PUBLIC TESTIMONY SIGN-UP SHEET

Regional Exemption

Agenda Item: C-2(a) BSAI Crab Emergency Relief

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	~~Kenny Down / David Little~~	~~Freezer Longline Coalition~~ ~~Freezer Longline Conservation Cooperative~~
2	Steve Minor	NPCA
3	Heather McCarty / Everette Anderson	CBSFA / APICDA
4	Simeon Swetzof / Mateo Paz-Soldan	City of St. Paul
5	Edward Poulsen	Alaska Bering Sea Crabbers
6	Jake Jacobsen	Inter-Cooperative Exchange
7	Frank Kelty	City of Unalaska
8	MIKE STANLEY	GKCHA
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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.

FINAL / COPY

November 20, 2010

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

Re: December 2010 Meeting
Agenda Item C-2(a) Emergency Relief from the Regional Landing Requirement

Gentlemen,

More than two years ago crab harvesters, crab processors and crab-dependent communities began a series of meetings to try to develop a civil contract-based process that would allow crab vessels to deliver "A share" crab outside of its specified region in response to particular emergencies, while preserving the community and regional protections established in the BSAI Crab Rationalization Program.

We are pleased to report to you that our work has been successful. In accordance with the Council's direction, we have developed a contract-based approach that establishes eligibility requirements, performance standards, mitigation measures and a framework for compensation, among other features.

Dr. Mark Fina has been an important participant in the process, and the draft RIR/IRFA that he has submitted to the Council is, we believe, sufficient for the Council to take formal action on this agenda item.

On the following pages we make several recommendations for specific Elements and Options in the Motion that you will be considering. We hope that this amendment package can now go forward.

Sincerely,

Mayor Shirley Marquardt for the City of Unalaska

Mayor Simeon Swetzof for the City of St. Paul

Phillip Lestenkof for CBSFA

Larry Cotter for APICDA

Edward Poulsen for the Bering Sea Crabbers

Steve Minor for the North Pacific Crab Association

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FROM

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FINAL

December 6, 2010

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

Re: December 2010 Meeting
Agenda Item C-2(a) Emergency Relief from the Regional Landing Requirement

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More than two years ago crab harvesters, crab processors and crab-dependent communities began a series of meetings to try to develop a civil contract-based process that would allow crab vessels to deliver "A share" crab outside of its specified region in response to particular emergencies, while preserving the community and regional protections established in the BSAI Crab Rationalization Program.

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Edward Poulsen for the Bering Sea Crabbers

Steve Minor for the North Pacific Crab Association

Arni Thomson, Alaska Crab Coalition

Our comments and recommendations are based on Mark Fina's "simplified motion", which begins on page 7 of the RIR/IRFA.

Alternative 2 – Regional Landing Exemption
This action would establish an emergency relief exemption for the regional delivery requirement under the BSAI crab program. The action 1) specifies the eligibility requirements for the exemption and the contracting parties, 2) establishes reserve pool certification and periodic reporting requirements 3) establishes how the emergency relief regulation is to be administered and 4) establishes a Council review process.

Regulatory components

Exemption and administration

Option 1: As a prerequisite to being 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 provide NMFS with an affidavit attesting to having entered into a non-binding framework agreement that addresses mitigation, a reasonable range of terms of compensation, and a reserve pool requirement to the satisfaction of the parties. The affidavit shall be delivered to NMFS:

~~*Suboption 1: prior to the opening of the season.*~~
Suboption 2: by a fixed date ***(October 15 for all fisheries)***

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 deliver to NMFS an affidavit attesting to having entered into an exemption contract that addresses mitigation, terms of compensation if appropriate, and a reserve pool requirement, to the satisfaction of the parties, prior to the day on which the exemption is sought. The exemption shall be granted upon timely submission of a framework agreement affidavit and subsequent filing of an exemption contract affidavit.

Parties to the framework agreement (and the affidavit attesting to that agreement) may include several IFQ holders, several IPQ holders, and several community/regional representatives, including representatives from multiple regions.

~~*Option 2: 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 deliver to NMFS an affidavit attesting to having entered into an exemption contract prior to the day on which the exemption is sought.*~~

Note: Any affidavit attesting to an exemption contract shall specifically identify the amount of IFQ/IPQ that are subject to the exemption.

Regional/community representatives

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.*~~

(New language) ***Option: The entity or entities determined by the Council to be the community representatives in the North Region shall develop an allocation or management plan for North Region St Matthews Blue King Crab and North Region Opilio Crab PQS issued without a ROFR within 180 days of implementation of this regulation.*** ~~*.*~~
~~*(Note: This provision could be applied instead of (c), if (a) or (b) is selected as the primary means of determining regional representatives).*~~

Effect on excessive share caps

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.

Reporting requirements

Any IFQ holders who are party to a framework agreement 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, and
5) a description of the consistency of the agreement with the Council's intent for this action.

At least two weeks prior to providing the annual Regional Landing Exemption Report to the Council, IFQ holders shall provide the annual Regional Landing Exemption Report to the communities and IPQ holders that are parties to framework agreements. Communities or IPQ holders may submit to the Council a Community Impact Report or IPQ holder report, respectively, that responds to the annual Regional Landing Exemption Report.

Statement of Council Intent

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. 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.

The Council intends that exemptions will be developed by agreement of the holders of Class A IFQ, holders of IPQ, and regional/community representatives. ***For emergency events of less than 2 million pounds in the aggregate, compensatory deliveries offer the opportunity to restore the landings to a region that are intended in current regulations; therefore no party should unreasonably withhold their agreement or unreasonably restrict the industry's ability to respond to those events.*** *A prerequisite to an exemption will be that the parties have entered a nonbinding framework agreement. It is the Council's intent that this framework agreement will define certain terms of the exemption, including 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. Mitigation would be intended to mitigate the effects on parties that might suffer some loss because of the granting of an exemption. Compensation would be intended to compensate parties for losses arising from the exemption. All framework agreements are expected to contain provision for a reserve pool. A reserve pool would be intended to provide industry wide, civil contract based delivery relief without regulatory or administrative intervention. Specifically, a reserve pool would be an agreement among holders of IFQ to certain arrangements in the use of their IFQ to reduce the need for exemptions from the regional landing requirement. It is believed that an effective reserve pool must 1) commit each participant in the pool to be bound by its rules; and 2) include 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.

