

Public Review Draft

Regulatory Impact Review

and

Initial Regulatory Flexibility Analysis

For a Proposed Regulatory Amendment to

**Allocate Processor Quota Share
to Aleutia Corporation**

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Abstract: This Regulatory Impact Review/Initial Regulatory Flexibility Analysis analyzes an action pertaining to the right of first refusal for the Bering Sea and Aleutians Islands Crab Rationalization Program. This amendment package considers an action to redress the concerns of a specific right holder, Aleutia Corporation, who asserts that a transaction subject to the right occurred without that entity being provided the opportunity to exercise the right. The action proposes to allocate to that entity an amount of processor quota shares up to the amount transferred in the transaction that is asserted to have triggered the right.

Executive Summary

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the “program”). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. This amendment package considers an action to redress the concerns of a specific right holder, Aleutia Corporation, who asserts that a transaction subject to the right occurred without that entity being provided the opportunity to exercise the right. The action proposes to allocate to that entity an amount of processor quota shares up to the amount transferred in the transaction that is asserted to have triggered the right.

Purpose and Need Statement

The Council’s has adopted a purpose and need statements for this amendment package:

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares (PQS) initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community. At least one PQS transfer is believed to have occurred without the right holder (Aleutia Corporation) being informed of the transaction, denying that right holder of the ability to exercise its right of first refusal to acquire PQS as intended by the program. This lack of notice allowed the transfer of PQS to a party other than the right holder and the movement of the processing to another community. Providing that right holder with a direct allocation of PQS could mitigate the negative impacts arising from that transaction. In addition, providing for notice of the location of use of IPQ and transfers of PQS to right holders could prevent similar circumstances from arising in the future and make the right more effective in protecting communities’ historical interests in processing and ensure that community entities are better able to assert their interests as provided for by the right.

Alternatives

The Council has identified a single action alternative. Under that alternative, Aleutia Corporation would receive an allocation of newly-issued PQS in an amount up to 0.55 percent of the PQS pool.

Effects of the action alternative – the issuance of newly created PQS to Aleutia Corporation

The action alternative would allocate up to 0.55 percent of the PQS in the Bristol Bay red king crab to Aleutia Corporation to address its claim that it was denied the opportunity to exercise a right of first refusal on a transfer of PQS. Under the status quo, Aleutia may receive a future right of first refusal, as the current holder has offered to extend the right to settle Aleutia’s grievance. Even holding that right, Aleutia is unlikely to have an opportunity to exercise the right, as the current holder is a Community Development Quota group affiliate that is unlikely to transfer the shares in the foreseeable future. The action alternative would provide Aleutia with the benefit of the share allocation, at no cost to Aleutia. Aleutia is likely to contract custom processing of landings in the Aleutians East Borough to contribute economic activity to the borough. The allocation will dilute PQS holdings of all other processors slightly (as the effect is distributed among all PQS holders in proportion to their holdings). The action will also

result in a minor redistribution of processing geographically to the location of processing chosen by Aleutia (most likely King Cove) at the expense of other communities. Since the amount of crab at issue is very small, the redistribution is unlikely to affect the amount of economic activity or municipal revenues in any other location to a noticeable degree.

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1.0 INTRODUCTION

In August of 2005, fishing in the Bering Sea and Aleutian Island (BSAI) crab fisheries began under a new share-based management program (the “program”). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. This amendment package considers an action to redress the concerns of a specific right holder, Aleutia Corporation, who asserts that a transaction subject to the right occurred without that entity being provided the opportunity to exercise the right. The action proposes to allocate to that entity an amount of processor quota shares up to the amount transferred in the transaction that is asserted to have triggered the right.

This document contains a Regulatory Impact Review (RIR) in Section 2 and an Initial Regulatory Flexibility Analysis (IRFA) in Section 3 of the alternatives to modify rights of first refusal established under the program. Section 4 contains a discussion of the Magnuson Stevens Act (MSA) National Standards and a fishery impact statement.¹ This document relies on the RIR/IRFA for Modifications to Community Provisions analysis reviewed by the Council in February 2013 (NPFMC, 2013). Both of these analyses rely on information contained in the BSAI Crab Fisheries Final Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis/ Social Impact Assessment (NMFS/NPFMC, 2004).²

2.0 REGULATORY IMPACT REVIEW

This chapter provides an economic analysis of the action, addressing the requirements of Presidential Executive Order 12866 (E.O. 12866), which requires a cost and benefit analysis of federal regulatory actions.

The requirements of E.O. 12866 (58 FR 51735; October 4, 1993) are summarized in the following statement from the order:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

E.O. 12866 further requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant”. A “significant regulatory action” is one that is likely to:

¹ The proposed action is a minor change to a previously analyzed and approved action and the proposed change has no effect individually or cumulatively on the human environment (as defined in NAO 216-6). The only effects of the action are the effects on the distribution of processor shares, and as a consequence, distribution of landings of crab under the program. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

² This document relies on information contained in the BSAI In addition, further information concerning the fisheries and regulatory structure at issue in this action are contained in North Pacific Fishery Management Council/AECOM (November 2010).

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

2.1 Purpose and Need Statement

The Council has adopted the following purpose and need statement for this action:

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community "right of first refusal" agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares (PQS) initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community. At least one PQS transfer is believed to have occurred without the right holder (Aleutia Corporation) being informed of the transaction, denying that right holder of the ability to exercise its right of first refusal to acquire PQS as intended by the program. This lack of notice allowed the transfer of PQS to a party other than the right holder and the movement of the processing to another community. Providing that right holder with a direct allocation of PQS could mitigate the negative impacts arising from that transaction. In addition, providing for notice of the location of use of IPQ and transfers of PQS to right holders could prevent similar circumstances from arising in the future and make the right more effective in protecting communities' historical interests in processing and ensure that community entities are better able to assert their interests as provided for by the right.

2.2 History of Action

In October 2012, the Council deliberated on a suite of right of first refusal actions that had developed over a series of meetings. These actions were all intended make the right of first refusal more effective for crab processing communities. At this meeting the Council heard public testimony from Aleutia representatives describing a transaction that occurred, subject to the right of first refusal without providing the Eligible Crab Community (ECC) entity, the opportunity to exercise the right. Aleutia requested that the analysis include a consideration of allocating the amount of PQS represented by Aleutia's right of first refusal to be used within Aleutians East Borough. In response, the Council chose to include this as an action alternative in the Public Review Draft of the analysis.

In February 2013, at the Portland, Oregon Council meeting, the Council received this analysis and heard a staff presentation on this regulatory package (see NPFMC, 2013). The Council chose to bifurcate this issue, (called Action 6 in the analysis), from the rest of the right of first refusal package due to its nature as a specific case related to the right of first refusal rather than a change to a broad provision in the contacts.

After slightly modifying the language of the action alternative, the Council chose not to take action on this issue in February of 2013, but encouraged private negotiations and indicated they were prepared to

reconsider the issue should stakeholders return to the Council indicating that private resolution was unsuccessful. The Council voted against pre-establishing Alternative 2 as the preliminary preferred alternative if the issue were to be brought back to the Council.

2.3 Description of Alternatives

The Council approved an action alternative in October 2013. The action is intended to redress the community entity's loss of opportunity to exercise the right of first refusal on a transfer of PQS. The specific alternatives identified by the Council for this action are:

Alternative 1 – Status quo

No further of issuance of PQS

Alternative 2 – Issuance of PQS to Aleutia

Bristol Bay red king crab PQS shall be allocated to Aleutia Corporation in an amount that would result in that corporation receiving up to 0.55 percent of the PQS in that fishery. This allocation would be made exclusively from newly issued PQS.

2.3.1 Alternatives Considered, but not Advanced for Analysis

No alternatives to the action alternative have been considered by the Council. Given the nature of the dispute, the Council has developed an alternative that would address Aleutia's concern with the impact proportionally distributed to other PQS holders and communities. Other potential actions are believed to be infeasible or ineffective.

2.4 Existing Conditions

This section describes the relevant existing conditions in the crab fisheries. The section begins with a brief description of the management of the fisheries under the rationalization program, followed by descriptions of the harvesting and processing sectors in the fisheries, including only information relevant to this action. A brief description of communities dependent on the crab fisheries is also included as background, concerning community effects of this action.

2.4.1 Management of the Fisheries

The following nine crab fisheries are managed under the rationalization program:

- Bristol Bay red king crab,
- Bering Sea *Chionocetes opilio*,
- Eastern Bering Sea *Chionocetes bairdi*,
- Western Bering Sea *Chionocetes bairdi*,
- Pribilof red and blue king crab,
- St. Matthew Island blue king crab,
- Western Aleutian Islands red king crab,
- Eastern Aleutian Islands golden king crab, and
- Western Aleutian Islands golden king crab.

