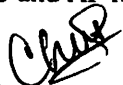


MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver 
Executive Director
DATE: March 29, 2010
SUBJECT: Bering Sea and Aleutian Islands crab issues

ESTIMATED TIME 5 HOURS (All C-5 items)
--

ACTION REQUIRED

- (a) Emergency exemption from regional delivery requirement – stakeholder proposals
- (b) Final action on Western Aleutian Islands golden king crab fishery regionalization

BACKGROUND

- (a) Emergency exemption from regional delivery requirement – stakeholder proposals

Over the course of several meetings, the Council received public testimony that an exemption should be created to regional landing requirements in the event that compliance with those requirements is prevented by unavoidable circumstances. The exemption would be intended to address safety risks, potential loss of resource (through excessive deadloss), and extreme economic hardships that may arise if deliveries under regional landing requirements applicable to Class A individual fishing quota (IFQ) are delayed or prevented by extreme ice conditions or other uncontrollable circumstances. In response, the Council developed alternatives and reviewed an analysis of those alternatives at its February 2009 meeting. At that time, the Council requested stakeholders to propose revisions to alternatives to address concerns raised in public testimony at that time. To avoid potentially insurmountable administrative burdens the alternatives would establish a system of civil contracts between harvesters, processors, and regional representatives, as the means of defining the exemption. Since that time, stakeholder discussions developed preliminary suggestions concerning possible revisions, but failed to reach any consensus concerning changes to the alternatives. As a result, the Council took no action on this matter, until its February 2010 meeting when stakeholders expressed an interest in scheduling the issue for this meeting. In response, the Council requested stakeholders work to submit a proposed exemption alternative at this meeting. Although stakeholders made substantial progress in developing an exemption provision, no consensus has been reached to date. Proposals and descriptions of possible alternatives developed by different stakeholders are attached (see Item C-5(a)).

- (b) Final action on Western Aleutian Islands golden king crab fishery regionalization

Since the second year of fishing under the Bering Sea and Aleutian Island crab rationalization program, participants in the Western Aleutian Island golden king crab fishery have expressed concern that the West region landing requirement may be unworkable in that fishery. The program requires that 50 percent of the catcher vessel Class A IFQ be landed in the area west of 174° West longitude. Under the program to date,

shore-based crab processing in this region has occurred only in the community of Adak. In the first four years of the program, deliveries to the Adak plant were complicated as the operator of that plant holds few of the processor quota shares in the fishery. Despite this mismatch, holders of processor shares have largely relied on the plant in Adak for West region processing. Until this season, this reliance on a single plant may have contributed to leaving a portion of the TAC unharvested, as a limit on use of processor shares prevented the entire West region allocation being processed at a single plant. To overcome this obstacle, the Council adopted an amendment to the program exempting custom processing in the West region from the use processor share caps, which NOAA Fisheries implemented this year. Although this regulation would resolve any issue concerning the ability of the Adak plant to process all West region landings from the fishery, in August of this year, the operator of that plant filed for bankruptcy. This filing prompted participants in the fishery to assert that an exemption from the regional landing requirement should be available to address a shortage of processing capacity in the West region. To fully realize the exemption, those participants have made the following two requests:

- (1) NOAA Fisheries use an emergency rule to exempt the holders of West region designated IFQ and IPQ from that regional landing requirement for the 2009-2010 crab fishing season. They request that the exemption apply throughout the year, regardless of whether the Adak plant reopens, suggesting that it is in the interest of all parties to make deliveries and process all landings in Adak, should the plant be available. In addition, the parties assert that they have reached an agreement with the community of Adak to compensate the community for the loss of tax revenues should the landings be redirected to another location.
- (2) The Council advance for analysis an amendment to the crab program that would provide an exemption from the West region landing requirement, in the event that qualifying interested parties agree that no processing capacity is available to support those landings.

In response, at its December 2009 meeting, the Council request that NOAA Fisheries undertake emergency rulemaking establishing an exemption from the West region landing requirement for the current 2009-2010 crab fishing season. In addition, the Council requested that staff develop an analysis of alternatives for an amendment that would either allow for exemptions from the landing requirement in future years based on the agreement of qualified parties that no shoreside processor is available in the region or remove the West region landing requirement altogether. After reviewing the analysis at the February 2010 meeting, the Council scheduled this item for final action at this meeting. A copy of the analysis is attached (see **Item C-5(b)**).

MUNDT MACGREGOR

Telephone: 206-624-5450
Facsimile: 206-624-5409
www.mundtmac.com

FISHERMEN'S TERMINAL OFFICE
1005 20th Avenue West, Suite 115
Seattle, WA 98119-1290

BAINBRIDGE ISLAND OFFICE
271 West Way NE, Suite 109
Bainbridge Island, WA 98110-2873

Joseph M. Sullivan
206-319-1104
jsullivan@mundtmac.com

Respond to Fishermen's Terminal Office

March 31, 2010

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

Re: April 2010 Council Meeting - Agenda Item C-5(a) - Bering Sea Crab
Rationalization Issues - Emergency Exemptions from Regionalization
- Stakeholder Proposals

Dear Chairman Olson,

Attached are a draft motion and a draft purpose and needs statement we are submitting on behalf of Inter-Cooperative Exchange Policy Advocacy Committee ("ICEPAC") for the Council's consideration in connection with the agenda item referenced above. ICEPAC represents crab harvesters who hold approximately 70% of the Bering Sea crab harvester quota shares. We look forward to providing the Advisory Panel and the Council with explanations of the elements and options of the draft motion during the April meeting.

While the attached motion is to a large extent the product of a collaborative effort among representatives of Bering Sea crab harvesters, processors and communities, it is not a consensus document. Specifically, the provisions concerning a "framework contract" in Components 1 and 3 of the motion are still under discussion among sector representatives. We will continue to work on this issue between now and

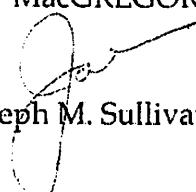
Mr. Eric A. Olson
March 31, 2010
Page 2

MUNDT MACGREGOR LLP

the time that the Council takes up agenda item C-5(a), and we hope to reach a consensus on this issue by then.

Sincerely yours,

MUNDT MacGREGOR L.L.P.


Joseph M. Sullivan

JMS:bgg

Regional Landing Requirement Relief Purpose and Need Statement

In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require associated catch to be delivered and processed in the designated region. Since implementation of the program in late 2005, and except in the case of the Western Aleutian Islands Golden King Crab fishery, all of the crab IFQ has been harvested and processed as intended by the crab rationalization program. However, icing conditions in the Northern Region have created safety concerns, and delayed and in some cases prevented harvesters from entering harbors to deliver to shore-based and floating processors located in the regions, as required by the regional share designations. In addition, other unforeseeable events, events such as an earthquake or tsunami, or man-made disaster, could prevent deliveries to eligible processors in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements. Such an exemption should also provide a mechanism for reasonable compensation to all parties directly impacted by the granting of the exemption to ensure that the protections intended by the regional designations continue to be realized despite the exemption. The purpose of this action is to develop a regulation to allow waiver of the regional landings requirement for Class A shares in the event that eligible processing facilities are unable to receive crab for an extended period of time.

Regional Landing Exemption

This action would establish an emergency relief exemption for the regional delivery requirement under the BSAI crab program. Component One specifies the eligibility requirements for the exemption and the contracting parties. Component Two establishes reserve pool certification and periodic reporting requirements. Component Three establishes how the emergency relief regulation is to be administered. Component Four establishes a Council review process.

Component One. The Contract Parties.

To be eligible to apply for and receive an exemption from a regional landing requirement, the IFQ holder, the matched IPQ holder and the affected community entity in the region for which the regional landing exemption is sought shall have entered into a framework contract, including mitigation requirements and a range of terms of compensation.

Option 1: prior to the opening of the season.

Option 2: by a fixed date (to be determined).

To receive an exemption from a regional landing requirement the IFQ holder, the matched IPQ holder and the affected community entity in the region for which the regional landing exemption is sought shall have entered an exemption contract prior to the day on which the exemption is sought.

The entity that will represent communities shall be (options):

- (a) the entity holding or formerly holding the ROFR for the PQS,
- (b) the entity identified by the community benefiting from (or formerly benefiting from) the ROFR,
- (c) a regional entity representing the communities benefiting from the ROFR or formerly benefiting from the ROFR.

The entity or entities determined by the Council to be the community representatives in a region shall develop an allocation or management plan for any PQS issued without a ROFR in that region by a date certain established by the Council.

Component Two. Reserve Pool and Reporting Requirements.

A reserve pool can provide industry wide, civil contract based delivery relief without regulatory or administrative intervention; therefore, regulatory relief is an explicit incentive available only to Class "A" participants who are members of approved reserve pools, to matched IPQ holders and to affected community entities.

Harvest sector reserve pools do not require NMFS approval; however, on an annual basis, before a date certain established by NMFS through regulation, participants in the BSAI crab fisheries must certify to NMFS their establishment of or membership in an existing reserve pool to be eligible for regional landing requirement relief. The certification shall name the Class A IFQ holders who have established or are members of the reserve pool. Subject to the other terms and conditions of this action, the parties to a reserve pool shall be eligible for regional landing requirement relief if: 1) their reserve pool certification states that the reserve pool agreement commits each party to be bound by the rules of the reserve pool; and 2) the parties to the

reserve pool identified on the certification represent not less than (60%, 70%, 80%) of the "A" share IFQ held by (a) unaffiliated cooperatives and unaffiliated IFQ holders not in a cooperative, in the aggregate; or (b) held by affiliated cooperatives and affiliated IFQ holders not in a cooperative, in the aggregate.

Reserve pool representatives shall provide an annual Regional Landing Exemption Report to the Council which will include the following:

- 1) a comprehensive explanation of the membership composition of the reserve pool and the measures in effect in the previous year,
- 2) the number of times a delivery relief exemption was requested and used,
- 3) the mitigating measures employed before requesting the exemption,
- 4) an evaluation of whether regional delivery exemptions were necessary, and their impacts on the affected participants.

Reserve Pool Representatives shall circulate the annual Regional Landing Report to communities two weeks before submission to the Council. Communities may submit to the Council a Community Impact Report that responds to the annual Regional Landing Report.

Component Three. Administration of the Exemption.

Administration of the exemption

In accordance with Component One, the three parties will file an affidavit with NMFS affirming that a framework contract has been signed, and subsequently file a second affidavit affirming that an exemption contract has been signed. In the affidavits, the parties shall affirm that the framework contract includes mitigation requirements and a range of terms of compensation, and that the exemption contract describes the conditions under which the exemption is being or would be requested, including mitigation requirements and terms of compensation specific to the exemption being sought.

Exemption

An exemption shall be granted upon timely submission of a framework contract affidavit and subsequent filing of an exemption contract affidavit by the Class "A" IFQ holder, the matched IPQ holder and the affected community entity that are parties to the framework contract that they have entered into an exemption contract, and that the exemption contract describes the conditions under which the exemption is being requested, including mitigation requirements and the terms of compensation. Pursuant to Component Two, above, the Class A IFQ holder that is party to the framework contract and the exemption contract must be identified as having established a reserve pool or as a reserve pool member on a timely filed reserve pool certification that meets the requirements of Component Two.

The exemption contract affidavit shall result in the regional tag being removed from the requested amount of Class "A" IFQ and the matched IPQ; and the requirement that NMFS apply any IPQ used at a facility through a custom processing arrangement against the IPQ use cap of the owners of that facility shall be suspended for all Class A IFQ and matched IPQ included in the exemption.

If an exemption contract includes an obligation to make compensatory deliveries, an exemption making such deliveries possible shall be granted upon submission of an affidavit by the Class A

ICEPAC Draft 3-30-2010

IFQ holder, the matched IPQ holder and the affected community entity or entities that the exemption is being requested to make compensatory deliveries pursuant to the terms of an exemption contract under which regional landing relief was previously granted and used.

Component Four. Council Review.

The Council will review the Regional Landing Exemption Program within:

- (a) two years
- (b) after the first season in which an exemption is granted.

Thereafter, the Council will review the Regional Landing Exemption Program as part of its programmatic review, and, based on the record, may amend or terminate the Regional Landing Exemption Program.

NORTH PACIFIC CRAB
ASSOCIATION

March 31, 2010

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

Re: Agenda Item C-5(a) - Emergency Relief from Regional delivery Requirements

Dear Chairman Olson,

At the February NPFMC meeting ICEPAC requested that the Council put "Emergency Relief" back on the Agenda for April. The Council agreed to do so but several members asked that the stakeholders bring back a consensus position. After a lengthy work session last Friday we arrived at a consensus position which was encapsulated and circulated in a draft on Monday morning and which is included with this letter. Unfortunately, since that time some parties have proposed additional provisions which we feel are completely unworkable, and which undermine several important provisions that had been previously agreed upon.

The changes to the previous consensus document are incorporated in the submission from ICEPAC to the Council this morning. We share the concerns of ICEPAC that gave rise to their proposed changes, and have suggested other avenues for addressing them; but we are absolutely opposed to the approach submitted by ICEPAC. And contrary to their transmittal letter, wherein it states that "the provisions concerning a "framework contract" in Components 1 and 3 of the motion are still under discussion", there has not been any meeting or teleconference concerning their revisions, nor is there any scheduled at this time. In fact, we asked them to move forward with us on the consensus document and continue discussions about our mutual concerns to see if we could resolve them in the next few days.

The consensus motion agreed to on Monday gives us all of the tools needed to address any event. The motion would establish an emergency relief exemption for the regional delivery requirement under the BSAI crab program that uses Reserve Pools as our first response mechanism. Component One specifies the contracting parties, Component Two establishes reserve pools and periodic reporting requirements, Component Three establishes how the emergency relief regulation is to be administered and Component Four establishes a Council review process. We also agreed on a Purpose & Need Statement.

All parties to the negotiations agree that we should develop a "framework" agreement and collectively analyze several possible scenarios, our mitigation options and compensation methods. In fact, we all think this is a vital part of the process. At the same time, we have all agreed that it is unlikely that we will accurately forecast all possible scenarios. Where we differ significantly is in regards to the purpose of the framework agreement. We see it as a template with boilerplate provisions that have been generally agreed upon and that will provide the basis for an exemption contract if and when one is ever needed. All that should remain to complete in the event of an emergency for which relief is sought is to insert the date, names of affected parties, mitigation efforts attempted, identification of pounds to be exempted from regionalization, and terms of compensation.

When an actual emergency occurs, it is everyone's intent to first use Reserve Pool mechanisms to try to deal with it; if that is not enough then and only then do we (a) negotiate an actual "exemption contract" and (b) request the delivery waiver(s).