Allowing several IFQ holders, IPQ holders, and community/regional entities to be a party to the same framework agreement is intended to streamline negotiations, facilitate the use of reserve pools, and allow for the incorporation of compensatory deliveries (should the parties believe compensating deliveries are appropriate). If an exemption is needed for compensatory deliveries, the process for receiving that exemption shall be the same as the process of affidavits used to make any other exempt deliveries under this action.

Council Review

The Council will review the Regional Landing Exemption Program within: ~~(a) two years and~~ (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.

Emergency Exemption from Regional Delivery Requirements

Framework Agreement

DRAFT FOR DISCUSSION

Explanatory notes

This is the version of the draft framework agreement resulting from the most recent discussion at the Emergency Relief workgroup meeting in Seattle November 17, 2010. The framework agreement is designed to be a private agreement. It is referenced in the draft motion preferred by the working group, as a requirement for subsequently entering into exemption contracts, to obtain exemption from regional delivery requirements.

In summary, there are three emergency relief scenarios contemplated here:

1. events totaling up to 1 million pounds;
2. events totaling between 1 and 2 million pounds;
3. events totaling more than 2 million pounds

There are two different issues dealt with in the scenarios:

1. Community sign-off:

For events totaling up to 1 million pounds, the affected communities are not required to sign off, but they are notified. For events totaling over 1 million pounds, the affected communities must sign off.

2. Compensation:

For events totaling up to 2 million pounds, compensatory deliveries are the form of compensation. For events totaling more than 2 million pounds, the form or forms of compensation depend on the circumstances and duration of closure, and will be dealt with in the actual exemption contracts.

In addition, the draft framework agreement deals with reserve pool requirements, performance metrics and mitigation requirements.

Framework Agreement

DRAFT

This Regional Landing Requirement Relief Framework Agreement ("Framework Agreement") is entered into by and among [Community Representatives], [IPQ Holders] and [IFQ Holders] [altogether, "the Parties"]to provide a general framework for individual contracts that the Parties will enter as a precondition for the National Marine Fisheries Service ("NMFS") granting emergency relief from regional landing requirements. ("Emergency Relief Contracts")

RECITALS

A. The Bering Sea and Aleutian Island Crab Rationalization Program adopted by the North Pacific Fishery Management Council (the "Council") as Amendments 18 and 19 to the Fisheries Management Plan for the Bering Sea and Aleutian Islands crab fisheries, and implemented through National Marine Fisheries Service regulations at 50 C.F.R. 680 (the "Crab Rationalization Program") includes several regional landing requirements (the "Regional Landing Requirements"). The Regional Landing Requirements stipulate that certain amounts of crab harvested pursuant to Individual Fishing Quota ("IFQ") issued annually must be delivered in certain regions of the fishery based on historical delivery patterns, and regionally designate "Class A" IFQ and corresponding Individual Processing Quota ("IPQ") accordingly.

B. The parties acknowledge that the Regional Landing Requirements were included in the Crab Rationalization Program to provide certain Bering Sea and Aleutian Islands communities with protection from adverse economic consequences that could result from changes in crab delivery and processing locations made possible by the Crab Rationalization Program.

C. The parties intend that the Regional Landings Requirements fulfill their purpose under the Crab Rationalization Program, i.e., providing the beneficiary communities with crab deliveries and processing activity that promotes stable and healthy fisheries economies. However, the parties acknowledge that circumstances outside of the parties' control could impair IFQ holders from making crab deliveries in the designated region within a commercially reasonable period of time after crab harvests, or could prevent IFQ holders from doing so within the related crab fishing season. Under these circumstances, the Regional Landing Requirements could prevent crab that has been harvested from being delivered alive, resulting in loss of the related product value, or could prevent crab from being delivered during the regulatory fishing season. This would not only result in communities failing to receive the benefit of the intended crab deliveries, but could also result in waste of Bering Sea and Aleutian Islands crab resources, which would be inconsistent with the Crab Rationalization Program's

purposes and National Standard 1 of the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act").

D. Further, in the absence of an exemption to the Regional Landing Requirements, persons harvesting IFQ crab may have incentives to attempt crab deliveries under unsafe or marginally safe conditions, to avoid losing the value of their harvests.

E. The parties therefore wish to define certain terms and conditions under which a person harvesting crab IFQ may obtain relief from an otherwise applicable Regional Landing Requirement.

FRAMEWORK AGREEMENT

The parties agree as follows:

1. Purpose of Agreement. This Framework Agreement defines the general terms and conditions under which Emergency Relief Contracts may be executed and affidavits may be filed with the National Marine Fisheries Service ("NMFS"), which, upon filing, will result in NMFS re-designating the Class A IFQ described in the affidavit and the IPQ with which it is matched as free of any Regional Landing Requirements. As such, this Framework Agreement is not specifically binding on any Party, though each Party understands that NMFS regulations require the affected harvester, processor and community to agree unanimously to the Emergency Relief Contract terms.

General Terms and Conditions

1. Eligibility to enter Emergency Relief Contracts.

(a) Only IFQ holders who are members of a qualifying reserve pool shall be eligible to enter an Emergency Relief Contract. The qualifying reserve pool is as described in Appendix A.

(b) The community entities eligible to enter into an Emergency Relief Contract shall be designated by regulation.

(Note: this wording may need to be revised to reflect that the intent is for the Council to designate in their action the field of community entities that are eligible.)