Under the program, holders of License Limitation Program (LLP) licenses, endorsed for one or more of these fisheries, were issued owner quota shares (QS), which are long-term access privileges, based on the license's qualifying harvest histories in that fishery. Catcher processor license holders were allocated

catcher processor vessel owner QS for their LLPs' histories as catcher processors and catcher vessel owner QS for their LLPs' histories as catcher vessels; catcher vessel license holders were issued catcher vessel QS based on their LLPs' histories as a catcher vessel. These owner QS are approximately 97 percent of the QS pool. The remaining three percent of the initial allocation of QS was issued to eligible captains as crew QS or "C shares", based on the individual's harvest histories as a permit holder on a crab vessel. QS annually yields individual fishing quota (IFQ), which represent privileges to harvest a particular amount of crab (in pounds) in a given season (based on the TAC). The size of each annual IFQ allocation is based on the amount of QS held in relation to the QS pool in the fishery. So, a person holding one percent of the QS pool would receive IFQ to harvest one percent of the annual total allowable catch (TAC) in the fishery. Ninety percent of the "catcher vessel owner" IFQ are issued as "A shares", or "Class A IFQ," which must be delivered to a processor holding an equal amount of unused individual processor quota (IPQ).³ The remaining 10 percent of these annual IFQs are issued as "B shares", or "Class B IFQ," which may be delivered to any processor.⁴ Processor quota shares (PQS) are long term shares issued to processors. These PQS yield annual IPQ, which represent a privilege to receive a certain amount of crab harvested with Class A IFQ. IPQ are issued for 90 percent of the catcher vessel owner TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.⁵

In addition to processor share landing requirements, Class A IFQ and IPQ (in most fisheries) are subject to regional landing requirements, under which harvests from those shares must be landed in specified regions. The following regional designations are defined for the different fisheries in the program:

Bristol Bay red king crab – North/South division at 56°20'N latitude
Bering Sea *C. opilio* – North/South division at 56°20'N latitude
Eastern Bering Sea *C. bairdi* – none (or undesignated)
Western Bering Sea *C. bairdi* – none (or undesignated)
Pribilof red and blue king crab – North/South division at 56°20' N latitude
St. Matthew Island blue king crab – North/South division at 56°20'N latitude
Western Aleutian Islands red king crab – South of 56°20'N latitude
Eastern Aleutian Islands golden king crab – South of 56°20'N latitude
Western Aleutian Islands golden king crab – undesignated and West of 174°W longitude

To further protect community interests, the Council included in the program a provision for community rights of first refusal on certain PQS and IPQ transfers. The representative entity of any community that supported in excess of 3 percent of the qualified processing in any fishery received the right on the PQS (and derivative IPQ) arising from processing in that community.⁶ In addition, entities representing qualified communities in the Gulf of Alaska north of 56°20' N latitude received a right of first refusal on any PQS issued, based on processing in a community not qualifying for a right of first refusal in that same

³ C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ and regional landing requirements.

⁴ The terms "A share" and "Class A IFQ" are used interchangeably in this paper, as are the terms "B share" and "Class B IFQ".

⁵ Although 90 percent of IFQ issued each year are issued as A shares, individual allocations can vary from 90 percent. Holders of PQS and their affiliates receive their IFQ allocations as A shares only to the extent of their IPQ holdings. The rationale for issuing A shares to PQS holders and their affiliates to offset IPQ holdings is that these persons do not need the extra negotiating leverage derived from B shares for these offsetting shares. To maintain 10 percent of the catcher vessel owner IFQ pool as B shares requires that unaffiliated QS holders receive more than 10 percent of their allocation as B shares (and less than 90 percent A shares).

⁶ The community of Adak was excluded from the rights of first refusal, as that community received a direct allocation of 10 percent of the Western Aleutian Islands golden king crab fishery.

area of the Gulf. Only the community of Kodiak qualified for this Gulf provision. Four fisheries – the Eastern and Western Bering Sea *C. bairdi* and the Western Aleutian Islands red and golden king crab fisheries – are exempt from the rights of first refusal provisions, as allocations of PQS in those fisheries were based on historic processing in other fisheries.

In the case of Community Development Quota (CDQ) communities, the representative entity holding the right is the local CDQ group. In all other communities, the right is held by an entity designated by the community. The right is established by a contract between the community entity and the PQS holder. Under the contract, the right applies to 1) any sale of PQS, and 2) sales of IPQ, if more than 20 percent of the PQS holder's community-based IPQ in the fishery were processed outside the community by another company in 3 of the preceding 5 years. As currently formulated, to exercise the right, the community entity must accept all terms and conditions of the underlying agreement of the sale of PQS or IPQ subject to ROFR.⁷

Any intra-company transfers are exempt from the right of first refusal. To qualify for this exemption, the IPQ must be used by the same company.⁸ In addition, a transfer of PQS is exempt from the right of first refusal if the resulting IPQ will be used in the community holding the right. To meet this exemption requirement, the purchaser must agree to use at least 80 percent of the annual IPQ in the community in 2 of the following 5 years and grant a right of first refusal on the received PQS to the community's representative. Under two circumstances, the right will lapse. First, if a company uses its IPQ subject to right of first refusal outside of the home community for three consecutive years, the right on the underlying PQS (and derivative IPQ) lapses.⁹ Second, if a community entity chooses not to exercise the right on the transfer of PQS, the right also lapses.

To exercise the right, a community entity must provide the seller of PQS with notice of its intent to exercise the right and earnest money in the amount of 10 percent of the contract amount or \$500,000, whichever is less, within 60 days of notice of a sale and receipt of the contract defining the sale's terms. In addition, the entity must perform under the terms of the agreement within the longer of 120 days or the time specified by the contract.¹⁰

2.4.2 The Processing Sector

Processing privileges are relatively concentrated with twenty or fewer PQS share holders in each of the fisheries subject to rights of first refusal requirements (see Table 1). Concentration of processing privileges varies across fisheries. The Eastern Aleutian Islands golden king crab fishery is the most concentrated. The Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, which have had the most participants historically, are the least concentrated. The regional distribution of shares differs with landing patterns that arose from the geographic distribution of fishing grounds and processing activities. In the St.

⁷ However increasing flexibility in this provision will be considered at the October 2014 Council meeting as a trailing amendment to the RIR/IRFA Modifications to Community Provisions

⁸ This provision does not apply to custom processing arrangements, as no share transfer occurs under those arrangements.

⁹ Based on the RIR/IRFA Modifications to Community Provisions analysis, the Council took action to remove the provision that the right of first refusal would lapse if the PQS was used outside of the community for three consecutive years.

¹⁰ In February 2013, the Council voted that time available for a community entity to exercise a right of first refusal would change from 60 days to 90 days, and the time for a community entity to perform under the contract would change from 120 days to 150 days. These modifications will be made in the final ruling of the RIR/IRFA Modifications to Community Provisions action.

Matthew Island blue king crab and the Pribilof red and blue king crab fisheries, most qualified processing occurred in the Pribilofs or offshore in the North region, resulting in over two-thirds of the processing allocations in those fisheries being designated for processing in the North region. The Bering Sea *C. opilio* fishery allocations are split almost evenly between the North and South regions; while less than 5 percent of the Bristol Bay red king crab PQS is designated for North processing. All qualifying processing in the Eastern Aleutian Island golden king crab fishery occurred in the South region, resulting in all processing shares in that fishery being designated for processing in the South region. The relatively low median share holdings in the large fisheries (the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries) suggest that a large portion of the historic processing was concentrated among fewer than 10 processors. In the smaller fisheries, fewer than 5 processors hold a large majority of the shares. The maximum holding in each fishery was in excess of twenty percent of the pool.

Table 1. Processing quota share holdings as a percent of the processing quota share pool (as of June 19, 2012)

Fishery	Share holdings by region					Across regions			
	Region	PQS holders	Mean holding	Median holding	Maximum holding	PQS holders	Mean holding	Median holding	Maximum holding
Bristol Bay red king crab	North	3	0.85	0.23	2.31	16	6.25	4.39	22.98
	South	16	6.09	4.39	20.68				
Bering Sea <i>C. opilio</i>	North	8	5.87	5.51	15.46	19	5.26	3.42	25.18
	South	17	3.12	0.38	9.72				
Eastern Aleutian Island golden king crab	South	10	10.00	5.24	45.36	10	10.00	5.24	45.36
St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	10	10.00	6.87	32.67
	South	7	3.09	2.08	7.96				
Pribilof red and blue king crab	North	6	11.26	12.01	23.28	13	7.69	3.87	24.49
	South	10	3.25	1.09	13.85				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2011-2012.
Note: These share holdings data are publicly available and non-confidential.

Historically, holders of PQS have operated in multiple communities (in some cases onshore and in some cases on floating processors). While any specific PQS is subject only to a single community right of first refusal, many PQS holders have different portions of their share holdings subject to rights of first refusal by different communities. Maintaining share holdings that are subject to rights of first refusal of different communities could complicate exercise of the right, if the PQS holder attempts to include all of its share holdings in a single transaction. In this circumstance, two communities would hold a right of first refusal, yet no means of resolving a priority between the communities is established by the required contract provisions.

Table 2 demonstrates how an individual’s PQS may be subject to rights of first refusal associated with multiple communities, particularly if PQS from multiple crab fisheries are included in the transaction. In the 2011/12 season, there were a total of 27 PQS holders and 22 of them held quota that was subject to the right of first refusal for at least one community. For one diversified PQS holder, a transfer of all of their crab PQS would trigger the right of first refusal for four communities at once. More common are single or dual rights of first refusal associated with a PQS holder’s shares.

Table 2. PQS holdings subject to rights of first refusal (2011-2012)

Fishery	Total PQS holders	PQS holders with shares subject to rights of first refusal				
		total	on behalf of one community	on behalf of two communities	on behalf of three communities	on behalf of four communities
Bristol Bay red king crab	16	12	7	5	0	0
Bering Sea <i>C. opilio</i>	19	15	11	3	1	0
Eastern Aleutian Islands golden king crab	10	9	9	0	0	0
Pribilof red and blue king crab	13	11	8	3	0	0
Saint Matthew Island blue king crab	10	8	6	2	0	0
All fisheries	27	22	17	2	2	1

Source: RAM permit database (2011-2012)

Under the rationalization program, a large portion of the processing (and raw crab purchasing) is vested in the holders of processing shares. These share holders have used their allocations to consolidate processing activities in the fisheries, with plant participation in each fishery dropping by approximately one-third. Since the rationalization program was implemented, the number of processing plants participating in the Bristol Bay red king crab fisheries has remained relatively constant at approximately 12. The average processing by the top 3 plants in the fishery increased to approximately 20 percent, with the concentration of the different share types slightly higher (suggesting that the largest processors of the different share types differ). In the first six years of the program, between 10 and 12 plants have participated in the Bering Sea *C. opilio* fishery, a decline of almost 5 plants from prior to the program. Concentration of processing declined slightly in the 2010-2011 season. This decline likely resulted from the increase in the TAC, which resulted in substantial increases in the mean and median pounds processed, as well as the average pounds processed by the largest three plants. Ten or fewer plants participated in processing in the Bering Sea *C. bairdi* fisheries in the first three years of the program. Since these fisheries are directly prosecuted by few vessels and have relatively small TACs, the processing is slightly more concentrated than in the two largest fisheries. Five or fewer plants participated in the Eastern Aleutian Island golden king crab and Western Aleutian Island golden king crab fisheries in the first three years of the program, limiting the information that may be released concerning processing in those fisheries.