However, the ICEPAC proposal now stipulates that the framework agreement is actually a "framework contract" and therefore every party must successfully complete a framework contract prior to the season to even be eligible for emergency relief. Here is why we consider this a fatal flaw:

- 1) We have all agreed throughout this long process that catastrophic events cannot be predicted, but that "we will know it when we see it" and therefore the framework agreements were trial runs but our collective response would actually be incorporated into the "exemption contracts" at the time of the event. Now, we must try to figure out all possible events - and all possible remedies - ahead of time or be considered ineligible for relief.
- 2) The latter course is completely impractical. Consider its application in St. Paul for instance. It will take more than 50 pre-season agreements simply to make sure everyone is "eligible" to respond to an event in St Paul, let alone all other communities and possible events; and it is unlikely any of these agreements would accurately capture the necessary response in a crisis. Here are the required preseason agreements:
 - A. All 7 PQS holders individually with St. Paul and the Coops that deliver to those PQS holders (currently two Coops, on average); that's 14 agreements so far; then,
 - B. In anticipation of the need for "compensatory deliveries", all four southern region crab communities (Akutan, Dutch, King Cove and Kodiak) would then have to enter into some sort of parallel compensatory delivery agreement tied to the agreements listed above: 14 agreements x 4 more parallel agreements = 56 potential agreements just to establish "eligibility". And this despite the fact that everyone agrees that these pre-season agreements are not likely to be what we actually use in a specific emergency.
3. Then the real problem arises: if there is a major emergency, and the industry has to move millions of pounds of crab around, we need access to every bit of processing capacity available. But under the ICEPAC proposal, if two communities could not agree on a pre-season framework contract, then one or both of them become "ineligible" and we as an industry are probably precluded from using the processing capacity otherwise available in one of those communities; because there is no pre-season framework contract in place between those communities.

We are on the verge of snatching defeat from the jaws of victory. We agree that some form of a framework agreement process is vital. But elevating the framework agreement process to a formal contractual process imbedded in regulation makes no sense, will be extremely expensive and time consuming, and creates more potential harm than is warranted. In no way should the success of this effort hinge on pre-season, multi-party contracts based on hypothetical events which none of us have ever actually experienced.

We regret that this issue is once again before you without consensus. While we are more than prepared to engage in continued framework agreement discussions, we are surprised by the sudden, substantial changes to the consensus document developed through a long, difficult process.

Sincerely yours,



Steven K Minor

Purpose and Need Statement - DRAFT

In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require associated catch to be delivered and processed in the designated region. Since implementation of the program in late 2005, and except in the case of the Western Aleutian Islands Golden King Crab fishery, all of the crab IFQ has been harvested and processed as intended by the crab rationalization program. However, icing conditions in the Northern Region have created safety concerns, and delayed and in some cases prevented harvesters from entering harbors to deliver to shore-based and floating processors located in the region, as required by the regional share designations. In addition, other unforeseeable events, events such as an earthquake or tsunami, or man-made disaster, could prevent deliveries to eligible processors in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements. Such an exemption should also provide a mechanism for reasonable compensation to all parties directly impacted by the granting of the exemption to ensure that the protections intended by the regional designations continue to be realized despite the exemption. The purpose of this action is to develop a regulation to allow waiver of the regional landings requirement for Class A shares in the event that eligible processing facilities are unable to receive crab for an extended period of time.

Regional Landing Exemption - DRAFT

This action would establish an emergency relief exemption for the regional delivery requirement under the BSAI crab program. Component One specifies the contracting parties, Component Two establishes reserve pool and periodic reporting requirements, Component Three establishes how the emergency relief regulation is to be administered and Component Four establishes a Council review process.

Component One. The Contract Parties.

To receive an exemption from a regional landing requirement the IFQ holder, the matched IPQ holder and the affected community entity in the region for which the regional landing exemption is sought shall have entered a contract:

Option 1: prior to the day on which the exemption is sought.

Option 2: by a fixed date (to be determined).

The entity that will represent communities shall be (options):

- (a) the entity holding or formerly holding the ROFR for the PQS,
- (b) the entity identified by the community benefiting from (or formerly benefiting from) the ROFR,
- (c) a regional entity representing the communities benefiting from the ROFR or formerly benefiting from the ROFR

The entity or entities determined by the Council to be the community representatives in a region shall develop an allocation or management plan for any PQS issued without a ROFR in that region by a date certain established by the Council.

Component Two. Reserve Pool and Reporting Requirements.

A reserve pool can provide industry wide, civil contract based delivery relief without regulatory or administrative intervention; therefore, regulatory relief is an explicit incentive available only to Class "A" participants who are members of approved reserve pools, to matched IPQ holders and to affected community entities.

Harvest sector reserve pools do not require NMFS approval; however, on an annual basis, before a date certain established by NMFS through regulation, participants in the BSAI crab fisheries must certify to NMFS their establishment of or membership in an existing reserve pool. A reserve pool will be considered valid if 1) it commits each party to be bound by the rules of the reserve pool; and 2) the parties to the reserve pool represent not less than (60%, 70%, 80%) of the "A" share IFQ held by (a) unaffiliated cooperatives and unaffiliated IFQ holders not in a cooperative, in the aggregate; or (b) affiliated cooperatives and affiliated IFQ holders not in a cooperative, in the aggregate.

Reserve pool representatives shall provide an annual Regional Landing Exemption Report to the Council which will include the following:

- 3) a comprehensive explanation of the membership composition of the reserve pool and the measures in effect in the previous year,
- 4) the number of times a delivery relief exemption was requested and used,
- 5) the mitigating measures employed before requesting the exemption,
- 4) an evaluation of whether regional delivery exemptions were necessary, and their impacts on the affected participants.

Component Three. Administration of the Exemption.

Administration of the exemption

In accordance with Component One, the three parties will file an affidavit with NMFS affirming an exemption contract has been signed. In the affidavit, the parties shall affirm that the contract describes the conditions under which the exemption is being or would be requested, including mitigation requirements and terms of compensation.

Exemption

An exemption shall be granted upon submission of an affidavit by the Class "A" IFQ holder, the matched IPQ holder and the affected community entity that they have entered into an exemption contract, and that the contract describes the conditions under which the exemption is being requested, including mitigation requirements and the terms of compensation.

The affidavit shall result in the regional tag being removed from the requested amount of Class "A" IFQ and the matched IPQ; and the requirement that NMFS apply any IPQ used at a facility through a custom processing arrangement against the IPQ use cap of the owners of that facility shall be suspended for all Class A IFQ and matched IPQ included in the exemption.

"If an exemption contract includes an obligation to make compensatory deliveries, an exemption making such deliveries possible shall be granted upon submission of an affidavit by the Class A IFQ holder, the matched IPQ holder and the affected community entity or entities that the exemption is being requested to make compensatory deliveries pursuant to the terms of an exemption contract under which regional landing relief was previously granted and used."

Component Four. Council Review.

The Council will review the Regional Landing Exemption Program within:

- (a) two years
- (b) after the first season in which an exemption is granted.

Thereafter, the Council will review the Regional Landing Exemption Program as part of its programmatic review

Public Review Draft

REGULATORY IMPACT REVIEW

and

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Exemption to West Region landing requirement in the Western Aleutian Islands golden king crab fishery

For a proposed Regulatory Amendment to
Implement Amendment ___ to the Fishery Management Plan for
Bering Sea and Aleutian Islands King and Tanner Crabs

April 2010

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Executive Summary

Since the second year of fishing under the Bering Sea and Aleutian Island crab rationalization program, participants in the Western Aleutian Island golden king crab fishery have voiced concerns with processing capacity in the West region of that fishery. Specifically, the program requires that 50 percent of the catcher vessel Class A IFQ (or approximately 24 percent of the non-CDQ TAC) be landed in the area west of 174° West longitude (the West region). Under the program to date, shore-based crab processing in this region has occurred only in a single plant in the community of Adak. In the first four years of the program, deliveries to the Adak plant were complicated as the operator of that plant holds few of the processor quota shares in the fishery. Despite this mismatch, holders of processor shares have largely relied on the plant in Adak for West region processing. Until this year, this reliance on a single plant may have contributed to leaving a portion of the TAC unharvested, as a limit on use of processor shares prevented the entire West region allocation being processed at a single plant. To overcome this obstacle, the Council adopted an amendment to the program exempting custom processing in the West region from the processor share use caps, which NOAA Fisheries implemented this year.

Although this regulation would resolve any issue concerning the ability of the Adak plant to process all West region landings from the fishery, in August of this year, the operator of that plant filed for bankruptcy. This filing prompted participants in the fishery to assert that an exemption from the regional landing requirement should be available to address a shortage of processing capacity in the West region. In response, the Council recommended that NOAA Fisheries undertake emergency rulemaking providing an exemption in the current (2009-2010) season¹ and has advanced this analysis of an amendment to the crab program that would either provide an exemption from the West region landing requirement, in the event that qualifying interested parties agree to that exemption, or remove the West region landing requirement altogether.

Purpose and Need Statement

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

The purpose of this proposal is to develop a regulation to allow waiver of the requirement that west-designated Western Aleutian Islands gold king crab (WAG) individual fishing quota (IFQ) be delivered west of 174 ° W. longitude. A reliable shoreside processing facility may not be available each season to take delivery and process WAG IFQ. Relaxing the regional landing requirement would allow the IFQ to be delivered outside the west region, to promote full utilization of the TAC.

Alternatives

To meet the identified purpose and need, the Council has adopted the following alternatives for analysis:

Alternative 1: Status Quo (no exemption from West region landing requirements)

Alternative 2: Contractually Defined Exemption

To receive an exemption from the regional landing requirement in the WAG fishery,

Option 1: specified QS holders, PQS holders, shoreside processors, and municipalities

Option 2: specified QS holders, PQS holders, and municipalities

¹ An emergency rule would remain in effect for up to 180 days, resolving the issue for this season. A single extension of up to 185 days would be permitted, if necessary and appropriate, after which normal rulemaking would be needed to address any problem.

shall have entered into a contract. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed.

Definitions:

QS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG QS.

PQS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG PQS.

Shoreside Processors: A shoreside processing facility that is located in one of the defined municipalities and that processed in excess [options: 5, 10, or 20] percent of the west-designated WAG IFQ in the preceding fishing year.

Municipalities: The municipalities of Adak and Atka.

Approval of Exemption:

An exemption to the regional landing requirement will be granted, if the contracting parties have filed an affidavit with NOAA Fisheries affirming that a master contract has been signed. In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.

Effects of the Alternatives

The following subsections summarize the effects of the alternatives under consideration in this action.

Effects of the status quo (alternative 1)

Under the status quo, no exemption from the West region landing requirement exists. Currently, the only crab processing shore-based capacity in the West region is in Adak. If processing capacity in the West region is not accessed by PQS holders, landings in that region cannot occur. From the perspective of holders of West region IFQ, if the holder of matched IPQ fails to make available processing capacity in the West region to receive a delivery, that IFQ holder may be unable to harvest and make delivery of its allocation. In such a circumstance, the IFQ holder's only recourse is to pursue arbitration of the delivery terms. Since arbitration has not been used to date for this purpose in any fishery, it is not clear what the outcome of such a process might be. An arbiter can establish a contract between the IFQ holder and IPQ holder, defining delivery terms for the IFQ harvests. If an IPQ holder fails to perform, the IFQ holder could pursue a civil action against the IPQ holder for a violation of the contract.

Under the status quo, IFQ holders are likely to continue to be frustrated by poor planning of deliveries until reliable processing capacity is made available for their deliveries. It is important to recognize that this depends on several factors. Even if processing capacity is available in the West, if that capacity is not owned or controlled by the PQS holders, IFQ holders may continue to face uncertainties. Disputes between the Adak plant and other IPQ holders delayed landings in the past. Even if IPQ holders have access to the capacity, delivery arrangements will still need to be negotiated. Processors in the fishery have raised concerns that dispersed deliveries drive up their operating costs. Whether operating processors will choose to follow the harvesters preferred delivery schedules (without being compelled to do so by an arbitration determination) is not known.

Overall, IPQ holders are likely to continue to use shore plants in the West region, when those facilities are available and willing to process crab at a reasonable cost under a custom processing arrangement or pay reasonable IPQ lease fees. Currently, the only shore plant likely to operate the plant in Adak. Its future depends in part on whether arrangements can be made with Adak Seafood to stay or with another plant

operator. The success of reopening the plant will likely depend, in large part, on groundfish availability in the area. In the future, it is possible that a crab processing shore plant could be operated in Atka, but whether such a facility will be operational in future is not known. Whether an arbiter might establish a contract under which an IPQ holder would be obligated to accept deliveries in the West region (or pay damages) is uncertain.

The most likely community beneficiaries of the West region landing requirement are Adak and Atka, but whether they realize any benefit will depend on the choices of IFQ holders, IPQ holders, and plant operators. Only Adak appears likely to benefit from West regionalization in the near future, as it is home to the only operational crab processing facility. Yet, the uncertainties surrounding the operation of the plant in that community and potential competition from other plants that could be introduced bring any potential community benefits into question. In the long run, it is possible that Atka would benefit from the status quo, West region landing requirement. The owner of the small plant currently operating in Atka holds substantial West region PQS, which would ensure a reliable supply of West region landings, if the plant began accepting crab deliveries. The owner has considered developing crab processing at the plant, but currently has not firm plan for the developing that capacity. The failure of a major PQS holder to develop capacity in the region supports the conclusion that multiple operations capable of processing crab cannot be supported in the region.

Effects of the agreed exemption alternative (alternative 2)

Under the action alternative, an exemption to the regional landing requirement would be permitted on the agreement of certain QS holders, PQS holders, communities, and possibly plant operators. The required QS holders and PQS holders could include persons holding in excess of a threshold percentage of the respective West region share pool (i.e., 5 percent, 10 percent, or 20 percent). Currently, 8 persons hold West region QS, while 7 persons hold West region PQS. Of these, only 3 hold shares in excess of the 5 percent and 10 percent thresholds, while only 2 hold in excess of the 20 percent threshold, for each share type. Notably, the Adak plant operator meets only the two lower thresholds. Under the options defining the exemption, persons below the threshold would have no direct input into whether the exemption could be accessed. It is not known whether some of these share holders could exert influence on others who control the exemption.

In general, QS holders are likely to pursue the exemption, if they perceive a cost to complying with the West region delivery requirement. In general, these QS holders assert that making deliveries in the West region is less costly, as any plant in the West region will be closer to the grounds. Yet, costs could be higher, if a West region plant was not open at opportune times, offloaded too slowly, was not able to reliably schedule deliveries, or could not reliably pay for landings. As with QS holders, operational and cost considerations are likely to affect any decision of whether to pursue an exemption. If PQS holders perceive a higher cost associated with processing in the West region, they are likely to pursue an exemption; however, in the long run, a different dynamic could arise among PQS holders. If a PQS holder that is a required party to the exemption decides to process in the West, that PQS holder is likely to withhold consent to the exemption and work to extract as much value as possible from other PQS holders as a part of any negotiation for the processing of their IPQ. The PQS holders most likely to operate in the West are the largest PQS holder, who also is the CDQ representative of Atka, and the operator of the Adak plant. While these operation could be beneficial to a community (as is intended by the regional landing requirement), it is possible that a mobile plant could operate outside of any community, thus providing no benefit to any community in the region.