(c) Holders of IPQ in the subject fisheries shall be eligible to enter an Emergency Relief Contract.

2. Coordinating Committee.

A coordinating committee, which consists of the parties to this Agreement or their designees, will meet or communicate as needed to coordinate issues that arise related to the fishing season between the three sectors.

(Note: the Coordinating Committee process needs to be spelled out.)

3. Reporting Requirements.

The parties will provide reports to each other including: a report regularly updated showing the number of days the harbor was open; the amount of pounds delivered North vs. South; and the number of days processors sat idle. These reports shall form the basis for an annual report to the Council.

(Note: the content of the reports needs to be fleshed out, presumably to match the language in the proposed motion.)

Performance Metrics

The parties shall establish performance metrics that, in the event a request for relief is made and an Exemption Contract is contemplated, shall be used to assess the threshold for determining the scope and nature of the event, the potential mitigation opportunities and the basis for assigning responsibility for compensation, as well as the potential terms and limits of compensation. Note: these performance metrics are not mutually exclusive; further, all Parties recognize that there may be some circumstances for which the performance metrics may not be applicable.

(a) Performance Metric 1: Ratio of Northern Region to Southern Region deliveries over specific periods of time.

(b) Performance Metric 2: "Processor Capacity Utilization" expressed as a target percentage over specific periods of time.

Mitigation Measures

The IFQ holder and/or the IPQ holder should take certain steps in an attempt to overcome the circumstance preventing him/her/it from delivering and/or processing crab to or in the designated region before applying for relief. Specific steps should be included in the Emergency Relief Contract but should include at a minimum:

(a) Mitigation Measure 1: Swapping, leasing or otherwise exchanging shares through the Reserve Pool.

(b) Mitigation Measure 2 : Adjusting timing of season start and deliveries

(c) Mitigation Measure 3: Considering possibilities for additional or alternative processing capacity in the Region.

Exemption and Compensation Process

If, after taking the mitigation steps prescribed in the Emergency Relief Contract and this Framework Agreement, the IFQ holder still cannot make delivery, he/she/it may apply to NMFS for an emergency exemption, provided he/she/it follows the terms in the Emergency Relief Contract governing compensation to the affected community or other impacted contract party for any delivery of A Share quota outside the region for which it is designated.

Parties to the Emergency Relief Contract will identify the terms under which the parties to the contract may apply for exemption, and the terms under which the impacted parties to the contract may receive compensation. Examples of potential scenarios include the following:

Scenario 1

Events involving up to [1] one million pounds:

- Mitigation measures followed;
- Reserve Pool exhausted;
- No alternative processing capability in affected region;
- Affected IFQ and IPQ holders agree on exemption and sign affidavit, which includes poundage for which exemption is sought. Affected communities will be notified.
- Compensation: compensatory delivery/ies equal to the exempted poundage will be made back to the community/ies that lost the exempted delivery/ies, that season or in the following season.

Scenario 2

Events involving from [1] one million to [2] two million pounds:

- Mitigation measures followed;
- Reserve Pool exhausted;
- No alternative processing capability in affected region;
- Affected IFQ and IPQ holders and communities agree on exemption and sign affidavit, which includes poundage for which exemption is sought.
- Compensation: compensatory delivery/ies equal to the exempted poundage will be made back to the community/ies that lost the exempted delivery/ies, that season or in the following season.

Scenario 3

Events involving more than [2] two million pounds:

{Note: the group discussed that it may be necessary to annually adjust the set poundage in these scenarios if and when the TAC varies greatly either up or down.)

- Mitigation measures followed;
- Reserve Pool exhausted;
- No alternative processing capability in affected region;
- Affected IFQ and IPQ holders and communities agree on exemption and sign affidavit, which includes poundage for which exemption is sought.
- Compensation, which may include compensatory deliveries or monetary relief, shall depend on circumstances and duration of the closure including, but not limited to:
    - Unforeseen natural events other than ice events
    - Ice events that start early in the fishing season and are of long duration
    - Man-made events created by a party to the Contract.
    - Man-made events created by an individual or group not a party to the Contract

PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: C2 (b) ROFR

	NAME *(PLEASE PRINT)*	TESTIFYING ON BEHALF OF:
1	Paul Grunwald	SSIF
2	Steve Minor	NPCA
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Steven K. Minor
Executive Director

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December 6, 2010

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

Re: December 2010 Meeting
Agenda Item C-2(b) Community ROFRs

Gentlemen,

The North Pacific Crab Association represents several PQS holders, including two CDQ groups that have acquired significant amounts of PQS under the current regulations. On behalf of the NPCA, I am submitting comments in support of Action 1 in the draft RIR/IRFA and in opposition to Actions 2 and 3.

As the Purpose and Need Statement and the analysis show, significant amounts of PQS have already been transferred to community entities under this program. Eligible Crab Community Organizations in Kodiak, King Cove, St. Paul, St. George and Atka have all acquired PQS; in addition Coastal Villages Region Fund has acquired a significant share of the PQS utilized in Unalaska/Dutch Harbor. And, as Dr. Fina points out in his analysis, *"In five cases, community entities holding the right have acquired PQS subject to the right...but in no case was the right exercised directly."*

In light of these successful transfers, there is little or no evidence of a major "problem" that needs fixing. Furthermore, we think that some of the Actions in the motion are likely to hamper, rather than improve the program.

We have supported Action 1, the proposal to extend the time that a ROFR holder has to exercise their rights, for more than two years. We are likewise opposed to Actions 2 and 3; for reasons explained in this package.

Thank you,

Steven K. Minor
Executive Director

Overview

Dr. Fina's analysis at the top of Page 14 of the RIR/IRFA sums up the current situation nicely. It shows clearly that significant amounts of PQS have transferred to ECCOs or been transferred with the approval of the ECCOs to other communities or community entities.