In the first two years of the program, a large portion of the IPQ pool was subject to the “cooling off” provision, which required most processing to occur in the community of the processing history that led to the allocation of the underlying PQS. Consequently, few changes in the distribution of processing of Class A IFQ/IPQ landings occurred in the first two years of the program. Also, for most shares, entities representing the community of origin hold a right of first refusal on the transfer of the PQS and IPQ for use outside the community. This right is relatively weak, because intra-company transfers are exempt from the right, and, under the status quo, the right lapses if the IPQ are used outside of the community of origin for a period of three consecutive years. Despite the end of the cooling off period and the ease with which the right of first refusal may be avoided, in the third year of the program, most processing of IPQ landings occurred in the community of origin. Discerning the degree of redistribution, however, is not fully possible, as landings on floating processors are often categorized as “at-sea”. In many cases, these floaters operated within community boundaries, at times docked in the community harbor. In the 2010-2011 season, four years from the lapse of the ‘cooling off’ provision requirements, some redistribution of processing of Class A IFQ landings is suggested (see Table 3). Dutch Harbor and Akutan, collectively, have attracted slightly more Class A IFQ landings in the Bristol Bay red king crab fishery than under the cooling off period. These redirected landings reduced landings in King Cove and Kodiak, collectively. In the cooling off period, King Cove and Kodiak received substantially larger percentages of Class A IFQ

landings than their rights of first refusals suggest. These likely occurred as landings from within borough boundaries were consolidated in King Cove and as King Cove and Kodiak attracted landings that were unconstrained by the cooling off requirements. Processing of A share IFQ in Akutan and Dutch Harbor in the Bering Sea *C. opilio* fishery dropped substantially (by almost 20 percent) in the fifth and sixth years of the program. Redistribution of these landings to other locations cannot be revealed, because of confidentiality restrictions. The movements of landings suggest that with the cooling off provision expiring, it is possible to see a significant redistribution of landings among communities.

Table 3. Processing by share type and community (2010-2011)

2010-2011										
Fishery	Community	Class A IFQ			Class B IFQ			C share IFQ		
		Number of active plants	Pounds of share type processed	Percent of issued shares processed	Number of active plants	Pounds of share type processed	Percent of landings of share type	Number of active plants	Pounds of share type processed	Percent of landings of share type
Bristol Bay red king crab	Akutan	1	7,347,018	65.8	1	980,682	79.3	1	298,500	77.6
	Dutch Harbor	3			3			3		
	Floater	1	*	*	2	*	*	2	*	*
	King Cove	1	2,408,423	21.6	1	146,117	11.8	1	*	*
	Kodiak	2			4			1		
	St. Paul	1	*	*	1	*	*	1	*	*
Bering Sea <i>C. opilio</i>	Akutan	1	14,590,830	37.6	1	2,556,937	60.1	1	890,684	65.0
	Dutch Harbor	3			4			4		
	Floater	2	*	*	2	*	*	2	*	*
	King Cove	1	*	*	1	*	*	1	*	*
	Kodiak	1	*	*	1	*	*	2	*	*
	St. Paul	1	*	*	1	*	*	1	*	*
E. Aleutian Islands golden king crab	Dutch Harbor	3	*	*	3	261,706	100.0	3	84,933	100.0
	Floater	1	*	*	0	0	0.0	0	0	0.0
W. Aleutian Islands golden king crab	Dutch Harbor	4	1,184,177	98.8	3	132,427	100.0	2	*	*
St. Matthew Island blue king crab	Dutch Harbor	3	*	*	2	*	*	3	*	*
	St. Paul	1	*	*	1	*	*	1	*	*

Source: RAM IFQ data and RCR permit file.
 * withheld for confidentiality.
 Note: For Class A IFQ shows percentage of IPQ pool.

Processing share holders have achieved efficiencies under the program through consolidation of processing activities in fewer plants. A portion of this consolidation has been through traditional transfer of PQS and IPQ; but a substantial portion has also occurred through custom processing arrangements. Under these arrangements, a share holder contracts for the receipt and processing of landings of crab, while retaining all interests and obligations associated with the landed and processed crab.

The prevalence of custom processing relationships is evident in comparing the number of active IPQ accounts with the number of active processing plants (see Table 4). In the first year of the program, custom processing of deliveries occurred most prominently in the Bering Sea *C. opilio* fishery. Custom processing arrangements in that fishery expanded in the second year of the program and appear to have declined since. The decline may have occurred as relationships between plants and share holders stabilized, with fewer share holders having relationships with more than one plant. Few custom processing arrangements existed in the Bristol Bay red king crab fishery until the third year of the program, when Dutch Harbor plants entered relationships with several buyers. Few custom processing arrangements exist in other fisheries; however, it is possible that extensive custom processing may have occurred under any of those fisheries. Confidentiality protections prevent revealing processing amounts subject to these arrangements because of the relatively few processing participants in the fisheries.

Table 4. Number of active IPQ holder (buyer) accounts and IPQ processing plants by fishery (2005-2006 through 2010-11)

Fishery	Region	Community of Plant	2005 - 2006		2006 - 2007		2007 - 2008		2008 - 2009		2009 - 2010		2010 - 2011			
			Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants	Number of active IPQ holder accounts	Number of active plants		
Bristol Bay red king crab	North	St. Paul	1	1	1	1	2	1	1	1	2	1	2	1		
		Akutan	1	1	1	1	2	1	1	1	2	1	2	1		
	South	Dutch Harbor	3	3	3	3	7	4	7	4	4	3	4	3		
		King Cove	1	1	3	1	1	1	1	1	2	1	2	1		
		Kodiak	2	2	2	2	2	2	2	2	2	2	2	1		
		Floaters	2	2	2	2	2	1	2	1	1	1	1	1		
Bering Sea <i>C. opilio</i>	North	St. Paul	1	1	1	1	5	1	5	1	5	1	5	1		
		Floaters	6	3	14	2	3	1	2	1	2	1	2	1		
	South	Akutan	1	1	1	1	1	1	1	1	1	1	1	1		
		Dutch Harbor	5	4	7	3	4	3	3	3	4	3	4	3		
		King Cove	1	1	1	1	1	1	1	1	1	1	1	1		
		Kodiak	1	1	1	1	1	1	1	1	1	1	1	1		
		Kodiak	1	1	1	1	1	1	1	1	1	1	1	1		
		Floaters	1	1	1	1	3	1	2	1	2	1	1	1		
E. Aleutian Islands golden king crab	South	Akutan			1	1			1	1			1	1		
		Dutch Harbor	3	3	4	4	4	4	4	4	6	3	6	3		
		Floaters	1	1									1	1		
W. Aleutian Islands golden king crab	Undesignated	Adak	1	1												
		Dutch Harbor	2	2	2	2	2	2	4	3	4	2	4	2		
		Floaters							1	1						
	West	Adak	2	1	2	1	1	1	2	1						
		Dutch Harbor*									2	1	3	2		
		Floaters	3	2												
Eastern Bering Sea <i>C. bairdi</i>	Undesignated	Akutan			1	1	1	1	1	1	2	1				
		Dutch Harbor			5	3	4	3	3	3	5	3				
		King Cove			1	1	1	1	1	1	2	1				
		Floaters			1	1	2	2	4	2	2	1				
Western Bering Sea <i>C. bairdi</i>	Undesignated	Akutan	1	1	1	1										
		Dutch Harbor	4	4	5	3	3	2	3	3						
		King Cove	1	1	1	1	1	1	1	1						
		Kodiak	1	1												
		St. Paul	1	1			3	1								
		Floaters	4	2	1	1	3	2	3	2						
St. Matthew Island blue king crab	North	St. Paul			Fishery closed								5	1	6	1
	South	Akutan			Fishery closed										1	1
		Dutch Harbor			Fishery closed								1	1	3	3

Source: RAM IFQ data and RCR permit file.

* Processed under the exemption from regional delivery requirements.

2.4.3 Right of First Refusal Administration

Rights of first refusal are administered under the program through contractual requirements of affected parties. First, recipients of an initial allocation of PQS to which a right of first refusal could be applied must have entered a contract with an identified community representative prior to receiving that allocation. In addition, recipients of a transfer of PQS subject to the right but that does not trigger the right must enter a right of first refusal contract for that PQS prior to the transfer being processed. Once contracts are entered, the holder of the right and the PQS holder oversee the right through civil actions. This approach is intended to ensure that the right is established as required, while limiting the extent of agency involvement in any private dispute between the parties to the contract.

The ROFR contract provisions are also broadly specified in Section 11, Chapter 3 of the FMP for BSAI King and Tanner Crabs, pursuant to Section 313(j) of the MSA, and include the following (A through I):

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 IPQ 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.

2.4.4 Right of First Refusal Holdings

Based on the qualifying criteria, eight communities were eligible to have representative entities receive rights of first refusal in the different fisheries governed by the program (see Table 5).¹¹ The distribution of rights differs across fisheries, with Akutan, Unalaska, King Cove, St. Paul, and St. George all starting the program with rights on approximately 10 percent or more of the PQS in at least one fishery. Tracking the existence of rights is complicated, as current reporting requirements provide insufficient information for NMFS to actively monitor rights.¹² Only if the lapse of rights is voluntarily reported to NMFS will those lapses be recorded in NMFS data. So, it is possible that rights have lapsed, in addition to those shown.

¹¹ Rights established on implementation are included, as even those which have lapsed could be resurrected under one of the alternatives.

¹² The RIR/IRFA Modifications to Community Provisions analysis for final action addresses this shortcoming by

Table 5. Distribution of rights of first refusal by community on implementation and at the end of the 2011-2012 season (June 2012).