The option of requiring any shore plant that processes in excess of a threshold of the prior year's West designated landings could be used to ensure that a shore plant operator in the region can prevent an arrangement among other parties to circumvent the requirement and use other landing options for negotiating leverage. Since typically only a single processor has operated in the West, it is unlikely that

the level of the threshold will exclude any facility that operated in the previous year. The shore plant requirement may be overinclusive in some circumstances, and underinclusive in others. If a plant operator that has previously operated in the region is uncertain of whether it will operate in a year, it is unlikely to agree to an exemption, in order to maintain its position in the fishery, should it decide to operate. On the other side, a new plant may be planning to (and be fully capable of opening) but have no ability to ensure that landings in the region will be required, as it will have no say in the exemption. While QS holders maintain that a plant in the West would have operation benefits for vessels harvesting in the fishery, it is unlikely that a West region plant can operate as efficiently as plants in outside of the West region. Whether QS holders would deny the exemption in support of such a new plant is uncertain and could depend on whether PQS holders are willing to share any efficiency benefits realized as a result of the exemption. So, assuming that the purpose of including shore plant owners in the exemption is to ensure that the exemption is not available, if in the West region facility is operational, it is not clear that the exemption will not be available when a new plant is opening in the region.

Making the communities of Adak and Atka required parties to the contract could aid any development of shore plant capacity in those communities by allowing the communities to intervene on their behalf. The provision would require local governments to consent to the exemption. In most cases, it can be anticipated that these representatives will act on behalf of local plants, withholding consent to an exemption to foster local deliveries. Yet, in some circumstances, it is possible that political considerations or competing interests could lead some community representatives to consent to an exemption against the interests of a local plant. While inclusion of community interests as required parties may not always protect community-based plants, community participation in the agreement could be critical to ensuring that some regional benefit arises from West regionalization. Without requiring community agreement, it is likely that harvesters and processors would agree to the exemption based solely on their returns from the fishery.

The exemption is generally established by an annual agreement of the required parties. Once those parties file an affidavit with NOAA Fisheries affirming the existence of such a contract, the exemption would be granted. The exemption is granted only if the required parties agree to the exemption. Between harvesters and processors, it is possible that one party could use its required consent for negotiating leverage. While this provision can be administered in a straightforward manner, the option provides no certainty to participants in the fishery. Since no deadline for filing the exemption is provided, it is assumed that the exemption would be available at any time, if the parties filed the agreement. This degree of flexibility may be beneficial in that it would allow parties to wait to determine if processing capacity could be made available in the region prior to establishing the exemption.

Overall, the effect of the exemption will depend on the parties' choices. Each required party to the contract is free to determine whether to accede to the exemption. The exemption will be agreed to, when all parties see it in their interest to go along with the exemption. Whether a party may try to extract some benefit from the other parties is fully within its discretion. To the extent that there is turnover in required parties (either through transfers of QS or PQS or changes in community representation), the motivation of those parties may change, along with the results of the exemption. Consequently, whether the exemption serves its intended purpose is uncertain and may vary over time.

1 INTRODUCTION

Since the second year of fishing under the Bering Sea and Aleutian Island crab rationalization program, participants in the Western Aleutian Island golden king crab fishery have voiced concerns with processing capacity in the West region of that fishery. Specifically, the program requires that 50 percent of the catcher vessel Class A IFQ (or approximately 24 percent of the non-CDQ TAC) be landed in the area west of 174° West longitude (the West region). Under the program to date, shore-based crab processing in this region has occurred only in a single plant, in a single community, Adak. In the first four years of the program, deliveries to the Adak plant were complicated, as the operator of that plant holds few of the processor quota shares in the fishery. Despite this mismatch, holders of processor shares have largely relied on the plant in Adak for West region processing. Until this year, this reliance on a single plant may have contributed to leaving a portion of the TAC unharvested, as a limit on use of processor shares prevented the entire West region allocation being processed at a single plant. To overcome this obstacle, the Council adopted an amendment to the program, exempting custom processing in the West region from the use processor share caps, which NOAA Fisheries implemented in 2010.

Although this regulation would resolve any excessive share issue concerning the ability of the Adak plant to process all West region landings from the fishery, in August of this year, the operator of that plant filed for bankruptcy. This filing prompted participants in the fishery to assert that an exemption from the regional landing requirement should be available to address a shortage of processing capacity in the West region. In response, the Council recommended that NOAA Fisheries undertake emergency rulemaking providing a regional landing exemption in the current (2009-2010) season² and has advanced this analysis of an amendment to the crab program that would provide an exemption from the West region landing requirement, in the event that qualifying interested parties agree to that exemption.

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of alternatives to establish an exemption from West region landing requirements in the fishery. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.³

This document relies on information contained in the Bering Sea/Aleutian Islands Crab Fisheries Final Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis/Social Impact Assessment (NMFS/NPFMC, 2004).

2 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:

² An emergency rule would remain in effect for up to 180 days, resolving the issue for this season. A single extension of up to 185 days would be permitted, if necessary and appropriate, after which normal rulemaking would be needed to address any problem.

³ 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 geographic distribution of landings. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

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:

- 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 adopted the following purpose and need statement for this action:

The purpose of this proposal is to develop a regulation to allow waiver of the requirement that west-designated Western Aleutian Islands gold king crab (WAG) individual fishing quota (IFQ) be delivered west of 174 ° W. longitude. A reliable shoreside processing facility may not be available each season to take delivery and process WAG IFQ. Relaxing the regional landing requirement would allow the IFQ to be delivered outside the west region, to promote full utilization of the TAC.

2.2 Alternatives

To meet the identified purpose and need, the Council has adopted the following alternatives for analysis:

Alternative 1: Status Quo (no exemption from West region landing requirements)

Alternative 2: Contractually Defined Exemption

To receive an exemption from the regional landing requirement in the WAG fishery,

Option 1: specified QS holders, PQS holders, shoreside processors, and municipalities

Option 2: specified QS holders, PQS holders, and municipalities

shall have entered into a contract. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed.

Definitions:

QS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG QS.

PQS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG PQS.

Shoreside Processors: A shoreside processing facility that is located in one of the defined municipalities (Adak or Atka) and that processed in excess [options: 5, 10, or 20] percent of the west-designated WAG IFQ in the preceding fishing year.

Municipalities: The municipalities of Adak and Atka.

Approval of Exemption:

An exemption to the regional landing requirement will be granted, if the contracting parties have filed an affidavit with NOAA Fisheries affirming that a master contract has been signed. In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.

2.2.1 Alternatives considered, but not advanced for analysis

In addition to the above alternatives, the Council considered a variety of other approaches to addressing the problem identified in the purpose and need statement. The Council considered an exemption that would be available only after a factual finding of the absence of processing capacity. This provision could be administered either directly by NOAA Fisheries or by an arbiter selected by the interested parties. The Council elected not to advance these alternatives, as factual findings of the absence of processing capacity may be administratively unworkable. With mobile processing platforms, capacity availability can change in a relatively short time period. Making determinations of the availability of capacity may not be possible, given the potential for short term changes in capacity.

The Council also considered a provision under the action alternative that would have prohibited any party required to consent to the exemption from unreasonably withholding consent to the exemption. The proposed provision would have been administered by an arbiter jointly selected by the required parties. Although such a provision might be desirable, as it would prevent persons from barring the exemption without reason, the provision would also likely be unadministerable. Even with an arbiter, NOAA Fisheries would be required to provide the interested parties with the opportunity to appeal any arbiter decision. Under the appeal, NOAA Fisheries would be required to make a de novo finding (i.e., an original finding without deference to the arbiter's decision). As a result, the use of an arbiter may delay the granting of the exemption. In addition, NOAA Fisheries may be unable to expeditiously process any claim, if factual matters are disputed. To accommodate time constraints associated with contesting a party's withholding consent to an exemption, a timeline for application for the exemption would need to be developed. This timeline would limit flexibility and could prevent the exemption from achieving its intended purpose.

The Council also elected not to advance an alternative to remove the West region landing requirement altogether. Since the West region landing requirement is intended to induce the development of processing in the region, when such development is feasible, removal of the exemption would be inappropriate.

2.3 Existing Conditions

The section provides a brief discussion of the relevant conditions in the fishery. The section begins with a brief discussion of the pre-program License Limitation Program (LLP) fishery.

2.3.1 The LLP fishery

Prior to implementation of the rationalization program, the Bering Sea and Aleutian Island crab fisheries were managed under the License Limitation Program (LLP). Under that program, 28 licenses carried endorsements authorizing participation in the Aleutian Islands golden king crab fisheries (including the Western fishery). Despite a relatively constant TAC leading up to implementation of the rationalization program, the license limits were not constraining and the fishery did not attract the level of competition of other crab fisheries (see Table 1). The fishery's small TAC and distant and relatively limited grounds are believed to have been an effective deterrent to entry to those qualified under the LLP.

Table 1. TACs, catches, and participation by operation type in the Western Aleutian Islands golden king crab fishery (2000/1 through 2008/9 seasons).

wag

Season	TAC	Catch	Percent of TAC harvested	Number of vessels		
				catcher vessels	catcher processors	all unique vessels
2000 - 2001	2,700,000	2,902,518	107.5	11	1	12
2001 - 2002	2,700,000	2,693,221	99.7	8	1	9
2002 - 2003	2,700,000	2,605,237	96.5	5	1	6
2003 - 2004	2,700,000	2,637,161	97.7	5	1	6
2004 - 2005	2,700,000	2,639,862	97.8	5	1	6
2005 - 2006	2,430,006	2,382,468	98.0	2	1	3
2006 - 2007	2,430,005	2,002,186	82.4	2	1	3
2007 - 2008	2,430,005	2,246,040	92.4	2	1	3
2008 - 2009	2,551,500	2,252,111	88.3	2	1	3

Sources: ADFG fishtickets and NMFS RAM catch data (for 2005-2006, 2006-2007, 2007-2008, and 2008-2009)

Despite relatively low participation levels in the years leading up to implementation of the rationalization program, the fishery did exhibit signs of increased effort. Seasons progressively shortened during this time period (see Table 2).

Table 2. Season opening and closings in the Western Aleutian Islands golden king crab fishery (2001/2 through 2004/5 seasons).

wag

Season	Season opening	Season closing
2001 - 2002	August 15	March 30
2002 - 2003		March 8
2003 - 2004		February 2
2004 - 2005		January 3

Sources: ADFG Annual Management Report.

2.3.2 The rationalization program fishery

2.4 Management of the crab fisheries

Nine Bering Sea and Aleutian Island crab fisheries are managed under the rationalization program. Under the program, holders of License Limitation Program (LLP) licenses endorsed for a fishery were issued vessel owner quota shares (QS), which are long term privilege, based on their qualifying harvest histories in that fishery. Catcher processor license holders were allocated catcher processor vessel owner QS for their history as catcher processors; catcher vessel license holders were issued catcher vessel QS based on

their history as a catcher vessel. QS annually yield IFQs, which are privileges to harvest a particular amount of crab, in pounds, in a given season. 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 1 percent of the QS pool would receive IFQs to harvest 1 percent of the annual TAC in the fishery. Ninety percent of the catcher vessel owner IFQs is issued as "A shares" or "Class A IFQ," which must be delivered to a processor holding unused IPQs.⁴ The remaining 10 percent of these annual IFQs are issued as "B shares" or "Class B IFQ," which may be delivered to any processor.⁵ Processor quota shares (PQS) are long term privileges 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 TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.⁶

In addition to processor share landing requirements, Class A IFQ (along with IPQ) are, under the program, subject to regional landing requirements, under which harvests from those shares must be landed in specified geographic regions. For the Western Aleutian Islands golden king crab fishery, 50 percent of the Class A IFQ is undesignated which means that can be delivered to any processor with corresponding IPQ and 50 percent is designated for delivery in the West region, which is west of 174°W longitude, to any processor with corresponding West designated IPQ.

Under the rationalization program, quota shares were allocated based on historic harvesting activity in the fishery. With few historic participants, initial allocations of QS were very concentrated, and have remained very concentrated (see Table 3). Regional designations were assigned to all QS initial allocations, with half of the total allocation being designated for landing in the West region and the other half undesignated (allowing their landing in any location). Regional designations were applied to QS during the initial allocation, based on landings histories, but adjustments were necessary as substantially less than 50 percent of the historic landings were made in the West region. The West designation was intended primarily to aid the development of processing in the community of Adak. Adak had little historic processing prior to the end of the qualifying period, as the community was occupied exclusively by the U.S. military during the development of the Aleutian Island commercial fisheries. With the departure of the military in the late 1980s, the community has worked to develop civilian industries, including fish processing. Atka is recognized as a second potential beneficiary of the West region designation. That community has also begun to develop processing capacity in recent years, but has yet to develop crab processing capability.

⁴ Currently, the C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ landing privileges during the first three years of the program. During that period, the IPQ corresponding to the C share allocations are withheld.

⁵ The terms "A share" and "Class A IFQ" are used interchangeably in this paper, as are the terms "B share" and "Class B IFQ".

⁶ 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 entire IFQ allocations as A shares (and are not allocated B shares). The rationale for issuing only A shares to PQS holders and their affiliates is that these persons do not need the extra negotiating leverage derived from B shares. To maintain 10 percent of the 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).

Table 3. Quota share holdings by share type, region, and operation type in the Western Aleutian Islands golden king crab fishery (2009-2010).

Share type	Share holdings by region and operation type						Across regions and operation types			
	Region/Catcher processor	QS holders	Percent of pool	Mean holding	Median holding	Maximum holding	QS holders	Mean holding	Median holding	Maximum holding
Owner Quota Shares	Undesignated	12	26.9	2.2	1.0	11.0	15	6.67	1.78	45.73
	West	8	26.9	3.4	1.2	13.5				
	Catcher processor	3	46.2	15.4	0.5	45.7				
Crew Quota Shares	Catcher vessel	7	57.5	8.2	6.3	21.7	8	12.50	7.45	41.74
	Catcher processor	2	42.5	21.3	21.3	41.7				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2009-2010.
 Note: These share holdings data are publicly available and non-confidential.

As would be expected in this relatively small fishery, PQS holdings are relatively concentrated, with only 10 PQS holders (see Table 4). Initial allocations of PQS were made based on processing history in the fishery. Processors operating plants in the West region at the time of the initial allocation received their allocations in West designated PQS, while others received their allocations as both West designated PQS and undesignated PQS, in a proportion such that the pool of PQS was divided equally between West designated PQS and undesignated PQS. To some extent, holdings are concentrated by area with a single holder having in excess of 50 percent of the West designated shares and three holders controlling in excess of 95 percent of the shares in that region. This level of concentration would typically benefit share holders, by allowing consolidation of processing activity. In the first four years of the program, complete consolidation of West region processing activity was prevented by the processing share cap, which permitted no more than 30 percent of the pool from being held by or processed at the facility of a single person. An exemption from that cap now allows unlimited processing at a single facility in the West region (including the processing of all landings with undesignated shares).

Table 4. Processor quota share holdings by region in the Western Aleutian Islands golden king crab fishery (2009-2010).

Region	Share holdings by region					Overall share holdings			
	Number of PQS holders	Percent of pool	Mean holding	Median holding	Maximum holding	Number of PQS holders	Mean holding	Median holding	Maximum holding
Undesignated	8	50	6.3	1.0	29.6	10	10	6.8	30.0
West	7	50	7.1	0.5	26.3				

Source: NMFS Restricted Access Management Database (2009-2010).
 Note: The data are publicly available and non-confidential.