Fishery	Former beneficiary of the right	Percentage of PQS pool
Bristol Bay red king crab	King Cove*	5.3
	Kodiak*	3.5
Bering Sea *C. opilio*	St. George**	9.7
	St. Paul*	5.4
	Kodiak*	0.1
Eastern Aleutian Islands golden king crab	Unalaska***	6.9
Pribilof Island blue king crab	St. George**	2.5
St. Matthew Island blue king crab	Kodiak*	0.0

Source: RAM PQS data, 2009-2010

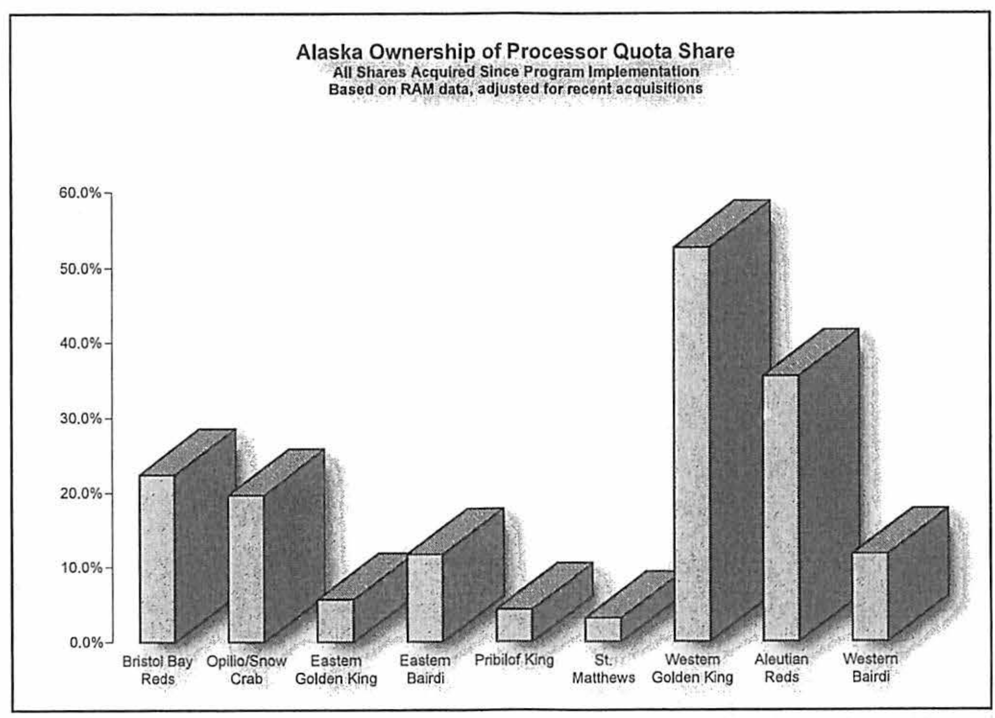
* PQS held by former right holder.

** Portion of the PQS held by former right holder, remainder released from right by agreement of the holder.

*** PQS transfer occurred with consent of the former right holder

The Results of ROFR relationships to date have been dramatic.

We think it is important to examine the ROFR proposals within the context of how ROFRs have worked so far, and in a more general sense, what the level of community ownership of PQS (the goal of ROFRs) is at this time.



When the BSAI Crab Rationalization Program was implemented, Alaska ownership of crab processing assets was negligible. **In just five years, Alaska's crab dependent communities (ECCO's and CDQ Groups acting as ECCOs) have become major owners of crab Processing Quota Share units in virtually every rationalized crab fishery.** This is one of the most stunning and least talked about aspects of the Program.

As stated in our cover letter, we believe that the underlying strategy of ROFRs has been achieved. The community issues committee recommended, and the Council approved the current ROFR framework knowing full well that it was likely that some Eligible Crab Community Organizations (ECCOs) could not or would not exercise their PQS purchase rights in every instance; instead, the goal was to make sure that the ECCOs had a seat at the table and some leverage (vis a vis the ROFR) in the ensuing negotiations.

To date there have been six major PQS transactions, and in the five instances where there was a ROFR agreement in place, the ECCO has in fact become the PQS buyer *without actually triggering the ROFR.* It is easy to understand why: since the PQS seller knew they were going to have to deal with the ECCO at some point in the transaction, they simply went to the ECCO first.

Action 1: Extend the time that a community has to accept and perform under a ROFR agreement.

For more than two years, the NPCA has supported this Action, which would extend the period that an ECCO, on behalf of the community, had to accept the purchase terms under ROFR to 120 days, and the period of time for execution of the transaction to 150 days.

Action 2: Remove any provision under which a ROFR lapses.

Over time this relatively simple Action has grown increasingly complex, and the NPCA now opposes both alternatives being considered under the heading "Action 2" for the following reasons:

- A ROFR is not triggered unless a potential purchaser intends on moving the PQS to another community.
- If a ROFR is triggered, and the current community (Community A) decides not to exercise the ROFR, thus allowing the PQS to go to another community (Community B), then the rights of Community A should be extinguished because Community B will, over time, invest in public infrastructure to support the additional processing and develop an economic dependence on the landings associated with the PQS. Community B's investments and dependence should

not be overshadowed by the long-term threat that Community A could at some future date exercise it's ROFR rights to the detriment of Community B.

- Thus, the single question before the Council should be whether Community B should acquire new ROFR rights to the PQS. In the past, the NPCA has supported this approach based on our understanding that the Action would not eliminate the Program's intra-company transfer provisions nor add any other new restrictions on processor efficiency within a region. However, as Dr. Fina points out in the RIR/IRFA on Page iv:

"Full analysis of this alternative will require additional definition of the alternative by the Council."

Therefore, this Action should be rejected; and if the Council wants to develop a new alternative then a small working committee should be established to provide the Council with a more focused framework.

Action 3: Applying ROFR assets to select assets.

The NPCA is opposed to this proposal, but we also believe that some proponents of this proposal do not understand how ROFRs actually work and that they are therefore trying to address problems that might not exist.