Fishery	Region	Right of First Refusal Beneficiary	Percentage of PQS pool		
			on Initial Allocation	in the 2011-2012 season	difference in percent
Bristol Bay red king crab	North	None	0.0	0.0	0.0
		St. Paul	2.5	2.5	0.0
	South	Akutan	19.7	19.7	0.0
		False Pass	3.7	3.7	0.0
		King Cove	12.7	7.4	-5.3
		Kodiak	3.8	0.2	-3.5
		None	3.4	12.2	8.8
Unalaska	50.7	50.7	0.0		
Bering Sea <i>C. opilio</i>	North	None	1.0	16.0	15.0
		St. George	9.7	0.0	-9.7
		St. Paul	36.3	30.9	-5.4
	South	Akutan	9.7	9.7	0.0
		King Cove	6.3	6.3	0.0
		Kodiak	0.1	0.0	-0.1
		None	1.8	2.0	0.1
Unalaska	35.0	35.0	0.0		
Eastern Aleutian Islands golden king crab	South	Akutan	1.0	1.0	0.0
		None	0.9	7.8	6.9
		Unalaska	98.1	91.2	-6.9
Pribilof red and blue king crab	North	None	0.3	2.7	2.5
		St. George	2.5	0.0	-2.5
		St. Paul	64.8	64.8	0.0
	South	Akutan	1.2	1.2	0.0
		King Cove	3.8	3.8	0.0
		Kodiak	2.9	2.9	0.0
		Unalaska	24.6	24.6	0.0
Saint Matthew Island blue king crab	North	None	64.6	64.6	0.0
		St. Paul	13.8	13.8	0.0
	South	Akutan	2.7	2.7	0.0
		King Cove	1.3	1.3	0.0
		Kodiak	0.0	0.0	0.0
		Unalaska	17.6	17.6	0.0

Source: RAMPQS data 2011-2012

In several instances, community entities holding the right have acquired PQS subject to the right (see Table 6). A variety of arrangements led to these transactions, but in no case was the right exercised directly. In one fishery, a portion of the PQS subject to the right was transferred to the community entity holding the right, while the right with respect to another portion of the PQS was allowed to lapse. In another instance, a PQS holder with a considerable harvest share holding transferred its PQS to the right holding community entity to avoid a potential harvester/processor affiliation that would have prevented participation in the arbitration program. In most cases, right holding community entities have been actively involved in PQS transactions involving shares subject to their rights. In some cases, those entities have acquired shares; in others, they have allowed transactions to proceed. This community involvement in transactions suggests that the right has affected community interests. In two cases, a right holder has

voluntarily agreed to relinquish the right. The terms of those agreements (and whether any compensation was made for the relinquishment) are not known.

Circumstances in the various communities and of the right holders and the processors have affected the manner in which PQS have either been transferred to right holders or have been relinquished. The limitations of the ‘cooling off’ provision prevented much of the IPQ subject to the right of first refusal from being used outside the community of origin in the first two years of the program. Only in the third year of the program (once the cooling off limitation lapsed) was any sizeable portion of the IPQ permitted to be moved. As a result, rights of first refusal on PQS are believed to have lapsed (as a result of use outside the community) in only a few instances in the first three years of the program.

Most notably, the right has lapsed with respect to PQS arising from historic processing in St. George. The St. George harbor and its entrance were damaged by a storm in 2004. In the first two years of the program, NOAA Fisheries found that damage prevented processing in St. George, and on request of both the community of St George and APICDA, approved use of a regulatory exemption to the cooling off landing requirements. In the third year, the PQS holders used the IPQ outside the community. As a consequence, by its terms, the right of first refusal lapsed on shares for which the Aleutian Pribilof Island Community Development Association (APICDA) held rights of first refusal on behalf of St. George. Despite these circumstances, APICDA reached agreements with both PQS holders with respect to these shares. Under the agreement with one of the PQS holders, APICDA acquired the PQS formerly subject to the right. The terms of the other agreements are not known, but APICDA relinquished its right as a part of that agreement.

In addition to shares subject to the St. George right of first refusal, PQS allocated based on processing in the Aleutians East Borough communities (i.e., Akutan, False Pass, King Cove, and Port Moller) was permitted to be moved within the borough (and outside the community) during the cooling off period. As a consequence, rights of first refusal for the benefit of those communities may also have lapsed from movement of processing.

Table 6. PQS no longer subject to rights of first refusal by fishery

Fishery	Community formerly benefiting from the right	Percentage of PQS pool no longer subject to the right	Percentage held by right holder
Bristol Bay red king crab	King Cove	5.3	5.3
	Kodiak	3.5	3.5
Bering Sea <i>C. opilio</i>	St. George*	9.7	5.7
	St. Paul	5.4	5.4
	Kodiak	0.1	0.1
Eastern Aleutian Islands golden king crab	Unalaska*	6.9	0.0
Pribilof red and blue king crab	St. George	2.5	2.5
St. Matthew Island blue king crab	Kodiak**	0.0	0.0

Source: RAMPQS data (2011-2012)

* All shares not acquired by the right holder were released from the right by the right holder.

**Right holder acquired small number of shares (less than 0.1 percent of the PQS pool).

Note: The table omits PQS amounting to 0.5 percent of the PQS pool in the Bristol bay red king crab fishery that are not currently subject to a right. The representative of Port Moller held that right at the start of the program. The removal of the right has not been reported to NMFS.

Assessing the extent to which rights have lapsed beyond those voluntarily reported to NOAA Fisheries is difficult because of the nature of available landings data. While some PQS holders have reported lapsing of rights voluntarily, regulations do not require PQS holders to report lapsing of a right. Although geographic landing requirements are applied in the program, records concerning location of landings are limited by record keeping protocols. Prior to the 2009-2010 season, most deliveries to floating processors were recorded as processed ‘at sea,’ without designation of a port. These ‘at sea’ deliveries may have taken place within community boundaries, and therefore may not be considered as being outside of the community that benefits from the right of first refusal. On the other hand, landing records will not fully reflect the geographic distribution of landings, which may result in rights lapsing (because of use of IPQ outside of the community for three consecutive years). In addition, no formal system is in place for reporting and documenting the lapse of rights of first refusal. Given this shortcoming, it is possible that more community rights of first refusal may have lapsed than are reflected in the available data. To address that shortcoming, NOAA Fisheries revised reporting requirements to collect processing by community from stationary floating shore plants, needed to determine whether landings on floating processors occur within community boundaries. This change, which became applicable in the 2009-2010 season, will allow monitoring of future lapses of rights of first refusal arising from use of the yielded IPQ outside of the designated community.

2.4.5 Communities

Nine communities qualified to receive the right of first refusal as an Eligible Crab Community (ECC) by having historically received three percent or more of the qualified landings in any Bering Sea and Aleutian Islands crab fishery included in the rationalization program. One of these communities, Adak, received a special allocation of Western Aleutian Islands golden king crab in lieu of an initial right of first refusal. The remaining eight ECCs include: Unalaska, Akutan, King Cove, St. Paul, St. George, Kodiak, Port Moller, and False Pass (Table 7). Each community is represented by a non-profit Eligible Crab Community entity that serves as a governing board. In the case a CDQ community, the CDQ group is this entity.

Table 7. Eligible Crab Communities (ECC) and associated ECC entities

ECC	ECC entity
Adak	None*
Akutan (CDQ community)	APICDA
False Pass (CDQ community)	APICDA
King Cove	Aleutia
Kodiak	Kodiak Fisheries Development Association
Port Moller	Aleutia
St. George (CDQ community)	APICDA
St. Paul (CDQ community)	CBSFA
Unalaska/ Dutch Harbor	Unalaska Crab, Inc.

Source: 70 FR 10174, March 02, 2005

*Adak does not have a right of first refusal because they received a special allocation of 10 percent of the Western Aleutian golden king crab TAC

These communities vary in their geographic relation to the fishery; their historical relationship to the fishery; and the nature of their contemporary engagement with the fisheries through local harvesting, processing, and support sector activity or ownership. Each of these factors influences the direction and magnitude of potential social impacts associated with the proposed action (NPFMC, 2008).

Commercial fishing and seafood processing play a significant role in the economic success of Unalaska/Dutch Harbor. This community is home to the greatest concentration of processing and catcher vessel activity of any Alaska community. In recent years, pollock has accounted for the majority of the total wholesale value processed in Dutch Harbor. The second largest contributor to total wholesale value processed in Dutch Harbor has been crab, with red king crab providing the largest value contribution of a crab species, followed by *C. opilio*. Dutch Harbor based processors received a substantial share of the PQS allocations in most crab fisheries under the rationalization program. These shares are subject to rights of first refusal of the Dutch Harbor community entity. These shares are unlikely to migrate out of the community, because crab processing at most facilities plays an important part in an integrated operation that serves several fisheries. Under the right of first of refusal, Unalaska/Dutch Harbor is represented by Unalaska Crab, Inc., a community entity created explicitly for the purpose of holding rights of first refusal and crab shares under the program. The City Council is the board of directors for this company (see NPFMC/AECOM, 2010; NPFMC/EDAW, 2008).

Once heavily dependent upon salmon, the community of King Cove is now more diversified, processing groundfish and crab from the GOA and BSAI. The community is home to several large crab vessels, and is also home to Peter Pan Seafoods,¹³ the only shore based processor located in King Cove. The plant processes salmon, crab, halibut, and groundfish. A large majority of King Cove's work force is employed full time in the commercial fishing industry, with additional employment in the community in support businesses dependent on commercial fishing. For several years now, the amount and total value of crab processed in King Cove have been declining, while groundfish processing has increased. The decline in crab production was due primarily to a decline in quotas, related to reduced stocks. In addition, AFA sideboard limits on BSAI crab have also limited the amount of crab that could be processed in King Cove. Under the rationalization program, crab processing has remained an important component of the diversified processing undertaken at the shore plant in King Cove. Yet, the potential for the community to attract additional processing is limited by excessive share caps, which constrain the local plant since its parent merged with the owner of two other plants active in the crab fisheries. In addition, rapid fleet contraction under the program, particularly in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, has affected King Cove. Approximately 20 crew jobs were estimated to have been lost (see Lowe, et al., 2006). Although difficult to quantify because of the yearly variation in crew employment, the estimate is consistent with information gathered in other studies (see NPFMC/AECOM, 2010; NPFMC/EDAW, 2008). In the first year of the program, fleet contraction is also believed to have caused a drop in demand for harbor and moorage services, and goods and services from fishery support businesses in King Cove. Attribution of these effects to the change in crab management is difficult, since data isolating spending of crab vessels and fishery participants from spending associated with other fishery and non-fishery activities, are not available (see Lowe, et al., 2006). Aleutia, Inc. is the community entity representing King Cove. Originally established as a salmon marketing company, the company also represents Sand Point and King Cove as their halibut and sablefish Community Quota Entity for purchases of quota in those fisheries.