The few QS holders in the fishery have used measures provided by the rationalization program to concentrate activity in the fishery beyond their QS holdings. Exclusive allocations have been organized in harvest cooperatives reducing the fleet to two catcher vessels and a single catcher processor, all of which have fished only cooperative allocations. In each of the first five years of the program, in excess of 99 percent of the annual IFQ has been allocated to cooperatives that have formed in the fishery. Gains arising from IFQ are also suggested by the changes in pot usage, pot lifts, and catch per unit effort in the fishery (see Table 5). In the first three years of the program, the number of registered pots per vessel has increased substantially, but the number of pot lifts in the fishery has fallen. Catch per unit effort has also risen substantially, suggesting that participants' use greater numbers of pots and allowing those pots to soak for longer periods.

Table 5. Pot usage and catches in the Western Aleutian Islands golden king crab fishery (2000/1 through 2007/8).

WAG

Season	Number of pots registered*	Number of pot lifts *	Lifts per registered pot*	Average catch per unit effort (crabs per pot lift)*	Pots per vessel	Pounds per pot
2000 - 2001	8,910	101,239	11.4	7	743	28.7
2001 - 2002	8,491	105,512	12.4	7	943	25.5
2002 - 2003	6,225	78,979	12.7	8	1,038	33.0
2003 - 2004	7,140	66,236	9.3	10	1,190	39.8
2004 - 2005	7,240	56,846	7.9	12	1,207	46.4
2005 - 2006	4,800	27,503	5.7	21	1,600	86.6
2006 - 2007	6,000	22,694	3.8	20	2,000	88.2
2007 - 2008	4,800	25,287	5.3	21	1,600	88.8

Sources: *ADFG Annual Management Report and **fishtickets and **NMFS RAM catch data (for 2005-2006, 2006-2007, and 2007-2008)

As might be expected, since implementation of the program, catcher vessel fishing has been extended over a longer period of time (see Table 6). Substantial time periods between landings (or breaks in fishing) appear to have developed. QS holders in the fishery assert that the large spreads between the first delivery and the last deliveries in the second and third years arise largely from the lack of available processing capacity in the West region. These QS holders assert that landings during the second and third years were delayed because participants relied on the shore plant at Adak to handle processing in the West region of the fishery, rather than establishing alternative platforms to support West region landings. Prolonged negotiations concerning processing arrangements between IPQ holders and the Adak processor are said to have delayed processor availability during those two years.

Table 6. Seasons and deliveries in the Western Aleutian Islands golden king crab fishery (2005/6 through 2008/9).

wag

Season	Season opening	Date of first delivery	Date of last delivery	Season closing
2005-2006		September 6	March 25	
2006-2007	August 15	September 10	May 6	May 15
2007-2008		September 14	May 21	
2008-2009		September 15	May 12	

Source: RAM IFQ landings data

While landings have been spread over a relatively long time period, the West region IFQ allocation is relatively small and is unlikely to support any extended fishing period (see Table 7). In each of the first four seasons of the program, 2 catcher vessels fished in the fishery. These vessels made between 2 and 9 landings in the West region in this time period. Given that over 80 percent of the total IFQ allocation in the fishery was harvested in each of these years (and over 90 percent of the total IFQ allocation in two years), it is unlikely that the West region allocation would require over 10 deliveries (absent any great increase in the TAC). Even if a West region plant were to attract a substantial share of the undesignated IFQ deliveries, the fishery is unlikely to produce much more than 20 landings in a season for that plant.

Table 7. Active catcher vessels, West region IFQ landings, and West region IFQ allocations (2005-6 to 2009-2010).

Season	Number of active catcher vessels	Number of landings of West region IFQ	West region IFQ allocations
2005-2006	2	9	570,932
2006-2007	2	2	570,932
2007-2008	2	5	570,932
2008-2009	2	4	599,474
2009-2010			599,475

Source: NMFS Restricted Access Management IFQ database.

Crab markets in general suffer from great volatility. First wholesale prices for golden king crab show a notable decline in 2006, the first full year after implementation of the rationalization program (Table 8).⁷ This drop coincided with an abundance of competing small sized red king crab imports. In the second and third years since implementation of the program, king crab inventories were depleted, which together with a relatively strong Japanese market, led to increases in golden king crab prices. Since that time, the weakness of the economy (and crab markets), particularly large retail and food service markets are believed to have led to a substantial decline in prices. Indications are that this trend will continue leading to prices near the 2006 level, which approached historic lows. Based on his market analysis, Sackton (2009) expressed concern that further declines in the value of golden king crab could make it is “not economical to harvest the entire quota.”

**Table 8. Estimated golden king crab ex vessel prices and first wholesale price, 2001 - 2006 (dollars/pound).
wag**

Year	Ex vessel price	First wholesale price
2001	3.37	6.95
2002	3.46	7.58
2003	3.62	7.89
2004	3.15	6.02
2005	2.89	6.00
2006	1.92	4.35
2007	2.16	5.34
2008	3.58	5.75

Source: ADFG Commercial Operators Annual Report

Note: Excludes Southeast plants.

Throughout the first four years of the program, the 30 percent processing share use cap prevented any single plant from processing all of the West region IPQ deliveries. Since the beginning of the fifth season (2009-2010), the use cap exemption applicable to custom processing has removed this regulatory impediment to a single processor receiving all West region IPQ deliveries. Although the exemption is

⁷ Final price data are available from State of Alaska Commercial Operators’ Annual Reports for the various species harvested in the program. These data, however, are not collected by fishery and include catch in fisheries other than those subject to the rationalization program. Although catch from the rationalization program dominate these data, in some case,s catch from other fisheries may affect final prices observed in these data. Overall, the data do show a declining price trend, which accurately characterizes price changes in recent years in the fisheries.

intended to resolve uncertainties concerning availability of processing capacity in the West region, the lack of capacity has persisted. Share holders in the fishery assert that this lack of capacity is caused by the circumstances surrounding the Adak plant.

Adak Fisheries reportedly stopped all processing at the plant after the 2009 Federal Pacific cod B season and shortly after the start of the State waters Pacific cod A season (mid-April). The plant is currently in 'hibernation mode,' running off of limited power. In early September, Adak Fisheries officially filed for Chapter 11 bankruptcy.⁸ The company had several unpaid creditors, with debt totaling several million dollars. The United States Bankruptcy Court for the District of Alaska (the Court) scheduled a hearing for November 9, 2009, in Anchorage, to consider the sale of the Adak plant and related assets to a new company, Adak Seafood, LLC.⁹ The proposed sale would include Adak Fisheries' fish processing equipment and other personal property housed in a building owned by Aleut Enterprises and leased to Adak Fisheries. Adak Seafood, LLC, is a newly-formed Delaware limited liability company, affiliated with Drevik International. Kjetil Solberg, former owner of Adak Fisheries, is the majority (51%) owner of the company, and Drevik owns 49%.¹⁰ The offer from Adak Seafood is \$488,000, plus assumption of the debtor's entire obligation to its primary creditor, Independence Bank, of approximately \$6.7 million. The sale is to be free and clear of the claims, liens, and interests of all persons receiving notice of the motion, except Independence Bank; and the claims, liens, and interests of all such persons (excluding Independence Bank) shall attach to the sale proceeds to the same extent and in the same order of priority as existed in the underlying property.

On November 5, 2009, Aleut Enterprises, LLC, filed an objection with the Court regarding the proposed sale of Adak Fisheries. Aleut Enterprises' lease to Adak Fisheries was scheduled to expire on December 31, 2009. Aleut Enterprises objected to the sale on several grounds, asserting, in part, that the terms of the Sale Application cannot be met, as Aleut Enterprises' lease was terminated pre-petition. Aleut Enterprises also objected to the sale on the grounds that the lease would expire on December 31, 2009, and that the deadline for extending the lease had passed.¹¹

The hearing for the sale of Adak Fisheries' assets was held on November 9 and 10, and on November 10, 2009, the Court approved the sale to Adak Seafood, LLC, with the original terms of the offer, and including other provisions.¹² One provision requires that at closing, Adak Seafood shall pay \$250,000 to Aleut Enterprises, LLC, for rent due in 2009 and property damage. Adak Seafood is also required to escrow \$150,000, which is supposed to represent six months of the minimum annual rent due to Aleut Enterprises for 2010. In addition, Adak Seafood is required to pay \$13,000 to the City of Adak to satisfy sales tax obligations. Aside from the primary creditor (Independence Bank), there are several other entities whose claims and liens do not attach to the sale. These, include but are not limited to, the IRS, State of Alaska, the City of Adak, and Pentech Leasing.¹³ Overall, Adak Fisheries was several millions of dollars in debt, and all but a little over \$7 million was removed through the bankruptcy proceedings, as the new company (Adak Seafood LLC) will assume the \$6.7 million owed to Independence Bank. The total sale, including the debt to Independence Bank and other various expenses, was about \$8 million. The order granting the sale notes that the only other offer or expression of interest in the plant was by Trident

⁸Source: Seafoodnews.com.

⁹ Case No. 09-00623 DMD, United States Bankruptcy Court for the District of Alaska, October 9, 2009.

¹⁰Testimony by Drevik at November 10, 2009, hearing on Case No. 09-00623 DMD.

¹¹Aleut Enterprises, LLC's Objection to Debtor's Motion to Sell Adak Fish Plant, Case No. 09-00623 HAR, U.S. Bankruptcy Court for the District of Alaska, November 5, 2009.

¹²For details, see Order Granting Debtor's Application to Sell Adak Plant Free and Clear of Liens, Case No. 09-00623 DMD, U.S. Bankruptcy Court for the District of Alaska, November 10, 2009.

¹³Pentech Financial Services, Inc., is the successor company to Pentek Leasing, which is a general equipment lessor for small and mid-ticket equipment.

Seafoods Corporation, which expressed an interest in purchasing certain assets, and after adjustment for differences between the two offers (Adak Seafood and Trident Seafoods), Adak Seafood's offer was millions of dollars higher. Trident Seafoods offered \$2 million for the assets of Adak Fisheries, and its offer did not include assumption of the \$6.7 million of debt owed to Independence Bank.¹⁴

Under the order, the terms of the lease of the building, from Aleut Enterprises to the new owner, Adak Seafood, stayed the same. Under its terms, the lease was scheduled to expire on December 31, 2009. In October, Independence Bank filed a complaint in Bankruptcy Court requesting an injunction to compel Adak Fisheries to exercise an extension of the lease and Aleut Enterprises to accept that extension.¹⁵ The sale order does not resolve this issue, as it specifically states that all parties reserve all rights with respect to the lease. Since the beginning of the year (the scheduled expiration of the lease), Aleut Enterprises has filed papers to remove Adak Seafood from the leased premises. To date, Adak Seafood is believed to have maintained occupancy of the plant. The plant is reported to have taken a small delivery of Pacific cod this year and is attempting to arrange for crab processing, but none has occurred at the plant, to date. Given these circumstances, it remains uncertain whether a shore-based plant will be operational in Adak in the near or long-term future.

Although the disposition of the bankruptcy of Adak Fisheries has contributed to uncertainties concerning processing capacity in the West region, processing capacity in the West region has been an issue since the opening of the fishery. In the first year of the program the Adak plant and a floating processor accepted deliveries in the West region. Since then, no plant other than the Adak plant has received West region deliveries of crab. Harvesters have asserted that they have been prevented from planning fishing, as negotiations between the Adak plant operator and IPQ holders have lasted well into the season. Harvesters also did not fully harvest the IFQ in the fishery in the second, third, or fourth years of the program, arguably because of the processor share use cap constraining processing at the Adak plant and a lack of any other available processing capacity in the West region. Notwithstanding these circumstances, it is not clear that the IFQ holders have used tools provided by the program that could assist them.

No binding arbitration actions have taken place in the fishery in the first four years of the program. In the current season, IFQ holders are believed to have maintained their right to arbitrate under the lengthy season approach, but have not initiated any proceedings to date. Some harvesters have suggested that they have avoided use of the arbitration system because they believe it will be ineffective and could hurt their positions in the fishery. These participants believe that the adversarial nature of arbitration proceedings could damage relationships between the sectors in the fishery. While it is clear that the system is adversarial and might stress relationships, it is unclear whether use of the system would damage relationships as contended. The system has been used effectively in other fisheries. While it has stressed relationships among participants at times, it is not believed to have had long term detrimental effects on those relationships beyond those that have arisen in other delivery disputes. In actuality, the use of the arbitration system in those other fisheries might be argued to have had a positive effect on relationships, since it has clarified expectations. In addition, it is asserted that the arbitration system may be ineffective in ensuring that processing is undertaken, because IPQ holders have used custom processing relationships to process landings in the region. It is clear that an arbitrator is likely to have no authority to compel a plant processing under a custom processing relationship to accept any delivery. The arbitrator is also unlikely to have authority to compel an IPQ holder to accept a delivery. Regardless of who is engaged in the physical processing of the delivery, the arbitrator's only authority is to establish a contract that binds both the IFQ holder and IPQ holder. Any failure to comply with that contract would be enforceable only

¹⁴Memorandum Regarding Potential Acquisition, No. 09-00623 DMD, U.S. Bankruptcy Court for the District of Alaska, November 5, 2009.

¹⁵Independence Bank v. Adak Fisheries, LLC, et al., Adversary Proceeding No. 09-90031, filed October 15, 2009.

through a civil action. So, an IPQ holder's failure to perform could be grounds for damages against that IPQ holder. Although the IFQ holder may have no action against the plant processing under the custom processing arrangement, it is unclear how the IFQ holder is disadvantaged, since the suit could be pursued against the IPQ holder. In addition, given the prevalence of custom processing in all fisheries under the program, it is unclear how this differs from the circumstances in any other fishery. In those other fisheries, the arbitration system has effectively protected IFQ holder interests.

2.4.1 Communities

Based on current conditions in the fisheries, two communities in the West region are potentially affected by this action: Adak and Atka. This section briefly profiles these communities, as they are the intended beneficiaries of the West region designation.¹⁶

The community of Adak, until recently, had no direct or indirect ties to commercial fishing because the island was home to a Naval Air Station since the 1940s. However, the U.S. Navy closed the air station several years ago, leaving the island to the local residents. As a result, the Aleut Corporation is trying to transform the island into a commercial fishing center in the Western Aleutians area of the Bering Sea.

Most commercial fishing deliveries to Adak are to a single processing plant, made by larger vessels from outside the area, since the community has a very limited small boat residential fleet. Of the species processed, cod, halibut, and black cod are the primary species. The community has also seen some crab and cod activity related to other companies, but these companies are not physically located in the community. Further description of the processing activity in the Adak area cannot be included in the profile due to data confidentiality restrictions.

Finally, Adak is in the process of developing support services capabilities for the commercial fishing fleet. The port facilities in Adak can also support a wide variety of large vessels. At-sea processors have used the port for transfer of product in addition to a supply stop.

A few aspects of the rationalization program are structured specifically to support Adak. First, ten percent of the TAC in the Western Aleutian Islands golden king crab fishery is allocated to a community entity representing Adak. This allocation is intended to support fishery development (including both harvesting and processing) in the community. Adak is also an intended beneficiary of a regional designation on one-half of the shares in the Western Aleutian Islands golden king crab fishery, which require crab harvested with those shares to be processed west of 174° West longitude. Currently, Adak is the only community in the West region with a shore-based crab processing plant. Processing of the West region allocation in Adak is not a certainty, since the rules in the fishery permit processing of those landings on floating processors.