From the NMFS website "Contract Terms for Right of First Refusal based on public law 108-199:

D. Any sale of PQS for continued use in the community of origin will be exempt from the right of first refusal. A sale will be considered to be for use in the community of origin if the purchaser contracts with the community to:

1. *use at least 80 percent of the annual IPQ allocation in the community for 2 of the following 5 years (on a fishery by fishery basis), and*

2. *grant the community a right of first refusal on the PQS subject to the same terms and conditions required of the processor receiving the initial allocation of the PQS.*

In other words, a ROFR is triggered only if the new buyer intends to remove the crab processing activity from the community in question. If instead the buyer intends on continuing operations in the community, the ROFR is not triggered and it remains in force because it is one of the "assets" being acquired in the sale, and the community retains its standing in the (new) relationship.

If in fact the new buyer intends on relocating the crab processing activity to another community, then and only then is the ROFR triggered. In this event the current regulations are also clear:

B. Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement.

This is the correct approach. It is difficult to imagine any regulatory body or court that would uphold a proposed regulation that would allow an outside party (the ROFR holder) to essentially dismantle and destroy the value of a business entity by choosing only to purchase certain valuable assets and discarding the rest.

The seafood industry - like every other "mature" industry - is based on well-capitalized, high volume, high risk, low margin business entities. Investments costs and operating expenses are often spread across multiple fish species and even geographic locations. To allow a community to pick and choose only the most valuable assets under a ROFR could destroy the operating ability and value of the business enterprise.

C-2(b) Initial Review on BSAI Crab ROFR
December 9, 2010

~~The AP recommends~~ ~~t~~The Council requests staff ~~move~~ prepare the analysis ~~forward~~ for public review with the following changes to the elements and options:

Action 1: Increase a right holding entity's time to exercise the right and perform as required.

Alternative 1 – status quo

1) Maintain current period for exercising the right of first refusal at 60 days from receipt of the contract.
2) Maintain current period for performing under the right of first refusal contract at 120 days from receipt of the contract.

Alternative 2: Increase an entity's time to exercise the right and perform.

1) Require parties to rights of first refusal contracts to extend the period for exercising the right of first refusal from 60 days from receipt of the contract to 90 days from receipt of the contract.
2) Require parties to rights of first refusal contracts to extend the period for performing under the contract after exercising the right from 120 days from receipt of the contract to 150 days from receipt of the contract.

Action 2: Increase community protections by removing the ROFR lapse provisions.

Alternative 1 – status quo

1) Maintain current provision under which the right lapses, if IPQ are used outside the community of the entity holding the right for three consecutive years.
2) Maintain current provision, which allows rights to lapse, if the PQS is sold in a sale subject to the right (and the entity holding the right fails to exercise the right).

Alternative 2 – Strengthen community protections under circumstances where ROFR may lapse.

Require parties to rights of first refusal contracts to remove the provision that rights lapse, if the IPQ are used outside the community for a period of three consecutive years.

Require that any person holding PQS that met landing thresholds qualifying a community entity for a right of first refusal on program implementation to maintain a contract providing that right at all times

Action 3: Apply the right to only PQS or PQS and assets in the subject community.

Alternative 1 – status quo

The right of first refusal applies to all assets included in a sale of PQS subject to the right, with the price determined by the sale contract.

Alternative 2: Apply the right to only PQS.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS subject to the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price applies shall be determined by a) agreement of the parties or b) if the

parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal

Applicable to Alternative 2:

- For any transaction that includes only PQS, the community entity may request that an appraiser value the PQS. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser.

-The appraiser shall establish a price that represents the fair market value of the PQS, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

-Timeline for assessment and performance (from receipt of the sale contract by the community entity):

Within:
10 days: community may request an assessor
20 days: jointly selected assessor chosen, or if the parties do not agree on a single assessor, then each party chooses an assessor
40 days: if no single assessor is chosen, the two assessors will choose a third assessor
60 days after assessor is chosen (by either method): assessor(s) establish a price
120 days after assessor is chosen: notification of community entity of intent to exercise the ROFR
180 days after assessor is chosen: community representative must perform under the contract

-The cost of the assessor will be paid equally by the PQS holder and community entity. If a third assessor is chosen, the PQS holder and community entity will pay their chosen assessor and divide equally the cost of the third assessor.

Action 4: Require community approval for IPQ subject to the right to be processed outside the subject community.

Alternative 1- Status Quo

Intra-company transfers of PQS and IPQ outside the subject community are permitted without requiring the PQS holder to notify the community entity that holds the right.

Alternative 2- Require community consent to move IPQ outside the community

Require the PQS holder to obtain written approval from the community prior to processing IPQ subject to the right (or formerly subject to the right), at a facility outside the subject community.

PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: C-2(c) BSAI Crab 5yr Review

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	Linda Kozak	Crab Group
2	Jim Wilen	Alaska Bering Sea Crabbers 6 min
3	Mateo Paz-Soldán	City of St. Paul
4	Heather McCarty	CBSFA
5	TERRY HAINES	FISH HEADS
6	Gary Painter	F/V Trailblazer
7	Tim Henkel	Deep Sea Fisherman's Union 6 min
8	Edward Poulsen	Alaska Bering Sea Crabbers 3 min
9	Jake Jacobsen	ICE
10	SHAWN C. DOCHTERMANN	CREWMAN'S ASSOCIATION
11	Tom Suryan	SEA / Bristol Mariner
12	Arni Thomson	UFA + ACC
13	City of UNAlaska Group	City of UNAlaska
14	KEITH COLBURN	F/V WIZARD
15	Steve Branson	Self
16	Jan Pitzman	Fortune Sea / F/V Kona Kai
17	Dave Fraser	ACDC
18	DAVID DENNIS	Fisherman
19	Margaret Hall	Rondys, Inc.
20	Jim Stone	F/V Arctic Hunter
21	Steve Minor	NPCA
22	Gretar Gudmundsson	F/V Notorious
23	Siri Dammarell	F/V [illegible] Dolphin
24	Leonard Herzog	Home Crab Coop
25	Rick Shelford	

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.