The economy of Akutan is heavily dependent upon the groundfish and crab fisheries in the BSAI and GOA. The community is home to one of the largest shore based seafood processing plants in the area and is also home to a floating processor. The community also provides some limited support services to the fishing community. In addition, Akutan is a Community Development Quota (CDQ) community. The vast majority of catch landed in Akutan comes from vessels based outside of the community. Most of those vessels focus primarily on pollock, Pacific cod, and crab. The large shore plant is operated by

¹³ Peter Pan Seafoods is a wholly owned subsidiary of Nichiro-Maruha Corp., which also owns Westward Seafood operations in Dutch Harbor and a portion of Alyeska Seafoods.

Trident Seafoods. The shore processor is a multi-species plant, processing primarily pollock, Pacific cod, and crab. Given that the plant is an AFA-qualified plant with its own pollock co-op, pollock is the primary species in terms of labor requirements and economic value. However, the shore plant also accounts for a significant amount of the regional crab processing (in both value and volume) (EDAW, 2010). As with plants in Dutch Harbor and King Cove, crab has remained an important part of a diverse operation at the shore plant in Akutan, since implementation of the rationalization program. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of Akutan.

Although the economy of Kodiak is more diversified compared to King Cove and Akutan, fishing is a significant contributor to the community economy. Excluding the USCG, four of the top ten employers in Kodiak in 2003 were fish processors. Kodiak's processing sector has also relied on a diverse group of fisheries to support its operations through ebbs and flows in resource availability. Although Kodiak has a long history of crab processing, in the years leading up to the implementation of the rationalization program (including the qualifying years used for processor share allocation), its dependence on the Bering Sea and Aleutian Island crab fisheries was small relative to Unalaska, King Cove, Akutan, and St. Paul. A study of the effects of the rationalization program on Kodiak during the program's first year found anecdotal evidence suggesting declines in spending at some businesses, but evidence of a broad decline in total local spending could not be identified. The study cautioned that effects may lag, so these findings should be viewed as preliminary (Knapp, 2006). The City of Kodiak and the Borough of Kodiak are represented by Kodiak Fisheries Development Association, an entity formed for the sole purpose of holding rights of first refusal and crab quota on behalf of the city and borough.

Unlike King Cove, Akutan, Unalaska, or Kodiak, St. Paul is primarily dependent upon the processing of snow crab, harvested in the North Pacific. According to ownership data, all crab deliveries to the Pribilof Islands are made by non-resident vessels. Since 1992, the local shoreplant on St. Paul has been the primary processor for crab in the North region. St. Paul is a primary beneficiary of the North/South regional distribution of shares in the rationalization program. This limitation on landings should ensure that a substantial portion of the processing in the Bering Sea *C. opilio* fishery is undertaken in St. Paul. In the long run, it is possible that St. George could obtain a greater share of North landings, but most participants currently prefer St. Paul's harbor facilities to those available in St. George. Central Bering Sea Fishermen's Association, the St. Paul CDQ group, is the community entity holding rights of first refusal on behalf of St. Paul.

As with St. Paul, St. George has depended primarily on processing of crab from the Bering Sea *C. opilio* fishery. Processing of crab in St. George has been exclusively by floating processors. Since 2000, little or no crab processing has taken place in St. George. Prior to the rationalization program, the loss of processing activity was primarily attributable to the decline in crab stocks. Under the rationalization program, no processing has returned to St. George. Processing shares were subject to the 'cooling off' provision requiring the processing of landings with those shares to be undertaken in St. George. Yet, harbor breakwater damage caused by a storm prevented deliveries to the community during the first two years of the program and that activity has not returned. Whether the community can attract crab landings in the future depends, in large part, on its ability to provide processing capacity and a harbor that is perceived to be safe and suitable for the large vessels currently used in the fisheries. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of St. George.

Limited processing of catch from the Bristol Bay red king crab fishery on floating processors occurred in the communities of False Pass and Port Moller in the processor qualifying years. This processing qualified both communities for rights of first refusal under the program. No processing is believed to have

occurred in either community since implementation of the program. And, neither community currently has a shore-based processing plant that supports crab processing. Port Moller has a salmon plant that is operated seasonally. Aleutian Pribilof Island Community Development Association, the local CDQ group in False Pass, is in the process of opening a processing plant in that community. At this stage, the plant does not support crab processing. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of False Pass. The right of first refusal for Port Moller is held by Aleutia.¹⁴

2.5 Analysis of Alternatives

Under this action, newly-created PQS would be issued to Aleutia Corporation to redress that right holding entity's grievance that a transfer of PQS subject to the right took place without providing that entity with the opportunity to exercise the right.

2.5.1 Alternative 1 – Status Quo - No further of Issuance of PQS

On implementation of the program, Snopac Products, Inc. (Snopac) was issued approximately 6.3 million units of PQS in the Bristol Bay red king crab fishery and approximately 57 million units of PQS in the Bering Sea *C. opilio* fishery. Of these shares, 2,147,761 units of PQS in the Bristol Bay red king crab PQS were issued based on processing in the community of Port Moller. These Port Moller-based shares (which constitute slightly more than 0.534 percent of the PQS pool in the Bristol Bay red king crab fishery) were subject to a right of first refusal of Aleutia Corporation, on behalf of the Aleutians East Borough.

In the 2012-13 season, the 0.534 percent of the PQS pool at issue yielded approximately 31,500 pounds of IPQ. In the 2007-2008 season, the amount of IPQ yielded by these PQS reached its highest level since implementation of the program - approximately 86,000 pounds of IPQ. Operationally, this amounts to, at most, approximately one very large or two medium sized deliveries of crab by a vessel. Currently, Aleutia holds approximately 5 percent of the Bristol Bay red king crab PQS, which it acquired from the original holder, who was required to divest after a merger of two processing companies resulted in the combined PQS holdings exceeding the 30 percent PQS cap.

In recent years, red king crab first wholesale prices have increased substantially from a low of approximately \$7.50 in 2006 to slightly less than \$18 in 2011. During this period, annual average revenues per landed pound of crab, net of only the landings purchase price, ranged from approximately \$0.80 to slightly less than \$2.50 per pound. In addition to purchasing crab, a processor would have expenses associated with processing and marketing of crab. Based on these estimates, the first wholesale value of the crab products generated annually from the PQS transferred without providing Aleutia with the opportunity to exercise the right would have ranged from approximately \$250,000 to approximately \$450,000. The first wholesale value of this crab product net of the ex vessel price would have ranged from approximately \$32,000 to approximately \$84,000. These amounts include not only any return to the IPQ holder, but also include all processing and marketing costs except the costs of ex vessel price of

¹⁴ Detailed descriptions of these communities and their historical and recent dependence on crab fisheries (including crab processing and the rights of first refusal) are contained in EDAW (2005), North Pacific Fishery Management Council/AECOM (November 2010), North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004a), and North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004b) Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries, and EDAW (2004).

crab.¹⁵ If one wished to value the PQS, its value could be estimated as the expected net present value of the stream of revenues arising from these annual returns. During the period from 2005 through 2011, custom processing costs averaged \$0.758 per pound of finished product. Assuming that the landings would be processed for the average custom processing fee, the net return from this crab would have ranged from approximately \$34,000 to approximately \$46,000 in the period from 2005 through 2011 (with the exception of 2006, when low prices together with a low recover rate would have resulted in little or no return). These estimated returns do not account for taxes (which range from approximately three percent to a five percent and vary by municipality), transportation, and marketing costs, so overall returns are likely lower.

Table 8. Red king crab production and landings

Year	First wholesale price (\$/pound)	Product weight (pounds)	Ex vessel price (\$/pound)	Ex vessel weight (pounds)	Recovery rate
2005	8.46	11,195,822	4.51	17,351,944	64.5
2006	7.51	8,745,346	3.89	15,061,317	58.1
2007	8.55	12,340,522	4.45	19,502,790	63.3
2008	9.75	12,180,778	5.14	19,326,681	63.0
2009	8.96	9,933,140	4.71	15,427,833	64.4
2010	13.50	8,608,635	7.41	13,433,333	64.1
2011	17.79	5,420,635	10.84	7,672,245	70.7

Source: Commercial Operators' Annual Reports.

In October 2008, the Council considered extending the cooling off period and extending the time the right of first refusal would lapse for PQS subject to St. George's right of first refusal (see NPFMC, 2008). Storm damage had rendered the St. George harbor unsafe for the processing during the original cooling-off period at the onset of crab rationalization. NOAA had granted an exemption for processing historical quota in St. George in 2006 and 2007. However, this would not preclude the PQS subject to St. George's PQS from lapsing under the status quo.

Before Council final action, on October 7, 2008, APICDA Joint Ventures (a wholly-owned subsidiary of Aleutian Pribilof Island Community Development Association) announced that it had entered a contract to acquire all of Snopac's PQS which primarily consisted of PQS historically processed in St. George.¹⁶ This private negotiation extinguished the need for the Council to take the action under consideration.

However, this transaction included the PQS subject to Aleutia's right of first refusal based on historical processing in Port Moller. Under the right of first refusal terms, Aleutia should have either 1) been offered a right of first refusal on the transfer by Snopac, or 2) received a certification from APICDA Joint Ventures that the transferred shares would be used in the community and offered a right of first refusal on future transfers from APICDA Joint Ventures. At the time of the transaction, neither of these requirements appears to have been met. No contract between APICDA Joint Ventures and Aleutia was

¹⁵ While these returns suggest that PQS has little value, it is possible PQS have considerable value to companies with diverse production operations and long term and stable markets for products. These companies may achieve production efficiencies by integrating crab production into their other operations. In addition, stable crab supplies may be important to these companies' markets and customers.