The community of Atka is the western most fishing community in the Aleutian chain. The economy of Atka is primarily based on subsistence, with support from commercial fishing. As of 2000, three Atka residents owned federally licensed fishing vessels and 19 residents were licensed as crew. The community has a small shore-based processor, Atka Pride Seafoods, which takes delivery of halibut and sablefish, mostly from the local fleet. In addition to fishing activity of the local fleet, some vessels have used Atka as a location to make crew changes. Although Adak was intended as the primary beneficiary of

¹⁶ Outside of the West region, communities that maintain crab processing could be affected. These include Dutch Harbor, Akutan, King Cove, and Kodiak. Profiles of these communities are omitted from this analysis, as these communities are likely to be affected in a relatively minor way, if at all. Profiles of these communities are available in EDAW (2005).

regionalization of the Western Aleutian Islands golden king crab fishery in the crab program, the Council was aware that Atka could benefit from the regionalization of that fishery, either through processing at the local shore plant (if the plant develops adequate processing capacity) or through processing on floating processors within the community's boundaries.

2.4.2 Emergency rulemaking

In response to the current circumstance, the Council has recommended that NOAA Fisheries advance emergency rulemaking under Section 305(c) of the Magnuson Stevens Fishery Conservation and Management Act to address the emergency that has arisen because of the shortage of processing capacity in the West region. Under that section, the Secretary, on finding an emergency, may promulgate regulations necessary to address the emergency. NOAA Fisheries policy guidelines provide that the only prerequisite for acting is that an emergency must exist and that rulemaking can be justified by economic emergencies. Emergency rule making is intended for circumstances that are "extremely urgent" where "substantial harm to or disruption of the...fishery...would be caused in the time it would take to follow standard rulemaking procedures." The Council concluded that the current fishery is disrupted as no feasible processing capacity will be available this season in the West region and that the result will be substantial economic harm to fishery participants unable to prosecute the fishery in compliance with the West region landing requirement. The guidance cautions that, "[c]ontroversial actions with serious economic effects, except under extraordinary circumstances should be undertaken through normal notice-and-comment rulemaking." The Council received no testimony in opposition to emergency rulemaking suggesting that the action would be non-controversial. Since normal notice-and-comment-rulemaking would be ineffective for addressing this year's circumstance, emergency rulemaking is the only available avenue to address this situation. In addition, the Council concluded that the circumstances are extraordinary, as the unanticipated closure of the Adak plant leaves harvesters in the fishery without an alternative market for landings in the region.

To further clarify the scope of emergencies to which this authority applies, the guidance defines an emergency as "a situation that:

- 1) results from recent, unforeseen events or recently discovered circumstances;
- 2) presents serious conservation or management problems in the fishery; and
- 3) can be addressed through emergency regulations for which the immediate benefits outweigh the value of advance notice, public comment, and deliberative consideration of the impacts on participants to the same extent as would be expected under the normal rule making process."

The Council concluded that:

- 1) the first criterion is met, as the unforeseen bankruptcy and closure of the Adak plant prevent deliveries at that facility.
- 2) the second criterion is met, as the West region landing requirement is the management problem that directly prevents prosecution of a portion of the fishery. In the absence of that requirement, landings could be made in operational processing facilities outside the West region (such as Dutch Harbor).
- 3) the third criterion is met, as the removal of the West region landing requirement will address the problem, providing a clear and direct benefit to fishery participants, who would otherwise be unable to complete the harvest of allocations designated for West region landing. The normal rulemaking process is the preferred avenue for making regulatory changes, as it provides interested parties the full ability to comment. In this case, the Council believes that the cost of lost harvests and the accompanying economic dislocation in fishery dependent communities

outweigh the benefit of using the more protracted, standard regulatory development process that would be ineffective for addressing the immediate issue.

Given the absence of processing capacity in the West region, the Council believes emergency rulemaking is warranted and that without emergency rulemaking a substantial portion of the fishery will likely remain unharvested to the detriment of all participants.

If acted on by NOAA Fisheries, the emergency rulemaking would provide for an exemption from the West region landing requirement; however, the exemption would be for a limited duration, addressing any West region processing capacity issue for, at most, the next two seasons. As a result, the Council would need to develop an amendment package addressing West region landing requirements, if it believes that the state of processing capacity in the region presents an unacceptable problem.

2.5 Analysis of alternatives

This section analyzes each of the alternatives beginning with the status quo. The first action alternative includes options for defining the qualifying parties to the exemption agreement, as well as two optional procedures. These options are discussed in the analysis of that alternative. To discern the distributional effects, the analysis examines the effects of the alternatives on West region IFQ holders, West region IPQ holders¹⁷, West region shore-based crab processors, and West region communities.

2.5.1 Alternative 1 - The status quo (no exemption)

Under the status quo, no exemption from the West region landing requirement exists. If PQS holders do not provide processing capacity in the West region (either by development of that capacity or through contracting with existing capacity), landings in that region cannot occur.

From the perspective of holders of West region IFQ, if the holder of matched IPQ fails to make available processing capacity in the West region to receive a delivery, that IFQ holder may be unable to harvest and make delivery of its allocation. In such a circumstance, the IFQ holder's only recourse is to pursue arbitration of the delivery terms. Since arbitration has not been used, to date, for this purpose in any fishery, it is not clear what the outcome of such a process might be. It is clear that an arbiter cannot compel an IPQ holder to provide processing capacity to accept a delivery (through an injunction or order); however, the arbiter can establish a contract between the IFQ holder and IPQ holder, defining delivery terms for the IFQ harvests. If an IPQ holder fails to perform, the IFQ holder could pursue a civil action against the IPQ holder for a violation of the contract.

The terms of any arbitrated delivery are uncertain and would likely depend on the circumstances. Although the arbitration standard directs the arbiter to establish an ex vessel price that preserves the historic division of first wholesale revenues, that standard also allows the arbiter to consider a variety of other factors, including harvesting and processing efficiency and the interest of maintaining financially healthy and stable harvesting and processing. Whether an IPQ holder could effectively use these considerations to convince an arbiter to adjust a price downward from the historic division of first wholesale revenues is uncertain. IPQ holders currently contend that, in the absence of the Adak plant or a similar multispecies processing facility, no economically feasible processing opportunity exists in the West region. Specifically, these IPQ holders contend that the time between deliveries in the fishery make

¹⁷ IFQ and IPQ represent the privilege to harvest and process (respectively) a specific number of pounds of crab in a season. Holders of these shares are directly affected by the regional landing requirements associated with their share holdings. QS and PQS holders are indirectly affected, as the value of their long term share holdings are affected by any change in value of the yielded IFQ and IPQ, respectively.

the introduction of a floating processor or catcher processor infeasible. Whether an arbiter will find that argument compelling is not known. In addition, IFQ holders have been reluctant to use the arbitration system in the fishery, as they contend that the arbitration system may be disruptive to harvester/processor relationships in the fishery. Whether this reluctance to use the system will continue in the future is not known, but as long as IFQ holders refrain from using this system, it will not be known whether that system could aid in compelling processors to arrange processing capacity in the West region.

IFQ holders (and the vessels that fish those IFQ) who choose not to use the arbitration system for determining delivery terms may be unable to make deliveries in the West region, if the matched IPQ holder fails to arrange for processing in the West region. In recent years, IPQ holder negotiations with the plant operator in Adak are said to have delayed landings of West region allocations. IFQ holders and IPQ holders contend that negotiations with the Adak plant operator are particularly contentious and have caused uncertainty over whether West region harvests will be made in any given year. In the current season, IFQ holders and IPQ holders appear to have determined that the harvesting and processing of the West region allocations are not economically feasible, unless the Adak plant operates. These circumstances suggest that in the absence of the exemption, harvests of West region allocations are in jeopardy of being unharvested as long as IPQ holders fail to establish their own processing capacity in the West region. Whether IFQ holders' use of the arbitration system could either overcome the reluctance of IPQ holders to establish reliable processing capacity in the region or induce IPQ holders to arrange for processing prior to or early in the season each year is not known. In the absence of reliable processing arrangements, harvesters are likely to continue to face uncertainties in arranging deliveries.¹⁸

Under the status quo, IFQ holders are likely to continue to be frustrated by poor planning of deliveries until reliable processing capacity is made available for their deliveries. It is important to recognize that this depends on several factors. Even if processing capacity is available in the West, if that capacity is not owned or controlled by the PQS holders, IFQ holders may continue to face uncertainties. Disputes between the Adak plant and other IPQ holders delayed landings in the past. Even if IPQ holders have access to the capacity, delivery arrangements will still need to be negotiated. Processors in the fishery have raised concerns that dispersed deliveries drive up their operating costs. Whether operating processors will choose to follow the harvesters preferred delivery schedules (without being compelled to do so by an arbitration determination) is not known.

To date, IPQ holders have resisted introducing additional capacity to the West region, choosing instead to rely on the Adak plant to accept their contracted deliveries. While this reliance has complicated deliveries for IFQ holders, IPQ holders have convinced those IFQ holders that West region excessive operational costs prevent alternative arrangements. IFQ holders seem to accept this argument and have chosen not to pursue arbitration to attempt to resolve the issue. Instead, IFQ holders and IPQ holders together have requested regulatory changes that would allow for landings outside of the West region. It is unclear whether an IPQ holder might be compelled to arrange processing capacity (or face a breach of contract claim from an IFQ holder) by an arbiter or whether an IPQ holder could operate or contract a processing facility profitably. Current IPQ holders contend that any new facility would be unprofitable. Economic feasibility of any shore-based facility would likely depend on whether groundfish landings are available,

¹⁸ It might be asked whether an arbiter could make a finding that releases the IFQ holder from the IPQ delivery obligation, if an IPQ holder asserts that it is infeasible to receive deliveries in the West region. It is not clear whether such a decision could be made. For such a decision to be administrable, the IPQ holder would need to relinquish the annual IPQ to a receiver designated by the IFQ holder (to allow for the required use of matched IPQ for a landing). The IFQ holder would then need to arrange a delivery to the new IPQ holder in the West region processor. This option would only be available, if requested by an IFQ holder in the arbitration, which seems unlikely given the IFQ holders' contention that West region processing is infeasible (if the Adak plant is unavailable).

as the Aleutian Island crab fisheries are relatively small. Whether a floater or catcher processor could be profitably contracted to take deliveries is not known, but may be another potential alternative for arranging deliveries at times when a shore plant is not available. This is likely to differ year-to-year with crab prices, TAC size, and availability of processing vessels. Such an inter-annual uncertainty inevitably increases costs for all parties and may further reduce the economic feasibility of processing in the region.

Overall, IPQ holders are likely to continue to use shore plants in the West region, when those facilities are available and willing to process crab at a reasonable cost under a custom processing arrangement or pay reasonable IPQ lease fees. Currently, the only shore plant likely to operate is the plant in Adak. Its future depends on whether arrangements can be made with Adak Seafood or with another company to operate the facility. The success of reopening the plant will likely depend, in large part, on groundfish availability in the area. In the future, it is possible that a crab processing shore plant could be operated in Atka, but whether such a facility will be operational, sustainable, and economically viable in future is not known.

When shore-based facilities are not available, IPQ holders may choose not to secure processing in the area, in the absence of an offer from an owner of a mobile processing platform or some prompting from an arbitration decision. Current IPQ holders believe that processing in the area, without an operational shore plant, is not cost effective. Consequently, they are unlikely to pursue opportunities to process in the absence of some galvanizing influence. Whether an arbiter might establish a contract under which an IPQ holder would be obligated to accept deliveries in the West region (or pay damages) is uncertain.

The most likely community beneficiaries of the West region landing requirement are Adak and Atka. Currently, neither community is in a position to benefit. Whether they will realize any benefit in the future will depend on the choices of IFQ holders, IPQ holders, and plant operators. Only Adak appears likely to benefit from West regionalization in the foreseeable future, as it is home to the only operational crab processing facility. Yet, the uncertainties surrounding the operation of the plant in that community bring any potential community benefits into question. If the plant begins to operate and no other processor introduces capacity to the region, it is possible that landings may occur at the Adak plant. If other capacity were introduced (inside or outside a community), the processing opportunity in Adak would need to be economically competitive with those other facilities to attract landings. Given the absence of competition in the past, it cannot be determined whether the plant operators could have offered prices that would be competitive, if other capacity were introduced. In the past, Adak plant operators have asserted that it is difficult or unlikely that the plant can compete with mobile facilities in either the crab or groundfish fisheries. The absence of other facilities in the region is likely a reflection of the difficulty operating in the region. In recent years, mobile groundfish plants have accepted deliveries of Pacific cod. To date, crab processors have perceived no similar opportunity in the crab fishery. The absence of crab processing is likely affected by both IFQ and IPQ in the fishery, which may prevent any owner of a mobile processor from the planning needed to efficiently operate. If a mobile facility were used in the region, it would need to attract landings away from the Adak plant, if that plant is operating (and any other available shore plant in the region). This competition would occur, only if the processor is able to compete profitably, which is not known.

In the long run, it is possible that Atka could benefit from the status quo, West region landing requirement. The owner of the small plant currently operating in Atka holds substantial West region PQS, which would ensure a reliable supply of West region landings, if the plant began accepting crab deliveries. The owner has considered developing crab processing at the plant, but currently has no firm plan for the developing that capacity. The failure of a major PQS holder to develop capacity in the region supports the conclusion that multiple operations capable of processing crab cannot be supported in the region.

2.5.2 Alternative 2 – Contractually defined exemption

Under the second alternative, an exemption to the regional landing requirement would be permitted on the agreement of specific parties. The alternative requires certain QS holders, PQS holders, communities, and possibly plant operators to be a party to the agreement.

The following options define required parties to the agreement to obtain the exemption:

To receive an exemption from the regional landing requirement in the WAG fishery,

Option 1: specified QS holders, PQS holders, shoreside processors, and municipalities

Option 2: specified QS holders, PQS holders, and municipalities

shall have entered into a contract. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed.

Definitions:

QS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG QS.

PQS Holders: Any person or company that holds in excess of [options: 5, 10, or 20] percent of the west-designated WAG PQS.

Shoreside Processors: A shoreside processing facility that is located in one of the defined municipalities (Adak or Atka) and that processed in excess [options: 5, 10, or 20] percent of the west-designated WAG IFQ in the preceding fishing year.

Municipalities: The municipalities of Adak and Atka.

The required QS holders and PQS holders could include persons holding in excess of a threshold percentage of the respective West region share pool (i.e., 5 percent, 10 percent, or 20 percent). Currently, 8 persons hold West region QS, while 7 persons hold West region PQS (see Table 9). Of these, only 3 hold shares in excess of the 5 percent and 10 percent thresholds, while only 2 hold in excess of the 20 percent threshold, for each share type. Notably, the Adak plant operator meets only the two lower thresholds. Under the options defining the exemption, persons below the threshold would have no direct input into whether the exemption could be accessed. It is not known whether some of these share holders could exert influence on others who control the exemption.