26. Richard Parris
27. Tom Miller
28. John ~~[illegible]~~ Whittier

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

201th Plenary Session – December 8-14, 2010
Hilton Hotel Anchorage, Alaska

Re: C-2 (c) Receive report on BSAI CR 5-year review

Public Comment By: Shawn Dochtermann for the Crewman's Association

Kodiak, Alaska — Tel: (425)-367-8777

Mr. Secretary, Chairman Olson, and NPFMC members,

My name is Shawn Dochtermann a 32-year commercial fisherman, with 24 years crab fishing experience in the Bering Sea. I am here representing myself as well as hundreds of Bering Sea crab fisherman, of which, many are disenfranchised and over 80 have the opportunity to be active participants.

We'd here today to put on the record our comments on the 5 year review and amendment package on the BSAI CR program.

The problem statement is flawed as it states the "BSAI CR program is a comprehensive approach to rationalize an overcapitalized fishery in which serious safety and conservation concerns needed to be addressed. Conservation, safety, and efficiency goals have largely been met under the program."

1. We had a conversation with a Vice-president of the First National Bank of Alaska this year and he stated that the Bering Sea crab fisheries were not overcapitalized previous to rationalization and that they were now due to the inflated values of the IFQs (over $1 billion dollars) compared to the value of the past LLPs (value unknown). Now the BSAI crab fisheries are overcapitalized due to the increased value of the rights/privileges to prosecute the fisheries. Safety was just one of facades of the BSAI crab fisheries that enabled economic allocations to be implemented without following the Due

Process in the U.S. Congress and the National Standards of the Sustainable Fisheries Act of 1996 (SFA).

2. NIOSH the safety portion of the Center for Disease Control (CDC) published a study that attributes improvement of safety at sea in the Bering Sea crab fisheries as a result of the U.S. Coast Guard inspecting and regulating crab vessel from 1999 to date, not due to the CR program that privatized the fisheries by the NPFMC/Senator Ted Stevens that was implemented in 2005. Please use the following report as basis for improvement of safety for the BSAI crab fisheries:

   http://www.uscg.mil/proceedings/articles/38_Woodley,%20Lincoln,%20Medlicott_Improving%20Commercial%20Fishing%20Vessel.pdf

   Safety has not improved for the majority of crewmen while prosecuting the Bering Sea crab fisheries due to the pot limit removal, co-ops being able to pull other vessel's pots and due the strict regime of the processors for vessels to make delivery dates. Crewmen on a vessel can be forced to pull all of a co-ops pots/gear without rest to make a delivery date with no concern for weather. With more days at sea, crews are forced to work through more storms. This has been reported by numerous crewmen since the implementation of the CR program, and has been put on the Council record more than a few times.

   The U.S. Coast Guard (USCG) aircrews spend hundreds of more hours in the air risking their lives to patrol the longer crab seasons. The longer patrols takes away from the their time to do drills and for marine mammal coverage. There is a shortage of USCG aircraft in Alaska, especially to cover search and rescue.

3. The Conservation needs that were to be met with the CR program are causing harvesting complications. The fleet has been consolidated to approximately 70 vessels in the

rationalized fishery, but the fleet and its co-ops are fishing in a smaller box.

Due to the privatization of the Bering Sea (BS) crab fisheries the SSC should institute and analysis to investigate possible localized depletion due to a smaller fleet fishing in a smaller area, as witnessed by myself and many other crew and skippers. We think it would be in the best interest of conservation of the BS king crab and Opilio stocks to do a study that graphs out (overlay) every string of gear that has been set for the last 10 years. If one was to graph the gear year by year, then overlay the last 5 years of the pre-rationalized BS fisheries compared to the 5 years of the rationalized fisheries it would show the problems of consolidation of the actually fishing of the fleet and its gear. This data (available from the ADF&G 2010) is supported by the reduction of recruits in the Bering Sea red king crab fishery.

4. Entry-level opportunities of active participants or long term deckmen are non-existent without holdings of millions of dollars to enter into the BSAI crab fisheries. The facts are clear that the chosen alternative (a federal loan program) for the crewmen from the 2002 public review draft has nothing but stranded the crewmen from having the opportunity to invest in the fishery. There were three other alternatives that would have better suited the crewmen and allowed them ample opportunity to be fair and equitable initial recipients of privileges to harvest BS crab species. We've offered (NPFMC 186th Plenary session February 2008) other alternatives from the 2002 public review draft as possible solutions to fix the inequalities that were created by the initial allocation of excessive HQS to the LLP holders. The crewmen lost approximately $400 million in HQS due to the unjust taking by the LLP holders.

The crews of the BSAI CR program deserve fair and equitable compensation by layshare contracts. The 5 year review proposal does nothing to provide the present crews the opportunities to receive their historical ratios of compensation or their historical levels of participation

privileges to be restored. The idea of modifying the program so crew can buy into a program where the harvest quota share holder (HQSH) retain over $1 billion in privileges/rights is ludicrous, specially since the HQSH were gifted 100% of the privileges.