¹⁶ APICDA Joint Ventures Inc., press release, "APICDA Acquires Crab Processor Quota Shares", October 7, 2008.

entered to establish the right. In addition, a check box on the application form indicated that the APICDA Joint Ventures intended to use the IPQ outside the community, which suggests that the right was triggered. NOAA Fisheries approved the transfer on December of 2008. At the time of the transfer, regulations provided that:

If requesting a transfer of PQS/IPQ for use outside a [community] that has designated an entity to represent it in the exercise of a [right of first refusal]..., the application must include an affidavit signed by the applicant stating that notice of the desired transfer has been provided to [that] entity....¹⁷

Snopac did not provide the required affidavit at the time of the transaction. In March of 2012, Aleutia requested that NOAA Fisheries rescind the transfer, since Snopac did not provide the required affidavit at the time of the transfer. NOAA Fisheries denied this request, responding that Aleutia's remedy is to pursue Snopac for a violation of the terms of its right of first refusal contract. At that time, NOAA Fisheries also requested that Snopac provide the required affidavit. Snopac responded to the request with a letter (not an affidavit) noting that the company was in the final stages of shutting down and asserting that it is the "understanding" of the company that the required notice was provided and its "belie[f that] such documentation existed and was destroyed in the process of our shutting down the company".¹⁸ This correspondence is attached as Appendix A.1.

Further, Aleutia asserts that it received no prior notice of the transfer or that the transfer would trigger its right. The APICDA announcement of the sale makes no mention of the right holder or community of origin on the any of the PQS, but suggests that the transaction is being undertaken for the benefit of St. George and that all of the PQS should be viewed as a St. George community asset. This assertion seems inconsistent with the transfer of PQS subject to Aleutia's right, as that PQS is based on processing history in the Aleutians East Borough, and therefore is designated as South PQS, which cannot be processed in St. George because St. George is located in the North region. Aleutia has asserted that had it known of the transfer, it would have "taken steps to assert[] its [first refusal] rights to [the] PQS." In addition, Aleutia has corresponded with APICDA Joint Ventures, offering to acquire the PQS. In response, APICDA Joint Ventures has offered to extend the right of first refusal to Aleutia on any future sale of the PQS for use outside of the Aleutians East Borough.¹⁹

At this point, Aleutia's choices are limited. Snopac has shut down.²⁰ While the company may have some assets and it may be possible to assert a claim against the company or an officer or agent of the company, such a case may have a limited chance of success. Any claim against a former officer or agent would involve the added complication of establishing individual liability. In assessing whether to pursue such a claim, Aleutia would need to conclude that the cost of such a case could outweigh the expected return. In considering the action, Aleutia must consider not only its chance of prevailing, but also the possible remedies. If a judge ordered that Aleutia be offered the shares as if the right were triggered, it is unknown what price would be applied to the transfer. Given the small amount of shares at stake and the tenuous direct benefit to Aleutia that arises from the option to acquire the shares at the applicable offer price for the benefit of the communities it represents, it is possible that Aleutia would conclude that pursuing a legal action will not justify the litigation costs. The nature of the transaction between Snopac and

¹⁷ 50 CFR 680.41(h)(2)(i)(C).

¹⁸ Letter of Jenna Hall, Vice President, SnoPac Products, Inc. to Jessica Gharrett, Restricted Access Division, National Marine Fisheries Service, August 15, 2012.

¹⁹ Letter on behalf of Aleutia from Michael Stanley to Jessica Gharrett, Restricted Access Division, National Marine Fisheries Service, March 12, 2012.

²⁰ The company's phone line is no longer in service.

APICDA Joint Ventures contributes to the complication from Aleutia's standpoint. The Snopac/APICDA Joint Ventures transaction included a variety of shares other than the Port Moller-based shares, which (under the terms of the right of first refusal) Aleutia would have also needed to acquire to exercise the right. Many of those shares were subject to a right of first refusal of APICDA. Given these complexities, it is very unclear what remedy might be offered by a court, should that court find that Aleutia successfully asserted that it has been deprived of the opportunity to exercise the right.

Given the uncertainty of its claim and the relatively unknown potential remedy, if it should succeed in the claim, it would seem unlikely that Aleutia would reasonably conclude that pursuit of a civil claim is merited. As a result, the PQS would remain with APICDA Joint Ventures, who would process crab purchased using the yielded IPQ in a manner consistent with APICDA's general objectives. Currently, landings are likely processed through custom processing arrangements (which could be reached with processors operating in the South region in Dutch Harbor Akutan, or King Cove). In the longer term, it is possible that the landings would be processed in False Pass, if APICDA advances its plan to expand processing in that community to include crab processing. Since processing of landings with these IPQ is not limited beyond the South regional designation, the geographic distribution of processing is uncertain.

Aleutia may receive a future right of first refusal, as the current holder has offered to extend the right to settle Aleutia's grievance. Even holding that right, Aleutia is unlikely to have an opportunity to exercise the right, as the current holder is a Community Development Quota group affiliate that is unlikely to transfer the shares in the foreseeable future.

2.5.2 Alternative 2 – Issuance of PQS to Aleutia

Under the action alternative, an amount of Bristol Bay red king crab PQS would be allocated to Aleutia Corporation that would result in that corporation receiving 0.55 percent of the PQS in the fishery.²¹ This allocation would be made exclusively from newly-issued PQS. As a consequence, all other PQS holders in the Bristol Bay red king crab fishery would experience a dilution of their PQS interests.

The most direct effect of this action is to provide Aleutia with the value of the PQS allocation. It is unlikely that Aleutia would use the allocation to strictly achieve a maximum financial return. Instead, Aleutia would likely attempt to consolidate the processing of the yielded IPQ with its other PQS holdings in the Aleutians East Borough. Currently, Aleutia holds approximately 5 percent of the PQS in the Bristol Bay red king crab fishery. Since Aleutia does not own or operate a crab processing facility, it has contracted the processing of its shares with Peter Pan at its King Cove plant.²² To continue to achieve the goal of processing its shares in the Aleutians East Borough in the near term, it would likely continue to reach agreements with Peter Pan, although it is possible that processing could be moved if an agreement could not be reached or if borough needs would be better served by moving the processing elsewhere. It is likely that, as long as that the King Cove processor offers reasonably competitive custom processing rates, Aleutia would elect to have its IPQ landings processed at that plant. The processing undertaken using shares issued by this action (which would be as much as one large delivery or two medium sized deliveries during a relatively high TAC year) would supplement other processing activity at that plant, most likely including processing of red king crab purchased by the plant owner through both its PQS holdings and any purchases of landings made with Class B and C share IFQ, which are not subject to the

²¹ Note that this amount is slightly higher than the 0.534 percent of the PQS pool for which Aleutia was not given the opportunity to exercise the right of first refusal.

²² Karen Montoya, personal communication.

IPQ landing requirements. Peter Pan currently holds slightly more than 12 percent of the Bristol Bay red king crab PQS pool. Approximately 60 percent of those shares were derived from processing in King Cove, with the remainder derived from processing elsewhere in the Aleutians East Borough on floating platforms, which have not been used in the fishery in recent years. Although Peter Pan is free to move processing to other locations and has affiliates that operate in other locations, to date, Peter Pan and its affiliates have elected to continue processing most of the crab acquired through IPQ yielded by PQS history in Aleutians East Borough at its King Cove plant. Peter Pan's current plan is to continue this processing at its King Cove plant.

The loss of shares from the allocation would be distributed among all other current Bristol Bay red king crab PQS holders (including Aleutia's current holdings) by proportionally diluting of their PQS holdings as a share of the PQS pool. The two largest individual losses would be slightly more than 0.1 percent of the PQS pool (or approximately than 7,000 pounds of IPQ at the 2012-13 TAC level and approximately 19,000 pounds of IPQ at the 2007-2008 TAC level). The individual average loss would be approximately 0.03 percent of the PQS pool (or approximately 2,000 pounds of IPQ at the 2012-2013 TAC level and slightly more than 5,000 pounds of IPQ at the 2007-2008 TAC level). Although these amounts may seem inconsequential, they do represent lost landings and opportunities to the PQS holders whose allocations would be diminished and who are likely to view the allocation as enriching Aleutia at their expense. Holders of PQS who were forced to divest due to ownership caps also may view the allocation as particularly unfair, given that the Aleutia allocation will further reduce their share holdings.

In contrast to the status quo, processing in the Aleutians East Borough (and particularly King Cove) is likely to be supplemented by the processing of IPQ yielded by the PQS allocated to Aleutia. Since the amount of crab at issue is relatively small, it is very unlikely to affect the distribution of processing of other landings, but is only likely to supplement processing that is otherwise occurring at an already operating facility. Other communities are likely to lose processing in an offsetting amount relative to the additional processing that would occur in King Cove (or another Aleutians East Borough community). Since the allocation would be South region shares, a slight redistribution would occur from the North region to the South region. Since the North region allocation is only 2.5 percent of the Bristol Bay red king crab, this allocation would amount to at most approximately 2,000 pounds, if TACs remain in the same range as they have been since the program was implemented. These community losses would be nominal and would be unlikely to be noticeable by any community or its economy as a whole. Each community that loses landings would lose a small amount of local tax revenues from the loss of landings. The total amount of redistributed tax revenues would be less than approximately \$13,000 dollars based on recent TACs, crab prices, and municipal tax rates.

2.5.3 Net benefits to the Nation

This change could impose slight efficiency losses on PQS holders and buyers and could impose administrative costs that exceed any community benefit. Overall, the effect on net benefits to the Nation is expected to be minimal.