Among harvesters, the most likely influence would be through cooperatives. Since small West region share holders have relatively small undesignated share holdings, it is questionable whether these share holders could exert much influence over the exemption. The one share holder with more than 10 percent, but less than 20 percent, of the West region allocation also holds between 10 percent and 20 percent of the undesignated allocation. It is possible that this share holder may exert some influence over a decision to seek the exemption agreement. Since almost all harvesting has occurred on a few vessels, it is likely that those vessel operators will have substantial input into whether the exemption will be sought. Vessel operators in the fishery have exceeded all West regions thresholds under consideration. Given these considerations, it is likely that small share holders will have little influence over whether an exemption is sought.

In general, QS holders are likely to pursue the exemption, if they perceive a cost to complying with the West region delivery requirement. In general, these QS holders assert that making deliveries in the West region is less costly, as any plant in the West region will be closer to the grounds. Yet, costs could be higher, if a West region plant was not open at opportune times, offloaded too slowly, was not able to reliably schedule deliveries, or could not reliably pay for landings.¹⁹ In the past, harvesters in the fishery have suggested that the Adak plant has suffered from scheduling problems that have driven up their costs. In addition, the harvesters have alleged that the plant has either not paid for or delayed in paying for landings. Factors such as these could lead QS holders to favor the exemption.

Among PQS holders, the most likely influence would be through custom processing arrangements outside the West region. One PQS holder with less than 5 percent of the West shares also has substantial undesignated holdings. It is possible that this PQS holder might influence decisions of the larger West region holders, if it offered particularly good custom processing terms at its plant outside the West. Other large processors outside the West could have a similar influence, despite not holding any West PQS. As with QS holders, operational and cost considerations are likely to affect any decision of whether to pursue an exemption. If PQS holders perceive a higher cost associated with processing in the West region, they are likely to pursue an exemption; however, in the long run, a different dynamic could arise among PQS holders.

If a PQS holder that is a required party to the exemption decides to process in the West, that PQS holder is likely to withhold consent to the exemption. If that PQS holder operates the only plant in the region, it would then likely withhold consent and work to extract as much value as possible from other PQS holders as a part of any negotiation for the processing of their IPQ. The PQS holder most likely to operate in the West is the largest PQS holder, who also is the CDQ representative of Atka, or the plant operator in Adak. While the operation could be beneficial to a community (as is intended by the regional landing requirement), it is possible that a mobile plant could operate outside of any community, thus providing no benefit to any community in the region.

Table 9. West region share holders exceeding defined thresholds.

Share type	Number of holders			
	Total	over 5 percent	over 10 percent	over 20 percent
Quota share	8	3	3	2
Processor quota share	7	3	3	2

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2009-2010.

Note: These share holdings data are publicly available and non-confidential.

The option of requiring any shore plant that processes in excess of a threshold of the prior year's West designated landings could be used to ensure that a shore plant operator in the region can prevent an arrangement among other parties to circumvent the requirement and use other landing options for negotiating leverage. Since typically only a single processor has operated in the West, it is unlikely that the level of the threshold will exclude any facility that operated in the previous year. The shore plant requirement may be overinclusive in some circumstances, and underinclusive in others. If a plant operator that has previously operated in the region is uncertain of whether it will operate in a year, it is unlikely to agree to an exemption, in order to maintain its position in the fishery, should it decide to operate. On the

¹⁹ In the past, the Adak plant leased IPQ from other PQS holders. In all likelihood, the plant was able to lease these IPQ because of its unique position as the only operational plant in the West region.

other side, a new plant may be planning to (and be fully capable of opening) but have no ability to ensure that landings in the region will be required, as it will have no say in the exemption. While QS holders maintain that a plant in the West would have operational benefits for vessels harvesting in the fishery, it is unlikely that a West region plant can operate as efficiently as plants outside of the West region. Whether QS holders would deny the exemption in support of such a new plant is uncertain and could depend on whether PQS holders are willing to share any efficiency benefits realized as a result of the exemption. So, assuming that the purpose of including shore plant owners in the exemption is to ensure that the exemption is not available, if a West region facility is operational, it is not clear that the exemption will not be available, if new plant opens in the region.

Making the communities of Adak and Atka required parties to the contract could aid any development of shore plant capacity in those communities by allowing the communities to intervene on their behalf. The provision would require local governments to consent to the exemption. A few complications could arise by requiring local governments to be a party to the agreement. Since government administrators may not have authority to consent to an exemption without approval of the representative governmental body, it is likely that the representative body will need to meet and actively consent to the exemption. Such a public process could be time consuming. Although the crab season is several months long, whether any delay on the part of a community to approve the exemption will lead to the exemption being ineffective is not known. In addition, community officials who believe that development of processing capacity is important to the region may be unwilling to consent to the exemption. Under these circumstances, the exemption may be seen as ineffective.

In most cases, it can be anticipated that these representatives will act on behalf of local plants, withholding consent to an exemption to foster local deliveries. Yet, in some circumstances, it is possible that political considerations or competing interests could lead some community representatives to consent to an exemption against the interests of a local plant. For example, if IFQ and IPQ holders were to offer to compensate a community for lost tax revenues arising from the exemption, it is possible that a community government would consent to the exemption despite the ability of a local processor to handle the landings. Depending on the political climate in a community, it is also possible that a community could consent to an exemption despite the interests of the local business.

While inclusion of community interests as required parties may not always protect community-based plants, community participation in the agreement could be critical to ensuring that some regional benefit arises from West regionalization. Without requiring community agreement, it is likely that harvesters and processors would agree to the exemption based solely on their returns from the fishery. Most processors assert that costs are substantially higher in the West region (as scale efficiencies are available in locations with better access to other crab fisheries and larger groundfish fisheries). Given these costs and the apparent agreement of harvesters with this processor concern, it is possible that the exemption would be routinely agreed to, if community consent were not required.

The exemption is generally established by an annual agreement of the required parties. Once those parties file an affidavit with NOAA Fisheries affirming the existence of such a contract, the exemption would be granted. The following provision would be used to define when the exemption is available:

Approval of Exemption:

An exemption to the regional landing requirement will be granted if the contracting parties have filed an affidavit with NOAA Fisheries affirming that a master contract has been signed. In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.

Under the provision, the exemption is granted only if the required parties agree to the exemption. Between harvesters and processors, it is possible that one party could use its required consent for negotiating leverage. For example, a harvester, knowing that processing costs are higher in the West region, may withhold consent unless a processor is willing to share some of its efficiency benefits. While such a position may not be objectionable, especially if the harvester is likely to incur additional delivery costs, the ability to withhold consent may alter negotiating positions of the two parties. Similarly, communities could withhold consent to induce PQS holders to develop processing capacity in the region. While some PQS holders may view this position as unfair, it is likely consistent with the intent of the regional landing requirement.

While this provision can be administered in a straightforward manner, the option provides no certainty to participants in the fishery. Since no deadline for filing the exemption is provided, it is assumed that the exemption would be available at any time, if the parties filed the agreement. This degree of flexibility may be beneficial in that it would allow parties to wait to determine if processing capacity could be made available in the region prior to establishing the exemption. Yet, that same flexibility may provide some fishery participants with little certainty, if a required party desires to withhold consent in hopes that the exemption may not be needed. For example, a community may withhold consent until it is fully satisfied that PQS holders have shown considerable evidence that processing in the region is not feasible. Even then, there is no assurance that the agreement would be forthcoming. Because of these uncertainties, it is unclear whether the exemption could effectively address concerns of fishery participants. These uncertainties may drive up costs, dissipating rents from the fishery.

Overall, the effect of this provision will depend on the parties' choices. Each required party to the contract is free to determine whether to accede to the exemption. The exemption will be agreed to, when all parties see it in their interest to go along with the exemption. Whether a party may try to extract some benefit from the other parties is fully within its discretion. While the option is effective in making sure that each required party has veto power over the exemption, but the manner in which that veto power will be asserted is not certain. To the extent that there is turnover in required parties (either through transfers of QS or PQS or changes in community representation), the motivation of those parties may change, along with the results of the exemption. Consequently, whether the exemption serves its intended purpose is uncertain and may vary over time.

3 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.

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) and small government jurisdictions.

Small businesses: Section 601(3) of the RFA defines a “small business” as having the same meaning as a “small business concern,” which is defined under Section 3 of the Small Business Act. A “small business” or “small business concern” includes any firm that is independently owned and operated and not dominate in its field of operation. The U.S. Small Business Administration (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 form 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 U.S., including fish harvesting and fish processing businesses. A business “involved in fish 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 receipts not in excess of \$4.0 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 (including its affiliates) and employs 500 or fewer persons, on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. 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% 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 have the power to control less than 50% 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 control 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 nonprofit 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 A description of the reasons why action by the agency is being considered

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

The purpose of this proposal is to develop a regulation to allow waiver of the requirement that west-designated Western Aleutian Islands gold king crab (WAG) individual fishing quota (IFQ) be delivered west of 174 ° W. longitude. A reliable shoreside processing facility may not be available each season to take delivery and process WAG IFQ. Relaxing the regional landing requirement would allow the IFQ to be delivered outside the west region, to promote full utilization of the TAC.

3.3 The objectives of, and the legal basis for, the proposed rule

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 provide for an exemption from a West region landing requirement, in the event that processing capacity is unavailable in the region. 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 A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply

The action alternative directly regulates certain QS holders, IFQ holders, PQS holders, IPQ holders, the communities of Adak and Atka, and possibly certain shore based processors in those two communities.

The fishery has 15 holders of West region QS, of which 14 are estimated to be small entities. One of these entities is a CDQ group; one is a wholly owned subsidiary of a CDQ group; and the others do not exceed the \$4.0 million threshold.

In the 2009-2010 season, the fishery had 3 holders of West region IFQ, 2 of which are estimated to be small entities. One of these is a wholly owned subsidiary of a CDQ group; and the other is estimated to have annual receipts below the \$4.0 million threshold.

The fishery has 7 holders of West region PQS, of which 4 are estimated to be small entities. One entity is a CDQ group; another is a wholly owned subsidiary of a CDQ group, and two have fewer than 500 employees.

In the 2009-2010 season, the fishery had 6 holders of West region IPQ, 3 of which are estimated to be small entities. One entity is a CDQ group; another is a wholly owned subsidiary of a CDQ group, and the third has fewer than 500 employees.

Both the communities of Adak and Atka qualify as small entities, as neither has more than 50,000 residents.

A single shore plant may be directly regulated by an option under the action alternative. This shore plant is estimated to be a small entity.

3.5 A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule

The reporting, recordkeeping, and other compliance requirements could be increased under the action alternative, if parties agree to pursue an exemption. This burden is believed to be relatively minor, as it would require filing an affidavit with NOAA Fisheries. In addition, the parties would only pursue that exemption, if they believe they would benefit from that exemption.

3.6 An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule

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

3.7 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

In addition to the above alternatives, the Council considered a variety of other approaches to addressing the problem identified in the purpose and need statement. The Council considered an exemption that would be available only after a factual finding of the absence of processing capacity. This provision could be administered either directly by NOAA Fisheries or by an arbiter selected by the interested parties. The Council elected not to advance these alternatives, as factual findings of the absence of processing capacity may be administratively unworkable. With mobile processing platforms, capacity availability can change in a relatively short time period. Making determinations of the availability of capacity may not be possible, given the potential for short term changes in capacity. Small entities that are IFQ or IPQ holders would be disadvantaged by this alternative, since the exemption may be unavailable in circumstances that it might be appropriate.

The Council also considered a provision under the action alternative that would have prohibited any party required to consent to the exemption from unreasonably withholding consent to the exemption. The proposed provision would have been administered by an arbiter jointly selected by the required parties. Although such a provision might be desirable, as it would prevent persons from barring the exemption without reason, the provision would also likely be unadministerable. Even with an arbiter, NOAA Fisheries would be required to provide the interested parties with the opportunity to appeal any arbiter decision. Under the appeal, NOAA Fisheries would be required to make a de novo finding (i.e., an

original finding without deference to the arbiter's decision). As a result, the use of an arbiter may delay the granting of the exemption. In addition, NOAA Fisheries may be unable to expeditiously process any claim, if factual matters are disputed. To accommodate time constraints associated with contesting a party's withholding consent to an exemption, a timeline for application for the exemption would need to be developed. This timeline would limit flexibility and could prevent the exemption from achieving its intended purpose. Although IFQ holders and IPQ holders that are small entities may benefit from the exemption in some circumstances that it might be denied because of another party's unreasonable decision to withhold consent, since the provision is generally unworkable, it is unlikely that this alternative would have provided any benefit to these small entities. In addition, to the extent that the alternative might lead small entities to pursue administrative proceedings to challenge another required party's withholding of consent, this alternative could be costly to small entities.

The Council also elected not to advance an alternative to remove the West region landing requirement altogether. Since the West region landing requirement is intended to induce the development of processing in the region, when such development is feasible, removal of the exemption would be inappropriate. Although this alternative would have removed the burden of the West region landing requirement from small entities holding QS, PQS, IFQ, and IPQ, the provision would have removed any regulatory inducement to process in the West region. The potential future benefit of that requirement would therefore be denied the communities of Adak and Atka. Although the exemption created by the action alternative could reduce the potential for the development of processing capacity in Adak and Atka, it also provides those two small entities with the ability to withhold consent, as a means of inducing PQS and IPQ holders to develop processing capacity in the West region.

4 NATIONAL STANDARDS & FISHERY IMPACT STATEMENT

4.1 National Standards

Below are the ten National Standards as contained in the Magnuson-Stevens Act, and a brief discussion of the consistency of the proposed alternatives with each of those National Standards, as applicable.

National Standard 1

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

Nothing in the proposed alternatives would undermine the current management system designed to prevent overfishing. Either of the action alternatives would be intended to aid participants in harvest of the TAC and achieving 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 alternatives would treat all participants the same, regardless of their state of residence. The proposed change would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the program. The alternatives make no change in the distribution of fishing or processing privileges among holders. 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.

This action considers efficiency in utilization of the resource balancing that efficiency against regional interests represented by the regional landing requirement. The action is motivated by the potential failure to achieve optimum yield, as a result of the current and potential future lack of processing capacity in the West region.

National Standard 6

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

None of the alternatives would be expected to affect changes in the availability of Bering Sea and Aleutian Island crab resources each year. Any such changes would be addressed through the annual allocation process, which is not affected by the alternatives.

National Standard 7

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

This action does not duplicate any other measure and could reduce costs of enforcement actions in the fisheries, to the extent that West region landing requirements may not be complied with.

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 creates an exemption to West region landing requirements that could deprive the communities of Adak and Atka landings from the Western Aleutian Island crab fishery; however, those communities

have the authority to withhold consent to the exemption to induce PQS and IPQ holders to develop processing capacity in the West region (which includes both communities).

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.

This action has 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.

The alternatives considered under this action have no direct affect safety of human life at sea.

4.2 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. This action will have no effect on participants in other fisheries.

5 REFERENCES

- 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 (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.

6 PREPARERS AND PERSONS CONSULTED

Prepared by

Mark Fina, NPFMC
Gretchen Harrington, NMFS
Glenn Merrill, NMFS
Michael Fey, AkFIN
Lew Quierolo, Ph.D., NMFS

Persons Consulted

Larry Cotter
Michael Stanley
Dick Tremaine
Dave Fraser
Joe Plesha

Aleutian Pribilof Island Community Development Association
234 Gold Street, Juneau, Alaska 99801

Norton Sound Economic Development Association
420 L Street, Suite 310, Anchorage, Alaska 99501

Adak Community Development Corporation
P.O. Box 1943, Adak, Alaska 99546

Golden King Crab Harvesters Association

March 30, 2010

Sent via Facsimile Only

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

Re: Western Aleutian Islands Golden King Crab Fishery

Dear Chairman Olson and Council Members:

As stakeholders and representatives of stakeholders in the Western Aleutian Islands golden king crab (WAG) fishery, we write to express our joint position on the regional delivery requirement exemption on which the Council is scheduled to take final action at your upcoming meeting (agenda item c-5(b)).

