The BSAO supports the LBO system of binding arbitration. Unfortunately, over the past 2 years issues have arisen and we have discovered that the current regulations may not adequately specify the parameters for the last best offer proceeding and the authority of the arbitrator in that proceeding. This letter identifies and proposes solutions to many of those issues.

To facilitate your evaluation, this letter contains two sections. Section I identifies particular issues the BSAO has encountered, discussions of those issues, and proposed remedies for the Committee to consider.

Section II outlines two general remedies that may go a long way toward correcting a number of the problems we have encountered implementing the binding arbitration system.

SECTION I: Particular Issues and Remedies

BSAO Administration.

1. The Content/Timing of the Arbitration Organization Reports Needs to Be Adjusted.

Discussion: The BSAO should only be required to report its membership roster to RAM. Also, the timing and content of the report needs to be reconsidered. The regulations require information the Arbitration Organizations don't have and don't want to have. All information from the currently required BSAO report was already reported in the initial QS application and is reported in subsequent annual IFQ/IPQ applications. If necessary, Erling Jacobsen, the Executive Director of the BSAO, will provide more comprehensive comments.

2. The Council needs to clarify whether the "costs for arbitrating performance disputes" in 50 CFR 680.20(h)(10)(iv) includes the parties costs to arbitrate.

Discussion. The regulation is unclear and could mistakenly be read to have the arbitration system pay the costs of the parties to a performance dispute. Clearly, the cost of the contract arbitrator is intended to be charged against the general fees collected from the IFQ/IPQ holders. The Arbitration Organizations have to set the annual fee assessed the IFQ and IPQ holder to implement the binding arbitration system based on anticipated costs against the system. To fulfill that duty, the Arbitration Organizations need the Council to clarify whether the "costs for arbitrating performance disputes" includes other costs, including the costs of the parties to the performance dispute.

Correspondingly, it might be expedient and cost-effective to provide a regulatory mechanism that allows the parties to a performance dispute arising from a crab contract that includes a "true-up" under an agreed percentage pricing formula to have an independent third party auditor review the IPQ holder's confidential sales and financial information to determine whether the IPQ Holder has complied with its contract with the IFQ Holder. In the event the parties could not mutually agree to an independent auditor, each party could appoint an independent auditor and those two auditors could select the single independent auditor to review the confidential financial data. If the Council determines that the existing regulation does not include such costs and implements such a mechanism, it would seem fair and reasonable to include the costs of that single independent auditor amongst those paid by the general fees collected for the binding arbitration system.

3. The Council should consider removing artificial impediments that unnecessarily complicate and effectively restrict IFQ Holders' access to arbitration. See, generally, 50CFR 680.20(h)(3)

Discussion: Many of the jurisdictional, arbitrability and other issues regarding implementation of the binding arbitration system arise because of the labyrinth surrounding access to arbitration.

The Council should remove the artificial impediments to initiating arbitration and should allow IFQ Holders to initiate arbitrations at any time during that crab fishing year. There would be no practical need for different kinds of arbitration approaches. Mutual agreement for Lengthy Season approach would be unnecessary if an IFQ Holder can initiate arbitration before or after commencement of season. The timing of the arbitration

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decision could be based on the date of initiation. This would allow pre-season or post-season arbitrations as desired by the IFQ holder without the unnecessary complexity/restrictions of the current program.

The current arbitration structure was configured in response to issues (ie: last man standing, timing and preparation, etc.) that were adequately resolved by inclusion of the "lengthy season approach". In practice, we can see no advantage to harvesters or processors by any of the different approaches. Combining all "approaches" to arbitration eliminates confusing timing issues and achieves the same result in a more efficient manner.

4. Arbitrators Must Have the Authority to Decide on Jurisdiction/Arbitrability. See, 50 CFR 680.20(h)(1).

Discussion: The BSAO agrees with the Comment #2 of the ACPAO Memo that the arbitrator needs to have the power and authority to decide jurisdiction and arbitrability (the issue of whether the issue/case falls within the binding arbitration regulations).