> The BSAI crab crewmen needed to be established as the stranded labor portion (stakeholders that were not included) of the CR program, just as required by NS #4 paragraph (c) (3) (i) *Definition. An "allocation" or assignment" of fishing privileges is a* ***direct and deliberate distribution of the opportunity to participate in a fishery*** *among identifiable, discrete user groups, or individuals.* Any management measure (or lack of measurement) has incidental allocative effects, but **only those measures that result in direct distributions of fishing privileges will be judged against the allocation requirements of Standard 4**.
>
> Excessive HQS was distributed to LLP holders in the initial allocation of the CR program, depriving the BSAI crab crewmen of their rights to HQS and to fair negotiation for layshare contracts. Review NS#4 (c) (3) (iii) avoidance of excessive shares. **An allocation scheme must be designed to deter any person or other entity from acquiring an excessive share of fishing privileges,** ***and to avoid creating conditions fostering inordinate control, by buyers or sellers, that would not otherwise exist.***
>
> Due to excessive HQS being allocated to LLP holders, exorbitant lease fees have been extracted off the top of gross revenues and have deprived the vessel operators (crewmen) from receiving fair and equitable compensation from the HQS holders.
>
> Layshare contracts have never been included as part of the CR program for EDR data or for legal liability of the HQSH and the vessel owners. NOAA/NMFS may not be responsible for enforcing 46 U.S.C. section 10601, but it is their job to follow federal code, which they have never done in the process of creating the CR program. Otherwise, it will be the responsibility of the FBI or the courts to sort out why this was not done.

Now that 100% of HQS is being utilized by recipients that do not even actively fish on vessels there must be a change made to the program so that active participants own/hold HQS. Crewmen as stakeholders were left out of Due Process so we ask the council to add an alternative to the proposal for crew and it should read:

Alternative 3 :

Crewmen's historical basis of compensation ratios have been reduced without cause by the practices of exorbitant leasing of HQS by the HQS holders that received excessive shares. To restore fair and

equitable ratios of compensation to the crewmen a re-designation of HQS from owners to a class of active crewmen that participate in the BSAI crab fisheries is necessary. The re-designation would be between 5% and 10% each year for a period of 3 to 6 years, with a total re-designation of 30% to a active crewmen's pool. The re-designated quota shares would become D shares. The D shares would not be available for buying/selling but would remain valueless and would be held as a common pool. Therefore, the crew would use this pool of quota to negotiate a fair layshare contract minimum for all Bering Sea crab fisherman by a ranking or guild system.

The discussion paper "Leasing practices in the NP fisheries BSAI crab fisheries" NPFMC June 2009 it is inadequate.

- It doesn't reflect on the empirical data that is obtained from crewmen's settlement sheets and layshare contracts and is not reconcilable with vessel settlements.
- Crew or crewmen representatives were not consulted to participate in the design of the comparisons from pre and post rationalization compensation rations and layshare contracts.

The basis for comparison is not focused on leasing rates and the change in crew compensation ratios, but rather on days working on the vessel and off the vessel. Why was the focus not on finding the percentage of QS and the lease rates; e.g., the average lease rates deducted from the gross revenues of both red king crab and opilio crab of the industry overall? A comparison can only be done by using the crewmen's layshare contracts and the factual reconcilable settlements of every vessel participating in the BSAI crab fisheries as the best data for comparison. One must be able to compare the ratios between crew, vessel owners, and the rights holder (LLP changed to harvest quota share holders HQSH), but this is not possible without leasing data that is not existent in the December 2010 CR program 5-year review.

The use of daily rates for crew has no bearing on crew compensation since it is layshare contracts that are used to compensate crew. Since the days of whaling layshares were used; Herman Melville was compensated with 1/175 share for his labor while making his whaling trips back in the

day. When will the council and NOAA GC require that all vessels that participate in the harvest of BSAI crab submit layshare contract so that ***46 U.S.C. section 10601*** is enforced. We'd like to remind the council that HQSHs must follow all federal laws or may have their quota shares revoked by NOAA.

The EDR data for the 5-year review on leasing of quota share by the harvest quota holder is entirely incomplete. The council must have this data to compare the ratios pre and post-rationalization between the crew, vessel owners and the rights holders. The best way to obtain empirical data is for the council to require all vessels to furnish reconcilable crew settlements to NOAA for the computation of EDR data. All crew settlements would list leases, expenses, taxes, and all other fees witheld.

The data available from table Table 4-31 Crewmember pay and percent of gross vessel revenues paid to crew does display in the 3rd and 4th quartile that crewmen's aggregate compensation for red king crab has declined from approximately 36% pre-ratz to 20% post ratz, and 36% pre-ratz to 16% post ratz respectively by quartile. Bering Sea Opilio crew's aggregate percentage pre-ratz was approximately 35% but has changed to 21% post-ratz and 35.5% pre-ratz to 20% post-ratz respectively by quartile. This information is from incomplete data, so the possibility of the crew receiving even less compensation is highly likely.

After reading through 5 year review we have great concerns crew compensation reductions as listed on page 53; 60/154:

Although most changes in deductions, charges, and crew share percentages are to cover quota costs, anecdotal reports suggest that in some cases these changes have arisen from opportunistic vessel owners exerting negotiating leverage on crew. In these later cases, vessel owners have been able to exploit fleet contraction (and the surplus of available crew) to reduce crew compensation. Although these practices have been reported anecdotally and are suggested by the declining crew share percentages in the fisheries, data to directly assess the extent of these practices are not available.

I have bought with me settlement sheets from crewmen that were willing to furnish them if they were redacted so their private information was not available or otherwise lose their job due to retaliation. Due to financial constraint we have not had the ability to have them redacted. We anticipate having all of the settlement sheets available to the council at the next council meeting. We wonder if the council would like to pay for all the legal work to redact settlement sheet in the future, as we would be happy to

collect more settlement sheets from the members of the Crewman's Association that still participate in the Bering Sea crab fisheries.

The **Post-Rationalization Restructuring of Commercial Crewmember Opportunities in the Bering Sea and Aleutian Island Crab Fisheries** by Sepez, Lazrus, & Felthoven is still in draft form even though it was completed October 2008 except for an executive summary. Is this council ready to use this study to prove that crews are being held back from receiving fair and equitable compensation compared to pre-rationalization historical ratios between crew and rights holder. Therefore, we as NOAA GC to promote the finalization of this study so it can be used for the council to make further changes to the CR program for the crew that were left behind since June of 2002 in Dutch Harbor.