As this proposal was revised at the Council's February meeting, only two decisions need to be made among the alternatives. First, is the question of which entities must be party to the contract in order to trigger the exemption. We favor Alternative 2, Option 2, which would include specified QS holders, PQS holders, and the municipalities of Adak and Atka, but not include shoreside processors. Our preference is based on the fact that the interests of shoreside processors are already protected by either the PQS holders or the municipalities, and it is therefore unnecessary to have them sign off separately. In addition, there is uncertainty regarding who would have authority to agree to an exemption on behalf of a shoreside processor, the owner of a plant or the operator of a plant. Choosing option 2 would moot that question.

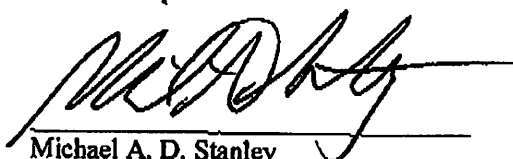
Second, we favor using a threshold of 20 % for QS holders and PQS holders to be defined parties to the exemption contract. We have reviewed the various holdings of QS and PQS in the WAG fishery, and believe that the 20 % figure best captures the active participants in the fishery. According to the initial review draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis presented to the Council in February, the difference between 20 % and a threshold of either 10 % or 5 % is only one QS holder and one PQS holder. RIR/IRFA at 18 (Table 9). The QS holder does not actively fish its quota but assigns its IFQ to a co-op, through which it is fished by a vessel whose owner's holding of QS is above the 20 % threshold. The interests of these QS holders are thus the same for purposes of entering into a contract that would trigger the exemption. The PQS holder that meets the 10 % threshold but not the 20 % threshold is the processing company that used to operate the plant on Adak but which is now in bankruptcy. The bankruptcy court has approved the sale of that company's assets to a new processing company, but the transfer of PQS to the new processor (or some other party) is pending payment of buyback fees for crab custom processed last year. NMFS has not issued IPQ for this PQS this season, and no golden king crab has been purchased or processed on Adak this year.

We want to thank the Council for its prompt action in moving this exemption proposal forward for final action. It will give participants in the fishery a mechanism for waiving the regional delivery requirement in seasons when reliable shoreside processing is not available to take delivery of WAG IFQ, and will thus promote full utilization of the TAC.

Larry Cotter
Chief Executive Officer
Aleutian Pribilof Island Community
Development Association

Janis Ivanoff
Chief Executive Officer
Norton Sound Economic Development
Corporation

Michael Swetzof
President
Adak Community Development Corporation



Michael A. D. Stanley
Golden King Crab Harvesters
Association

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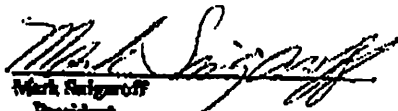


Larry Connor
Chief Executive Officer
Aleutian Pribilof Island Community
Development Association

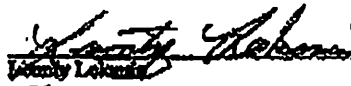
Janis Ivanoff
Chief Executive Officer
Norton Sound Economic Development
Corporation

Michael Swedof
President
Adak Community Development Corporation

Michael A. D. Stanley
Golden King Crab Harvesters
Association



Mark Seligson
President
Atkam Corporation

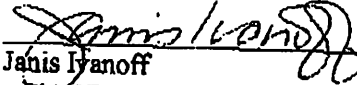


Wendy Lehman
Mayor
City of Atka

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Larry Cotter
Chief Executive Officer
Aleutian Pribilof Island Community
Development Association


Janis Ivanoff
Chief Executive Officer
Norton Sound Economic Development
Corporation

Michael Swetzof
President
Adak Community Development Corporation

Michael A. D. Stanley
Golden King Crab Harvesters
Association

participants in the fishery. According to the initial review draft Regulatory Impact Review and Initial Regulatory Flexibility Analysis presented to the Council in February, the difference between 20 % and a threshold of either 10 % or 5 % is only one QS holder and one PQS holder. RIR/IRFA at 18 (Table 9). The QS holder does not actively fish its quota but assigns its IFQ to a co-op, through which it is fished by a vessel whose owner's holding of QS is above the 20 % threshold. The interests of these QS holders are thus the same for purposes of entering into a contract that would trigger the exemption. The PQS holder that meets the 10 % threshold but not the 20 % threshold is the processing company that used to operate the plant on Adak but which is now in bankruptcy. The bankruptcy court has approved the sale of that company's assets to a new processing company, but the transfer of PQS to the new processor (or some other party) is pending payment of buyback fees for crab custom processed last year. NMFS has not issued IPQ for this PQS this season, and no golden king crab has been purchased or processed on Adak this year.

We want to thank the Council for its prompt action in moving this exemption proposal forward for final action. It will give participants in the fishery a mechanism for waiving the regional delivery requirement in seasons when reliable shoreside processing is not available to take delivery of WAG IFQ, and will thus promote full utilization of the TAC.

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Saint Paul Draft Motion
April 7⁹, 2010

Regional Landing Exemption

This action would establish an emergency relief exemption for the regional delivery requirement under the BSAI crab program. Component One specifies the eligibility requirements for the exemption and the contracting parties. Component Two establishes reserve pool certification and periodic reporting requirements. Component Three establishes how the emergency relief regulation is to be administered. Component Four establishes a Council review process.

Component One. The Contract Parties.

Option 1: To be eligible to apply for and receive an exemption from a regional landing requirement, the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the regional landing exemption is sought shall have entered into a framework agreement, including mitigation requirements and a range of terms of compensation.

If compensation is to include compensatory deliveries in the year following the granting of an exemption, the community entity or entities in the region from which the compensatory deliveries will flow may also be parties to the framework agreement.

SubOption 1: prior to the opening of the season.

SubOption 2: by a fixed date (to be determined).

To receive an exemption from a regional landing requirement the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the regional landing exemption is sought shall have entered into an exemption contract prior to the day on which the exemption is sought.

Option 2:

To be eligible to receive an exemption from a regional landing requirement the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the regional landing exemption is sought shall have entered into an exemption contract prior to the day on which the exemption is sought.

The entity that will represent communities shall be (options):

- (a) the entity holding or formerly holding the ROFR for the PQS,
- (b) the entity identified by the community benefiting from (or formerly benefiting from) the ROFR,
- (c) a regional entity representing the communities benefiting from the ROFR or formerly benefiting from the ROFR.

The entity or entities determined by the Council to be the community representatives in a region shall develop an allocation or management plan for any PQS issued without a ROFR in that region by a date certain established by the Council.

Component Two. Reserve Pool and Reporting Requirements.

A reserve pool can provide industry wide, civil contract based delivery relief without regulatory or administrative intervention; therefore, regulatory relief is an explicit incentive available only to Class "A" participants who are members of approved reserve pools, to matched IPQ holders and to affected community entities.

Harvest sector reserve pools do not require NMFS approval; however, on an annual basis, before a date certain established by NMFS through regulation, participants in the BSAI crab fisheries must certify to NMFS their establishment of or membership in an existing reserve pool to be eligible for regional landing requirement relief. The certification shall name the Class A IFQ holders who have established or are members of the reserve pool. Subject to the other terms and conditions of this action, the parties to a reserve pool shall be eligible for regional landing requirement relief if: 1) their reserve pool certification states that the reserve pool agreement commits each party to be bound by the rules of the reserve pool; and 2) the parties to the reserve pool identified on the certification represent not less than (60%, 70%, 80%) of the "A" share IFQ held by (a) unaffiliated cooperatives and unaffiliated IFQ holders not in a cooperative, in the aggregate; or (b) held by affiliated cooperatives and affiliated IFQ holders not in a cooperative, in the aggregate.

Reserve pool representatives shall provide an annual Regional Landing Exemption Report to the Council which will include the following:

- 1) a comprehensive explanation of the membership composition of the reserve pool and the measures in effect in the previous year,
- 2) the number of times a delivery relief exemption was requested and used, if applicable,
- 3) the mitigating measures employed before requesting the exemption, if applicable,
- 4) an evaluation of whether regional delivery exemptions were necessary, and their impacts on the affected participants, if applicable.

Reserve Pool Representatives shall circulate the annual Regional Landing Exemption Report to communities that are parties to framework agreements with the reserve pool representatives two weeks before submission to the Council. Communities may submit to the Council a Community Impact Report that responds to the annual Regional Landing Exemption Report.

Component Three. Administration of the Exemption.

Administration of the exemption

Option 1:

In accordance with Component One, the three parties will file an affidavit with NMFS affirming that a framework agreement has been signed, and, if applicable, subsequently file a second affidavit affirming that an exemption contract has been signed. In the affidavits, the parties shall affirm that the framework agreement includes mitigation requirements and a range of terms of compensation, and that the exemption contract describes the conditions under which the exemption is being or would be requested, including mitigation requirements and terms of compensation specific to the exemption being sought.

Option 2:

In accordance with Component One, the three parties will file an affidavit with NMFS affirming that an exemption contract has been signed. In the affidavit, the parties shall affirm that the exemption contract describes the conditions under which the exemption is being or would be requested, including mitigation requirements and terms of compensation specific to the exemption being sought.

Exemption

Option 1:

An exemption shall be granted upon timely submission of a framework agreement affidavit and subsequent filing of an exemption contract affidavit by the Class "A" IFQ holders, the matched IPQ holders and the affected community entity or entities that are parties to the framework agreement that they have entered into an exemption contract, and that the exemption contract describes the conditions under which the exemption is being requested, including mitigation requirements and the terms of compensation. Pursuant to Component Two, above, the Class A IFQ holder that is party to the framework agreement and the exemption contract must be identified as having established a reserve pool or as a reserve pool member on a timely filed reserve pool certification that meets the requirements of Component Two.

Option 2:

An exemption shall be granted upon timely submission of an exemption contract affidavit by the Class "A" IFQ holders, the matched IPQ holders and the affected community entity or entities that they have entered into an exemption contract, and that the exemption contract describes the conditions under which the exemption is being requested, including mitigation requirements and the terms of compensation. Pursuant to Component Two, above, the Class A IFQ holder that is party to the exemption contract must be identified as having established a reserve pool or as a reserve pool member on a timely filed reserve pool certification that meets the requirements of Component Two.

The exemption contract affidavit shall result in the regional tag being removed from the requested amount of Class "A" IFQ and the matched IPQ; and the requirement that NMFS apply any IPQ used at a facility through a custom processing arrangement against the IPQ use cap of the owners of that facility shall be suspended for all Class A IFQ and matched IPQ included in the exemption.

If an exemption contract includes an obligation to make compensatory deliveries, an exemption making such deliveries possible shall be granted upon submission of an affidavit by the Class A IFQ holders, the matched IPQ holders and the affected community entity or entities that the exemption is being requested to make compensatory deliveries pursuant to the terms of an exemption contract under which regional landing relief was previously granted and used.

Component Four. Council Review.

The Council will review the Regional Landing Exemption Program within:

(a) two years

(b) after the first season in which an exemption is granted.

Thereafter, the Council will review the Regional Landing Exemption Program as part of its programmatic review, and, based on the record, may amend or terminate the Regional Landing Exemption Program.

C-3(a) Non-Target Species Committee Report

The AP recommends the Council request staff prepare a discussion paper reflecting the list of items recommended by the Non-Target Species Committee on Page 2 of their minutes under agenda item C-3(a). *Motion passed 17-0*

C-3(b) Groundfish Annual Catch Limits

The AP recommends the Council adopt Alternative 2 for final action under this agenda item. *Motion passed 17/1*

C-5(a) Emergency Exemptions from Regionalization – Stakeholder proposals

The AP recommends the Council move forward with the Purpose and Need Statement that is consensus, as well as the components and options that are described below. *Motion passed 18/0*

Purpose and Need Statement

In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require associated catch to be delivered and processed in the designated region. Since implementation of the program in late 2005, and except in the case of the Western Aleutian Islands Golden King Crab fishery, all of the crab IFQ has been harvested and processed as intended by the crab rationalization program. However, icing conditions in the Northern Region have created safety concerns, and delayed and in some cases prevented harvesters from entering harbors to deliver to shore-based and floating processors located in the regions, as required by the regional share designations. In addition, other unforeseeable events, events such as an earthquake or tsunami, or man-made disaster, could prevent deliveries to eligible processors in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements. Such an exemption should also provide a mechanism for reasonable compensation to all parties directly impacted by the granting of the exemption to ensure that the protections intended by the regional designations continue to be realized despite the exemption. The purpose of this action is to develop a regulation to allow waiver of the regional landings requirement for Class A shares in the event that eligible processing facilities are unable to receive crab for an extended period of time.

Components and Options

This action would establish an emergency relief exemption for the regional delivery requirement under the BSAI crab program. Component One specifies the eligibility requirements for the exemption and the contracting parties. Component Two establishes reserve pool certification and periodic reporting requirements. Component Three establishes how the emergency relief regulation is to be administered. Component Four establishes a Council review process.

Component One. The Contract Parties.

To be eligible to apply for and receive an exemption from a regional landing requirement, the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the

regional landing exemption is sought shall have entered into a framework agreement, including mitigation requirements and a range of terms of compensation.

If compensation is to include compensatory deliveries in the year following the granting of an exemption, the community entity or entities in the region from which the compensatory deliveries will flow may also be parties to the framework agreement.

Option 1: prior to the opening of the season.

Option 2: by a fixed date (to be determined).

To receive an exemption from a regional landing requirement the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the regional landing exemption is sought shall have entered into an exemption contract prior to the day on which the exemption is sought.

The entity that will represent communities shall be (options):

- (a) the entity holding or formerly holding the ROFR for the PQS,
- (b) the entity identified by the community benefiting from (or formerly benefiting from) the ROFR,
- (c) a regional entity representing the communities benefiting from the ROFR or formerly benefiting from the ROFR.

The entity or entities determined by the Council to be the community representatives in a region shall develop an allocation or management plan for any PQS issued without a ROFR in that region by a date certain established by the Council.

Component Two. Reserve Pool and Reporting Requirements.

A reserve pool can provide industry wide, civil contract based delivery relief without regulatory or administrative intervention; therefore, regulatory relief is an explicit incentive available only to Class "A" participants who are members of approved reserve pools, to matched IPQ holders and to affected community entities.

Harvest sector reserve pools do not require NMFS approval; however, on an annual basis, before a date certain established by NMFS through regulation, participants in the BSAI crab fisheries must certify to NMFS their establishment of or membership in an existing reserve pool to be eligible for regional landing requirement relief. The certification shall name the Class A IFQ holders who have established or are members of the reserve pool. Subject to the other terms and conditions of this action, the parties to a reserve pool shall be eligible for regional landing requirement relief if: (1) their reserve pool certification states that the reserve pool agreement commits each party to be bound by the rules of the reserve pool; and (2) the parties to the reserve pool identified on the certification represent not less than (60%, 70%, 80%) of the "A" share IFQ held by (a) unaffiliated cooperatives and unaffiliated IFQ holders not in a cooperative, in the aggregate; or (b) held by affiliated cooperatives and affiliated IFQ holders not in a cooperative, in the aggregate.