As with the LBO decisions, the arbitrator's jurisdictional ruling needs to be issued without legal opinion or comment. The LBO arbitration system is predicated on prompt and efficient operation...prompt decisions/holding down costs. The decisions or rulings of arbitrators need to be binding. Therefore, as with LBO decisions and other procedural rulings, the decisions/rulings are not, and must not be, appealable. How many appeals should be allowed before an arbitrator's decision becomes "binding"? Allowing recourse to appeal would burden the program with additional time and expense and may open the door to take arbitration program decisions outside the intended (contracted) venues (with additional expense to parties?). Even if appeals were limited to hearing by contracted arbitrators, it is not in the best long-term interest of the program. It may also be used by IPQ holders to effectively annul the IFQ holder's current right to select an arbitrator from among the contracted arbitrators.

It is significant to note that these issues have previously primarily arisen in the context of whether an arbitration has been timely commenced. As discussed in Comment #7 above, that problem would be resolved if an IFQ Holder could initiate a binding arbitration at any time in the crab fishing year.

5. Market Analyst/Formula Arbitrator should not testify or comment in arbitrations.

Discussion. Neither the Market Analyst nor the Formula Arbitrator should be allowed to testify or provide comments in arbitrations. It is imperative and integral to the integrity of the system that the Market Analyst and Formula Arbitrator remain independent and above any appearance of preference. The reports are non-binding and any party to an arbitration can dispute the contents of any report.

Additionally, any attempts to influence the report or the factors considered in the reports by either processors or harvester needs to be prohibited. The processors seem to wish to turn the arbitrations into mini-trials, contrary to the intent in implementing LBO arbitration. The parties can make any arguments it needs based on the language in the reports.

6. Arbitrator shall presume against Party refusing to provide requested information. See, 50 CFR 680.20(h)(4)(iv).

Discussion: The regulations at 50 CFR 680.20(h)(4)(iv) currently allow a party to refuse to provide requested information to the arbitrator that the arbitrator believes would be useful in reaching a final decision. The regulations should be revised to allow the arbitrator to presume that the requested evidence would not support the party refusing to provide the requested information. Absent such authority, the arbitrations could be unfairly skewed, particularly if the requested information is not available to the other party. Absent such authority, parties could withhold damaging information without penalty. This issue is particularly significant in performance disputes, suggesting perhaps the practicality of independent auditors as discussed in Comment #4 above.

SECTION II: General Remedies.

A. Adopt General Statement of Intent.

The Council could adopt a general "Statement of Intent" to guide those persons subject to, implementing, and applying the regulations concerning the Binding Arbitration System codified at 50 CFR 680.20 et seq. We have learned the hard way that the current regulations are silent or unclear on a number of issues and that regulatory silence has been used to act contrary to the Council's intent. Some of the problems encountered are clearcut and can be simply and expressly clarified in the regulations. However, it is impossible to predict all of the issues that may arise and impractical for the Council to address each issue on an "ad hoc" basis. In those instances, with the "Statement of Intent", the Council could provide guidance to IFQ and IPQ holders, arbitration organizations, contract arbitrators, formula arbitrators, market analysts, third party data providers, and other interested parties in interpreting regulations and filling in the gaps in issues where the regulations are silent or unclear.

The Council could include a Statement of Intent in a new subsection (3) to 50 CFR 680.20(a) under the heading "Applicability."

The BSAO respectfully proposes the following text:

The binding arbitration system shall be conducted in a simple, timely, and cost-effective manner. Arbitration decisions shall be final and only identify the prevailing last best offer, without formal or informal comments. Arbitration evidence and materials shall remain confidential. Contract arbitrators shall have authority to make final and binding oral procedural, evidentiary, jurisdictional, and other rulings incident to the proceeding that shall be applicable only to that proceeding. To preserve the integrity of the system, contract arbitrators, formula arbitrators, and market analysts shall remain independent and shall discourage and disregard contacts not expressly authorized pursuant to the regulations, their contract(s) with the arbitration organizations, or the joint instructions of the arbitration organizations.

Very truly yours,
BERING SEA ARBITRATION ORGANIZATION

By: Erling Jacobsen, Executive Director

April 2, 2008

Eric Olsen, Chairman
North Pacific Fishery Management Council
605 W. 4th Ave. Suite 306
Anchorage, Alaska 99501

Re: Action on the 2005 Crab Rationalization Plan, and Emergency Rule Request for Onshore Landing of AI CV Trawl Cod

As the petitioner's representative in Adak's petition to State of Alaska to allow Adak to incorporate as a Second Class City, I personally led the effort to eventually get Adak incorporated as the newest City in the State of Alaska in 2001.