3.0 REGULATORY FLEXIBILITY ANALYSIS

3.1 Introduction

The Regulatory Flexibility Act (RFA), first enacted in 1980, and codified at 5 U.S.C. 600-611, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently

has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: 1) to increase agency awareness and understanding of the impact of their regulations on small business; 2) to require that agencies communicate and explain their findings to the public; and 3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

The RFA emphasizes predicting significant adverse impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts, while still achieving the stated objective of the action. When an agency publishes a proposed rule, it must either, (1) “certify” that the action will not have a significant adverse effect on a substantial number of small entities, and support such a certification declaration with a “factual basis”, demonstrating this outcome, or, (2) if such a certification cannot be supported by a factual basis, prepare and make available for public review an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact of the proposed rule on small entities.

Based upon a preliminary evaluation of the proposed pilot program alternatives, it appears that “certification” would not be appropriate. Therefore, this IRFA has been prepared. Analytical requirements for the IRFA are described below in more detail.

The IRFA must contain:

1. A description of the reasons why action by the agency is being considered;
2. A succinct statement of the objectives of, and the legal basis for, the proposed rule;
3. A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
4. A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule;
6. A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
 - a. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 - b. The clarification, consolidation or simplification of compliance and reporting requirements under the rule for such small entities;
 - c. The use of performance rather than design standards;
 - d. An exemption from coverage of the rule, or any part thereof, for such small entities.

The “universe” of entities to be considered in an IRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment of the industry, or portion thereof (e.g., user group, gear type, geographic area), that segment would be considered the universe for purposes of this analysis.

In preparing an IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule (and alternatives to the proposed rule), or more general descriptive statements if quantification is not practicable or reliable.

3.1.1 Definition of a Small Entity

The RFA recognizes and defines three kinds of small entities: (1) small businesses, (2) small non-profit organizations, and (3) small government jurisdictions.

Small businesses. Section 601(3) of the RFA defines a ‘small business’ as having the same meaning as ‘small business concern’, which is defined under Section 3 of the Small Business Act (SBA). ‘Small business’ or ‘small business concern’ includes any firm that is independently owned and operated and not dominant in its field of operation. The SBA has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor...A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust or cooperative, except that where the firm is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the United States, including fish harvesting and fish processing businesses. Effective July 22, 2013, a business involved in *finfish harvesting* is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual gross receipts not in excess of \$19.0 million for all its affiliated operations worldwide. A business involved in *shellfish harvesting* is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual gross receipts not in excess of \$5.0 million for all its affiliated operations worldwide. A *seafood processor* is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business that *both harvests and processes* fish (i.e., a catcher/processor) is a small business if it meets the criteria for the applicable fish harvesting operation (i.e., finfish or shellfish). A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership.

Affiliation may be based on stock ownership when (1) a person is an affiliate of a concern if the person owns or controls, or has the power to control 50 percent or more of its voting stock, or a block of stock which affords control because it is large compared to other outstanding blocks of stock, or (2) if two or

more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners, controls the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations. The RFA defines “small organizations” as any not-for-profit enterprise that is independently owned and operated, and is not dominant in its field.

Small governmental jurisdictions. The RFA defines “small governmental jurisdictions” as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

3.2 Reason for Considering the Proposed Action

The Council developed the following purpose and need statement defining its rationale for considering this action:

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares (PQS) initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community. At least one PQS transfer is believed to have occurred without the right holder (Aleutia Corporation) being informed of the transaction, denying that right holder of the ability to exercise its right of first refusal to acquire PQS as intended by the program. This lack of notice allowed the transfer of PQS to a party other than the right holder and the movement of the processing to another community. Providing that right holder with a direct allocation of PQS could mitigate the negative impacts arising from that transaction. In addition, providing for notice of the location of use of IPQ and transfers of PQS to right holders could prevent similar circumstances from arising in the future and make the right more effective in protecting communities’ historical interests in processing and ensure that community entities are better able to assert their interests as provided for by the right.

3.3 Objectives of Proposed Action and its Legal Basis

Under the current regulatory structure, Bering Sea/Aleutian Islands crab resources are managed by NOAA Fisheries and the State of Alaska, under an FMP. The objective of this action is to address a grievance related to a right of first refusal on the transfer of PQS. The action is intended to address a claim that a right should have been triggered by a transfer, but prior to which the right holder received no opportunity to exercise the right. The authority for this action and the FMP are contained in the Magnuson-Stevens Act, as amended by the Consolidated Appropriations Act of 2004.

3.4 Number and Description of Directly Regulated Small Entities

This action directly regulates a single community entity, Aleutia Corporation, which will receive an allocation of PQS under the action. This entity is a small entity.

3.5 Recordkeeping and Reporting Requirements

This action would make an allocation of up to 0.55 percent of the PQS pool to Aleutia Corporation. This allocation will have no effect on reporting, recordkeeping, or other compliance requirements.

3.6 Federal Rules that may Duplicate, Overlap, or Conflict with Proposed Action

The analysis uncovered no Federal rules that would conflict with, overlap, or be duplicated by the alternatives.

3.7 Description of Significant Alternatives to the Proposed Action that Minimize Economic Impacts on Small Entities

A thorough consideration and description of significant alternatives able to minimize economic impacts to small entities will be carried out after the Council has determined a preferred alternative.

3.8 Magnuson-Stevens Act and FMP Considerations National Standards

Below are the 10 National Standards as contained in the Magnuson-Stevens Fishery and Conservation Act (Magnuson-Stevens Act), and a brief discussion of how each alternative is consistent with the National Standards, where applicable. In recommending a preferred alternative, the Council must consider how to balance the national standards.

National Standard 1

Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

The proposed action would have no effect on any current management measure's prevention of overfishing or achievement of optimum yield.

National Standard 2

Conservation and management measures shall be based upon the best scientific information available.

The analysis draws on the best scientific information that is available, concerning the Bering Sea and Aleutian Island crab fisheries. The most up-to-date information that is available has been provided by the managers of these fisheries, as well as by members of the fishing industry.

National Standard 3

To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

The proposed action is consistent with the management of individual stocks as a unit or interrelated stocks as a unit or in close coordination.

National Standard 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 U.S. fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

The proposed action would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the program by ensuring that community interests are adequately protected. The action will not contribute to an entity acquiring an excessive share of privileges.

National Standard 5

Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose.

The action considers efficiency in utilization of the resource balancing that efficiency against community interests. The action is intended to ensure that community social and cultural interests are adequately protected.

National Standard 6

Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

The action does not affect the manner in which existing management measures account for variations among, and contingencies in, fisheries, fisheries resources, and catches.

National Standard 7

Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

The action does not duplicate any other measure and would not add costs beyond those necessary for its implementation.

National Standard 8

Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.

The action is intended to recognize the importance of fishery resources to communities and ensure sustained community participation in the fisheries.

National Standard 9

Conservation and management measures shall, to the extent practicable, (A) minimize bycatch, and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

These actions have no effect on bycatch or discard mortality.

National Standard 10

Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

This action has no effect on safety of human life at sea.

3.9 Section 303(a)(9) – Fisheries Impact Statement

Section 303(a)(9) of the Magnuson-Stevens Act requires that any management measure submitted by the Council take into account potential impacts on the participants in the fisheries, as well as participants in adjacent fisheries. The impacts of the alternatives on participants in the fisheries have been discussed in previous sections of this document. These actions will have no effect on participants in other fisheries.

4.0 REFERENCES

- ADFG (May 8, 2012) Emergency Order 4-S-24-12, Bering Sea Snow Crab Fishery Partial Extension of Eastern Subdistrict.
- ADFG (May 14, 2012) Emergency Order No. 4-S-25-12, Bering Sea Snow Crab Season Extended.
- EDAW (2004) Social Impact Assessment of the Environmental Impact Statement for Bering Sea and Aleutian Islands Crab Fisheries – Overview and Community Profiles, EDAW, San Diego, California.
- EDAW (2005) Comprehensive Baseline Commercial Fishing Community Profiles: Unalaska, Akutan, King Cove, and Kodiak, Alaska, EDAW, San Diego, California.
- National Marine Fisheries Service (October 24, 2006) Application for transfer of QS/IFQ, PQS/IPQ, OMB No. 0648-0154 (available at <http://www.fakr.noaa.gov/ram/default.htm>).
- North Pacific Fishery Management Council/AECOM (November 2010) Five-Year Review of the Crab Rationalization Management Program for Bering Sea and Aleutian Islands Crab Fisheries.
- North Pacific Fishery Management Council (January 2013) Regulatory Impact Review/Initial Flexibility Analysis, Modifications to Community Provisions.
- North Pacific Fishery Management Council (October 2008) Regulatory Impact Review/Initial Flexibility Analysis, Provision Defining Cooling off and Rights of First Refusal for the Protections for the Community of Saint George.
- North Pacific Fishery Management Council (June 2004) Motion of the Council for BSAI Crab Rationalization, June 10, 2002, updated through June 9, 2004.
- North Pacific Fishery Management Council/EDAW (November 2008) Three-Year Review of the Crab Rationalization Management Program for Bering Sea and Aleutian Islands Crab Fisheries.
- North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004a) Environmental Impact Statement, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries.
- North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004b) Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries.
- Queirolo, L. E. (2013) Conducting Economic Impact Analyses for NOAA Fisheries Service. (Revised in response to Presidential Executive Order 13563). National Marine Fisheries Service, P. O. Box 21668, Juneau, AK 99802. October 24, 2013.

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6.0 APPENDIX A.1

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March 12, 2012

Jessica Gharrett, Program Administrator
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P.O. Box 21668
Juneau, Alaska 99802-1668

Re: Aleutia, Inc. – Right of First Refusal

Dear Ms. ~~Gharrett~~: **JESSIE**

I am writing on behalf of Aleutia, Inc., an eligible crab community organization (ECCO) for the eligible crab community (ECC) of Port Moller.

In December 2008, the Restricted Access Management Division (RAM) approved the transfer of various blocks of crab processor quota share (PQS) from Snopac Products, Inc., to APICDA Joint Ventures, Inc. (AJV). At the time, the common understanding in the industry was that this transfer involved crab PQS that was earned based on processing that had taken place at St. George. Aleutia has recently learned, however, that the transfer also included PQS for Bristol Bay red king crab that were issued on the basis of processing that was done in Port Moller. As reflected on RAM’s website, APICDA received 2,147,761 units of PQS for Bristol Bay red king crab (PRO-BBR-S-500929692 through 503077452) that were earned due to processing in Port Moller.