Reserve pool representatives shall provide an annual Regional Landing Exemption Report to the Council which will include the following:

- 1) a comprehensive explanation of the membership composition of the reserve pool and the measures in effect in the previous year,
- 2) the number of times a delivery relief exemption was requested and used, if applicable,

- 3) the mitigating measures employed before requesting the exemption, if applicable,
- 4) an evaluation of whether regional delivery exemptions were necessary, and their impacts on the affected participants, if applicable.

Reserve Pool Representatives shall circulate the annual Regional Landing Exemption Report to communities that are parties to framework agreements with the reserve pool representatives two weeks before submission to the Council. Communities may submit to the Council a Community Impact Report that responds to the annual Regional Landing Exemption Report.

Component Three. Administration of the Exemption.

Administration of the exemption

In accordance with Component One, the three parties will file an affidavit with NMFS affirming that a framework agreement has been signed, and, if applicable, subsequently file a second affidavit affirming that an exemption contract has been signed. In the affidavits, the parties shall affirm that the framework agreement includes mitigation requirements and a range of terms of compensation, and that the exemption contract describes the conditions under which the exemption is being or would be requested, including mitigation requirements and terms of compensation specific to the exemption being sought.

Exemption

An exemption shall be granted upon timely submission of a framework agreement affidavit and subsequent filing of an exemption contract affidavit by the Class "A" IFQ holders, the matched IPQ holders and the affected community entity or entities that are parties to the framework agreement that they have entered into an exemption contract, and that the exemption contract describes the conditions under which the exemption is being requested, including mitigation requirements and the terms of compensation. Pursuant to Component Two, above, the Class A IFQ holder that is party to the framework agreement and the exemption contract must be identified as having established a reserve pool or as a reserve pool member on a timely filed reserve pool certification that meets the requirements of Component Two.

The exemption contract affidavit shall result in the regional tag being removed from the requested amount of Class "A" IFQ and the matched IPQ; and the requirement that NMFS apply any IPQ used at a facility through a custom processing arrangement against the IPQ use cap of the owners of that facility shall be suspended for all Class A IFQ and matched IPQ included in the exemption.

If an exemption contract includes an obligation to make compensatory deliveries, an exemption making such deliveries possible shall be granted upon submission of an affidavit by the Class A IFQ holders, the matched IPQ holders and the affected community entity or entities that the exemption is being requested to make compensatory deliveries pursuant to the terms of an exemption contract under which regional landing relief was previously granted and used.

Component Four. Council Review.

The Council will review the Regional Landing Exemption Program within:

- (a) two years
- (b) after the first season in which an exemption is granted.

Thereafter, the Council will review the Regional Landing Exemption Program as part of its programmatic review, and, based on the record, may amend or terminate the Regional Landing Exemption Program.

C-5(b) Final action on WAG King Crab Regional Delivery

The AP recommends the Council adopt Alternative 2, Option 2, with 20% selected in the definitions for quota share, as written below. *Motion passed 19/0*

Alternative 2: Contractually Defined Exemption

To receive an exemption from the regional landing requirement in the WAG fishery, specified QS holders, PQS holders, and municipalities shall have entered into a contract. The contract parties will annually file an affidavit with NMFS affirming that a master contract has been signed.

Definitions:

QS Holders: Any person or company that holds in excess of 20 percent of the west-designated WAG QS.

PQS Holders: Any person or company that holds in excess of 20 percent of the west-designated WAG PQS.

Municipalities: The municipalities of Adak and Atka.

Approval of Exemption:

An exemption to the regional landing requirement will be granted, if the contracting parties have filed an affidavit with NOAA Fisheries affirming that a master contract has been signed. In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.

D-1(a) BSAI Crab ACLs and Snow/Tanner Crab Rebuilding Plans

The AP recommends the Council:

Rebuilding Alternative

Consider an option to define rebuilding for crab stocks to include one year to be above Bmsy.

ACLs

Add option 4 under Process for ABC recommendation to include an option for St. Matthews that the SSC recommends ABC levels annually at the June meeting using survey data from the previous year.

Incorporate analysis showing historical exploitation rate and short-term future expected exploitation rate for the range of ACL options.

The AP is concerned about multiple buffering occurring due to ACL buffers as well as built in buffers currently incorporated in stock assessment models. The AP also recognizes the concerns regarding preemption of state management authority posed by implementation of ACLs and snow crab rebuilding requirements.

The AP endorses the Crab PT minutes regarding ACLs, accountability measures, and rebuilding plans.

Motion passes 17/0

D-1(b) Pribilof BKC rebuilding plan

The AP recommends the Council support the recommendations in the March 2010 Crab Plan Team minutes. In addition, the AP recommends that under Alternative 5, the analysis should examine PSC levels below the default OFL and that the analysis should examine the groundfish areas closures triggered by specific PSC levels. It is the AP's intent that this measure would provide a linkage between the crab and groundfish FMPs and that this concept should be examined in the context of accountability measures for all crab stocks.

Motion passed 16/0/1 (abstention)

D-2(a) Scallop SAFE

The AP recommends the Council approve the Scallop SAFE Report as presented. The AP also recommends that future SAFE reports include data on targeted scallop catch prior to 1993, and show crab bycatch both in terms of number of crab and weight of crab.

D-2(b) Scallop Annual Catch Limit Analysis

The AP recommends that the Council forward the analysis of Scallop ACLs with the current slate of alternatives and options. In addition, the AP recommends the analysis be expanded to include:

- 1) A discussion of overages both before and after coop formation.
- 2) A discussion of the possibility of managing scallops as a complex which would include non-target scallop species.

D-3(a) Bairdi bycatch in GOA

The AP recommends that the document not be released for public review at this time. The AP was made aware that the SSC had a list of issues with the analysis that prevented the SSC from moving the analysis forward. The AP did not hear the SSC minutes but recognizes that the SSC had concerns.

The AP recommends the analysis be revised to include the following items:

- 1) Describe and attempt to quantify the impacts of pelagic trawling on bairdi crab.
- 2) Describe the State of Alaska and federal definitions of pelagic gear more fully.
- 3) An option to exempt hook-and-line gear from the proposed action.
- 4) The amount of fishable area (<500 meters) in area 630 presently closed to each gear type.
- 5) The amount of fishable area in each of the potential closure areas.
- 6) Assess the protection offered by present closure areas to tanner crab by gear type.
- 7) The impact of predation on tanner crab by groundfish species, including predation inside cod pots.
- 8) An estimate of crab harvest in the commercial tanner crab fishery, including an estimate of crab bycatch in the directed fishery.
- 9) A breakout of pelagic vs non-pelagic groundfish harvests to understand the overall economic impact of the proposed actions.
- 10) Staff recommendations for closure areas for pot gear that better reflect pot effort and bycatch.
- 11) Further analysis of the impacts of 100% observer coverage requirement and possible mitigation actions.
- 12) Assess the efficacy of existing crab protection measures.

- 13) Further analysis of the practical and economic impacts of 100% observer coverage on vessels <60 feet.
- 14) Information on unobserved catch locations using VMS data.
- 15) Bathymetrically designed areas within the proposed closures based on preferred crab habitats.
- 16) Closure of smaller areas within the proposed stat areas.
- 17) An option to select specific closures rather than all proposed areas.
- 18) Further discussion of the definition of pelagic trawl gear including the practicability of using bottom sensors.
- 19) The importance of the directed tanner crab fishery to permit holders.

The AP also recommends the Council consider adding the following language to the existing problem statement:

“There is a greater prevalence of smaller vessels participating in the GOA groundfish fisheries. Because observer coverage requirements are based on vessel length there is less observed catch and more uncertainty regarding crab bycatch estimates. 100% observer coverage in the appropriate areas would provide the Council with a high level of confidence in the assessment of any crab bycatch caught in the designated areas, as a basis for future management actions as necessary.

Gear modifications may offer some reduced impacts on crab stocks.”

Motion passed 19/0

D-3(b) GOA Chinook Salmon Bycatch

The AP recommends that the Council initiate an amendment to require full retention of all salmon bycatch in the GOA pollock fishery. *Motion passed 19/0*

The AP recommends that the Council request that NMFS develop a program to enumerate salmon caught as bycatch and to develop a protocol so that DNA samples will be available for genetic testing when lab space is available. Samples should be taken to fill in any gaps in genetic baseline if needed.

Motion passed 19/0

The AP recommends that the Council ask staff to refine and expand the discussion paper on Chinook salmon bycatch in GOA groundfish fisheries to include:

- 1) expanded discussion of all salmon removals in GOA by ADFG management areas;
- 2) a chapter on potential effects of environmental changes on Chinook salmon stock abundance;
- 3) break out the groundfish fishery data by target fishery and by federal management area as appropriate;
- 2) further analysis of seasonal and yearly bycatch;
- 3) differentiating between state and federal bycatch rates;
- 4) updated spatial data on maps; and
- 5) data on all users (sport, subsistence, personal use, commercial, etc) to determine the level of use and dependence.

Motion passed 19/0

A motion to recommend that the Council not move forward with salmon bycatch action at this time failed 8/8.

D-3(c) Northern Bering Sea Research Area Plan

The AP recommends that the Council encourage NMFS to conduct tribal consultation before the 2010 groundfish bottom trawl survey takes place. *Motion passed 18/0*

The AP recommends that the Council adopt the revised NBSRA Research Plan schedule as outlined in item D-3(c)(5) with the following changes:

- 1) Include community and subsistence stakeholders in the science meeting scheduled for January 2011 for an integrated approach.
- 2) Move the updates scheduled for April 2011 to the June 2011 Council meeting in Nome, Alaska.

Motion passed 18/0

D-3(d) Amendment 80 Co-op Reports

The AP received a report from John Gauvin on development of a chinook salmon excluder.

D-3(e) Receive report of EFP testing of Chinook salmon excluder

The AP received a report from Jason Anderson on performance of the best Use Cooperative in 2009.

D-4(a) EFH 5-year Review

The AP supports the summary of recommended changes to the FMPs resulting from the EFH 5-year review provided on page 87 of the EFH report. The AP also supports the recommendations from the Crab Plan Team which will result in a discussion paper. The AP supports the recommendations from the Ecosystem Committee on recommended changes to salmon EFH. *Motion passed 18/0*

D-4(b) HAPC Criteria & Priorities

The AP recommends the Council adopt the HAPC evaluation criteria for HAPC proposals as presented on page 1 of agenda item D-4(b)(2) with the following changes:

- 1) The AP feels that the standard for ecological importance is set too low for habitat areas of particular concern and is essentially a re-statement of EFH criteria. Level 0 criterion should be deleted and remaining criteria re-numbered starting with zero. Level 3 for ecological importance should read: "Complex habitat condition and substrate serve as refugia, concentrate prey, and/or are known to be important for overfished species."
- 2) Require a minimum score of three for rarity so that only proposals for truly rare habitat sites are HAPC candidates.
- 3) Delete footnote 1 on the proposed evaluation criteria for HAPC proposals (D-4(b)(2)).
- 4) Underscore in HAPC criteria that the NPFMC's HAPC process is for sites (rather than types) and that the ecological importance is for "managed species".
- 5) The HAPC cycle should be 5 years to be in sync with EFH review.

Motion passed 15/4

A substitute motion to recommend the Council adopt HAPC criteria as presented in D-4(b)(2) page 2 with no changes failed 9/10.

Minority Report: A minority of the AP supported a substitute motion that the AP recommends the Council adopt the HAPC criteria on page 2 of D-4(b)(2). The minority supported this substitute motion because the main motion contained a number of elements which significantly alter the criteria. First, it is not necessary to change the criteria for ecological importance to a higher standard because this is only one of four factors, and a habitat area will have to score well on the other factors and meet the rarity criteria to qualify as a HAPC. Second, the minority was not comfortable with requiring a rarity score of 3 to be considered, both because we were unapprised of the SSC's position regarding this requirement, and because the requirement for a score of 3 that the habitat occur in only one region seemed too stringent given that a similar habitat could exist in more than one region and provide habitat for different fish stocks. Finally, the minority did not feel it was appropriate to delete pelagic water from the definition of habitat contained in footnote 1. Pelagic waters are a critical habitat area for many species and it is important that this type of habitat is eligible under the HAPC criteria.

Signed by: Rebecca Robbins Gisclair, Edward Poulsen, Chuck McCallum, Jeff Farvour, Tim Evers, Theresa Peterson, Julianne Curry

The AP recommends that the Council consider identifying Bristol Bay RKC spawning habitat as a HAPC priority type. *Motion passed 18/1*

The AP recommends that the Council identify skate nurseries and sablefish pre-recruit sites as HAPC priority types as indicated on table 15 of the EFH 5-year review summary report, including the accompanying explanatory text. *Motion passed 19/0*

Minority Report: A minority of the AP supported a motion recommending that the Council consider the Pribilof and Zemchug canyons as HAPC priorities. The motion failed 4/15 These canyons are unique as some of the deepest canyons in the world. They provide important habitat for rockfish, corals, sponges and other species and are part of the "greenbelt" of high production on the Bering Sea shelf edge. We have received numerous letters and public comments requesting that these canyons be considered, including requests from nearby communities. These canyons have also been submitted for consideration in previous HAPC proposal processes but did not meet the Council's priorities at that time. Given the unique and highly productive habitat these canyons provide it is appropriate to consider them in this HAPC process.

Signed by: Rebecca Robbins Gisclair, Chuck McCallum, Theresa Peterson, Tim Evers

D-4(d) Rural Community Outreach report and Chum Bycatch Plan

The AP recommends that the Council approve the Rural Outreach Committee's recommendations on page 1 and 2 of their report [item D-4(d)(1)]. The AP also recommends that the Council move forward with the Outreach Plan for the Chum Bycatch EA/RIR/IRFA as described in item D-4(d)(2). *Motion passed 18/0*

D-5 Staff Tasking

The AP recommends the Council initiate an analysis to determine whether the communities of Naukati Bay, Game Creek, Cold Bay, and Kupreanof should be included in the list of eligible communities contained in Table 21 of Amendment 66. *Motion passed 18/0*

The AP further recommends that the Council deny the halibut allocation request by the Native Village of Nanwalek. *Motion passed 15/0*

PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: C-5 (a) Emergency Exemptions from Regional...

NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1 { Simon Swetzof, Heather McCart	} City of St Paul, CBSFA TDX Corp NACA, Icepak, Unalaska
2 { Mateo Paz-Soldan Lisa Ross	
3 { Steve Minor Ed Poulson	
4 Frank Kelly	
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

PUBLIC TESTIMONY SIGN-UP SHEET

4/10
Final Action

Agenda Item: C 5 (b) WAG Regional Delivery

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	WAG Stakeholders	GKCHA / APIEDA / ACDC / ATAXAM
2	Mike Steady, Everett Anderson Dick Truchman, Dave Fraser	ATAXAM / Haka / Adak
3	Clem Tillion	Alvz Corp.
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