In 2001 I was elected to the first City Council of Adak, and was elected as its first Mayor.

While I am no longer the Adak Mayor, I feel a strong obligation to voice my concern over the future of Adak and respectfully request the Council to take a serious look at how recent fish regulations have adversely impacted Adak.

1. Crab Rationalization Plan.

At the time Crab Rationalization Plan came into effect in 2005, Adak was producing at least two million pounds of crab a year. But thanks to crab rationalization, Adak was no longer able to produce much more than 500,000 each year since the Plan came in effect, and then only if the PQS holders chose to allow their IPQ to be processed in Adak.

The plan made Adak more dependent on its other fisheries, especially pacific cod. And with pacific cod being Adak's main source of production, it helped tremendously that it could produce between 20 to 25 million pounds of Cod per year, making Adak's shoreside processing work to keep not only the processor going but to keep the City of Adak in a positive cash flow situation and public services adequately provided.

2. CV Trawl Cod for Areas 541 and 542. Proposed Onshore Landing Requirements.

In 2008, outside floating processors (Trident and Ocean Peace) decided to come into Adak waters with their own catcher boats and take away as much of the AI federal and State water Cod as they could, and ended up taking 60% of the Cod that would have been delivered shoreside in Adak.

The proposed Onshore Landing Requirement Proposal as presented in the Adak leadership letter to you dated March 23, 2008, makes the most sense for Adak.

Discussion: The Economic Situation in Adak.

It seems that every twist and turn that Adak has made in attempt to make commercial fishing work, is hampered by commercial fishing regulations that are not only NOT compatible with Adak's commercial fishery growth potential, but totally contrary to what Adak was able to do and actually doing - in the clear example of Adak's shoreside processing of a majority of Brown Crab west of 170 - until we were cut off by the 2005 Crab Rationalization Plan leaving us with a limited percentage of AI TAC for Brown Crab, and making the effort for Adak less than economically feasible.

The City has only 3 fulltime employees. Only one person, the City Clerk (now part-time), is at the office besides the Manager. The third employee is the city's maintenance person- who is forced to contract some of his work out when the city can afford it - which they really can't. The fourth employee is the sole person watching over the power plant.

It's a bleak situation that will not go away - until more money can come into the community. And that hold up is in the lack of income from fish that is not coming into Adak.

It is clear that National Standard 8, to protect the interests of the Adak Community is at stake here. The Council has a legal obligation to take into account the bad situation that Adak is in, and to take corrective action to "minimize adverse economic impacts" created by

prior Council actions.

It is fast becoming conceivable that, without the level of fish production we have been barely enjoying, the City of Adak could be forced to fold up, and the State of Alaska forced to come in and pick up all the liabilities behind a bankrupt city.

We consider the Adak situation to be an emergency and one requiring immediate corrective action.

Sincerely,

Agafon Krukoff
former Mayor
City of Adak, Alaska

John Jani C-2(a-b)
Arni Thomson
Ad Hoc Crab Coalition

Draft ~~AP~~/Council Motion

Council concurs with the industry and public review process for EDR meta data recommended by PNCIAC and outlined in its testimony and motion and further directs that use of the EDR data be postponed until the Council receives and
approves the metadata that is the outcome of that process.

KOZAK & ASSOCIATES, INC.
P. O. BOX 2684
KODIAK, ALASKA 99615
907-485-8824

Proposed Purpose and Needs Statement
BSAI Crab Management C-2(b)
April 2, 2008

The Bering Sea/Aleutian Islands Crab Rationalization program is viewed as having accomplished some of the goals established in the original Purpose and Needs statement as modified at the February 2002 Council meeting. However, the Council has heard many concerns regarding the proportion of B shares and that 10% may not be adequate over the long term to meet the intended goal of achieving healthy, stable and competitive markets.

Recognizing that each crab fishery in the BSAI is unique, the Council has determined to analyze each fishery separately, with a range of alternatives designed to provide information regarding potential impacts to harvesters, processors and communities of a change to the status quo of the 90/10 A share/B share split.