As you know from prior communications you have had with Karen Montoya, Executive Director of Aleutia, Aleutia claims that as the ECCO for Port Moller, it should have had the right of first refusal (ROFR) for this PQS earned from processing at Port Moller. Because this PQS is being processed outside the EEC of Port Moller – Aleutia understands the crab is now being processed in Akutan – the application to transfer the PQS should have contained an affidavit stating that notice of the transfer had been provided to Aleutia as the ECCO. See 50 C.F.R. § 680.41(h)(2)(C). In reviewing the redacted version of that application provided to Aleutia by the National Marine Fisheries Service (obtained pursuant to a FOIA request), it does not appear that the application contained such an affidavit. Had Aleutia been notified of the impending transfer of this Port Moller-derived PQS, as it should have been, it very likely would have taken steps to asserts its ROFR rights to this PQS.

Jessica Gharrett, RAM
March 12, 2012
Page Two

Aleutia has corresponded with AJV, requesting that AJV offer this Port Moller-derived PQS to Aleutia. AJV responded by offering to enter into a ROFR agreement with Aleutia that would apply to future transfers – *i.e.*, if AJV were to seek to transfer the PQS outside the Aleutians East Borough – but it is not willing to offer Aleutia the opportunity to purchase this PQS, as it could have through the exercise of a ROFR when the PQS was initially transferred to AJV. This is unacceptable. In Aleutia's view, the transfer of this PQS to APICDA has harmed Aleutia and was improper. Accordingly, Aleutia requests that RAM rescind its approval of this block of PQS from Snopac to AJV, so that Aleutia can exercise its ROFR and thereby protect the interests of the ECC which it represents.

Thank you for considering this request. Should you need any additional information from Aleutia regarding this matter, please let me know.

Sincerely,



Michael A. D. Stanley

cc: Aleutia, Inc.



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

July 20, 2012

Certified Return Receipt: 7007 0710 0003 2979 2244

Michael A. D. Stanley
Attorney at Law
P.O. Box 020449
Juneau, Alaska 99802

Dear Mr. Stanley:

On March 13, 2012, the Restricted Access Management Program of the National Marine Fisheries Service, Alaska Region (RAM) received your letter dated March 12, 2012. In your letter, you stated that the transfer of 2,147,761 units of Processor Quota Shares (PQS) for Bristol Bay red king crab (PRO-BBR-S-500929692 through 503077452) from Snopac Products, Inc., (Snopac) to APICDA Joint Ventures, Inc. (AJV) was improper. RAM approved the transfer in December 2008.

On behalf of your client, you claim that the transfer should not have been approved because Snopac did not submit an affidavit stating that notice of the transfer had been provided to Aleutia, Inc., (Aleutia). Aleutia is the Eligible Crab Community Entity (ECCE) for Port Moller and held the Right of First Refusal (ROFR) for Port Moller.

A regulation at the time of transfer, 50 C.F.R. § 680.41(h)(2)(i)(C)(2008), provided:

If requesting transfer of PQS/IPQ for use outside an ECC that has designated an entity to represent it in exercise of ROFR under paragraph (l), the application must include an affidavit signed by the applicant stating that notice of the desired transfer has been provided to the ECC entity *under civil contract terms referenced under §680.40(f)(3)* for the transfer of any PQS or IPQ subject to ROFR.
[emphasis added]

NMFS revised its regulations governing transfers of crab PQS, and eliminated this provision, in November 2009.¹

RAM will not rescind its approval of this transfer. If Snopac violated the terms of its civil contract with Aleutia, Aleutia's remedy lies with Snopac. Snopac entered into a contract with Aleutia and agreed to provide Aleutia with notice of the transfer of the PQS that was subject

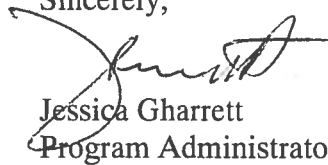
¹ Final Rule, 74 FR 51515, 51520 (Oct. 7, 2009) revising 50 C.F.R. § 680.41(h). This regulation became effective on Nov. 6, 2009.



to Port Moller's ROFR. As required by 50 C.F.R. § 680.40(f)(3), when Snopac initially applied for PQS, Snopac submitted affidavits affirming completion of a contract for ROFR with the terms required by section 303(j) of the Magnuson-Stevens Act.² These terms include a provision that "[a]ll 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."³ The statute and regulations contemplate that an aggrieved signatory to a ROFR contract who claims its terms were unfulfilled will pursue a civil remedy. *See, e.g.*, NMFS Response to Comment 123, 70 FR 10174, 10206 (March 2, 2005) ("NMFS will not be involved in the completion of these civil contracts.")⁴

Since Snopac should have provided an affidavit of notification with its application for transfer in 2008, by separate letter, I am asking that Snopac provide this affidavit now. If you have any questions regarding this letter, please contact me at (907) 586-7461.

Sincerely,



Jessica Gharrett
Program Administrator
Restricted Access Management

² Application by Snopac for Crab Processor Quota Share (received by RAM May 25, 2005); Affidavits Concerning Execution of ROFR Agreement by George Blakey on behalf of Snopac and by Bob Barnett on behalf of Aleutia (signed Oct. 19, 2005, received by RAM, Oct. 21, 2005).

³ Paragraph E, Contract Terms for Right of first Refusal based on Public Law 108-199, available at NMFS Alaska Region website: <http://www.fakr.noaa.gov/sustainablefisheries/crab/rat/posters/firstrefusal.pdf>.

⁴ NMFS's Response to Comment 119 also states that a community would seek fulfillment of the ROFR contract terms through civil court proceedings. Final Rule, 70 FR at 10206.

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Prep: KyleM, McKeen,M: 7/16/12

Rev: MMcKeen: 7/18/12

Rev: jgharrett 7/17/12, 7/19

bcc: Crab file: Snopac Products, Inc.
Crab file: APICDA Joint Ventures, Inc.
Crab file: Aleutia, Inc.
GCAK: Mary Alice McKeen
RAM reading file



**UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration**

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

July 20, 2012

Snopac Products, Inc.
6118 12th Avenue South
Seattle, WA 98108-2768
Attn: Mr. Greg Blakey

Dear Mr. Blakey:

On December 3, 2008, the National Marine Fisheries Service, Alaska Region, Restricted Access Management Program (RAM) approved the transfer of 2,147,761 units of Processor Quota Shares (PQS) for Bristol Bay red king crab (PRO-BBR-S-500929692 through 503077452) from Snopac Products, Inc., (Snopac) to APICDA Joint Ventures, Inc. (AJV). Under the Crab Rationalization Program, this PQS was issued with a Right of First Refusal (ROFR) held by the Aleutians East Borough (AEB), within which Port Moller is located. The Eligible Crab Community Entity (ECCE) with the right to exercise ROFR for the AEB is Aleutia, Inc. (Aleutia).

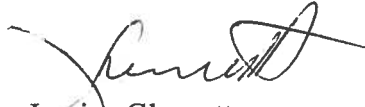
Snopac's original application for this PQS included affidavits affirming completion of a contract for ROFR, including the terms enacted under section 313(j) of the Magnuson Stevens Act. These affidavits were signed by representatives of Snopac and Aleutia on October 19, 2005. Aleutia has brought it to our attention that Snopac's application to transfer this PQS to AJV did not include an affidavit stating that Snopac had provided notice of the desired transfer to Aleutia. A regulation at the time of transfer, 50 C.F.R. § 680.41(h)(2)(i)(C)(2008), provided as follows:

If requesting transfer of PQS/IPQ for use outside an ECC that has designated an entity to represent it in exercise of ROFR under paragraph (l), the application must include an affidavit signed by the applicant stating that notice of the desired transfer has been provided to the ECC entity under civil contract terms referenced under § 680.40(f)(3) for the transfer of any PQS or IPQ subject to ROFR.



Since Snopac should have provided an affidavit at the time of the transfer, I request that, by August 20, 2012, Snopac provide an affidavit for our records that meets the terms of the above regulation. If you have any questions, please contact me at (907) 586-7461.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jessica Gharrett', with a large, sweeping flourish extending to the left.

Jessica Gharrett
Program Administrator
Restricted Access Management

cc: APICDA Joint Ventures, Inc.
234 Gold Street
Juneau, AK 99801

Aleutia, Inc.
408 Main Street
Sand Point, AK 99661

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Prep: KyleM, McKeen,M: 7/16/12

Rev: MMcKeen: 7/18/12

Rev: jgharrett 7/17/12, 7/19/12

Bcc: Crab file: Snopac Products, Inc.
Crab file: APICDA Joint Ventures, Inc.
Crab file: Aleutia, Inc.
GCAK: Mary Alice McKeen
RAM reading file



from
Aleutia
on G-4(a)

Quality Seafood Since 1983

6118 - 12th Ave. S., Seattle, WA 98108-2768
Phone 206.764.9230 ~ Fax 206.764.5540
www.snopac.net

August 15, 2012

Ms. Jessica Gharrett
National Marine Fisheries Service
Alaska Region
Restricted Access Management
PO Box 21668
Juneau, AK 99802-1668

Re: Your letter dated July 20, 2012

Dear Ms. Gharrett:

We are in receipt of your letter as referenced above, regarding the 2008 sale of our Crab Processor Quota Shares (PQS) to APICDA Joint Ventures Inc. That entity did in fact purchase all of our PQS.

We are in the final stages of a sale of our assets to another seafood company and Snopac Products will no longer exist once the sale is complete. As of the end of September, we will no longer be occupying office space and have already destroyed many files in the process of shutting down the company.

It is our firm understanding that all rules pertaining to the transfer of PQS from Snopac to APICDA were followed, including those rules involving ROFR and providing proper notices of such a transfer to Aleutia Inc. We firmly believe such documentation existed and was destroyed in the process of our shutting down the company.

Please accept this response as an affidavit in lieu of the original document.

Best regards,

SNOPAC PRODUCTS INC.


Jenna Hall, Vice-President