We'd like to see formal discussion of this study by the Council and it's staff. It would be a great starting point to understand how the crew and skippers have lost not just their fair and equitable historical compensation, but how lease fees have stolen the wealth from the gross revenues that a product of the crews labors while at see and the historical privileges to over $400 millions dollars of HQS.

We'd like to know what has happened to the June 2008 Crab Management Motion that was presented at the 188th Plenary session in Kodiak, Alaska. There were 5 alternatives for crew, #3-5 might be possible solutions to helping crew get fair and equitable compensation layshare contracts? Why did this motion just slip away into the darkness, when it was a template to start helping the crew that is losing up to $40 million in crewshare compensation per year to HQS holders who hold excessive IFQ privileges?

It's clear the coercion exists in the industry and the crew can't speak without loss of their jobs due to retaliation. The vessel owners paying exorbitant lease rates can't speak out, otherwise their leased quota share would be removed by a Co-op controller. When will NOAA GC ask NOAA OLE to investigate these racketeering tactics?

We'd like to impress upon the council the problems the CR program has enacted on vessels that deliver to the Northern region. Safety of vessels and their delivery abilities have been removed by allowing processors to leave the region. For example, previous to rationalization there were two floating processors in St. George Island, and up to 3 floating process at St.

Paul Island, and one shoreside processor in St.Paul. Now there is only processor shoreside in St.Paul to handle all of the Northern regions crab. That the other processors have been aloud to consolidate the processing efforts from 6 to 1 interest is the major problem besides icing conditions in the Pribloff Islands.

The Council needs to require more processing ability in the Pribloffs, otherwise should be liable for vessel safety and accidents that occur. That vessels have to wait to deliver and chance their gear being moved by ice is ridiculous.

Now that NOAA is looking at Catch Shares for all U.S. fisheries we need to fix the ills of the CR program or otherwise plague other fishermen and the coastal communities across the nation with bad policy that will serve to give the investor class the chance to turn fishermen into indenture servants.

This council has the duty of following US laws and it's clear that to follow Due Process it must change the CR program to allow gifted ownership of HQS to crew as a pool or as individual so that they may receive fair and equitable compensation for their labors in the BSAI crab fisheries.

Bottomline: Crewmen are being compensated with 2 ½ to ½ % of the net proceeds after leasing, bait, fuel and provisions post-rationalization while historically the pre-rationalization crewmen made 5-7% of net proceeds after expenses. The HQSH are taking what they call **surplus profits** [Ed Pouslen's PC C-2(c)] from the gross proceeds. It's clear that this exorbitant leasing/royalties is taking the majority of the profits from the crab industry and leaving the vessel owners and crew with unfair and inequitable compensation.

Our goal is to provide the benefits of the CR program to all participants in the industry on a more equal basis, as it has proven

to be the most cumbersome program that did not fulfill it's assurance that:

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

-NPFMC former Chairman Dave Benton's letter to Congress on May 6, 2003-

Shawn C Dochtermann

Executive Director - Crewman's Association

Kodiak,AK

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December 6, 2010

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

Re: December 2010 Meeting
Agenda Item C-2(C) Five-Year-Review

Gentlemen,

On behalf of the North Pacific Crab Association ("NPCA"), we are submitting this analysis of the very specific price formation issues raised by Council staff in the Five-Year-Review of the BSAI Crab Management Plan.

The Five Year Review is a significant, detailed set of documents. It illustrates that, for the most part, the BSAI crab management program is meeting the intent of this Council and the Congress. However, as the Five Year Review also points out there is at least one significant aspect of the program that has resulted in unintended inequities and market disincentives:

"Perhaps the greatest concern with the application of the arbitration standard to price setting is the potential disincentive for processors to aggressively market their products. As the formula arbitrator has observed, if the formula is applied by solely dividing the first wholesale revenues between harvesters and processors the incentive for a processor to take risks associated with more costly market opportunities (such as developing new markets or holding product to time sales most advantageously) will be diminished greatly, and possibly fully removed. For example, if a formula returns only 30 percent of the first wholesale revenues to a processor, a processor would realize no additional return from a product that costs 30 additional cents to produce and sells for an additional dollar." (Page 105).

This is exactly the situation we are now facing. The Five Year Review goes on to correctly state that *"... in the absence of agreements of the participants in both sectors concerning efforts to serve new markets or take market risks the(se) developments may not take place. While participants in both sectors have expressed a willingness to consider these types of arrangements, none are known to have developed to date."* (Page 106)

There have been modest gains in product and market development, but virtually all of the risks associated with these developments has been born by the processing sector, while a majority of the benefit associated with these developments have gone to the harvest sector.

If these issues are not addressed, the situation will get worse in 2011 because of two pending actions at the Board of Fish:

1. The proposal to reduce the legal size for Bairdi. Although the NPCA is not opposed to reducing the legal size for Bairdi. It will fundamentally change the market value for Bairdi away from it's historic norm. Bairdi IPQ holders, once matched to Bairdi IFQ holders, have a legal obligation to purchase their harvest and to pay an ex-vessel price based on historic data which will not be reasonable as market value for the smaller product declines.

2. The proposal to further expand the St Matthews Blue King Crab season. St Matts BKC is a low volume North Region species. The further elongation of the season will increase processor operating times and costs without any reasonable offset in revenues under the current price formation system.

Finally, testimony from the Bering Sea Crabbers submitted for this meeting point out the fact that the fleet anticipates further consolidation due to many vessels inability to meet new Coast Guard rules, which could further shift inefficiencies onto the processing sector without any reasonable framework to work out an equitable response.

The NPCA does not believe that this situation will resolve itself without some direction from the Council. The following analysis traces how this situation has come to characterize the program, why we believe it is inconsistent with program intent and what can be done to reestablish proper market incentives.

Thank you for your consideration,

Steve Minor
Executive Director

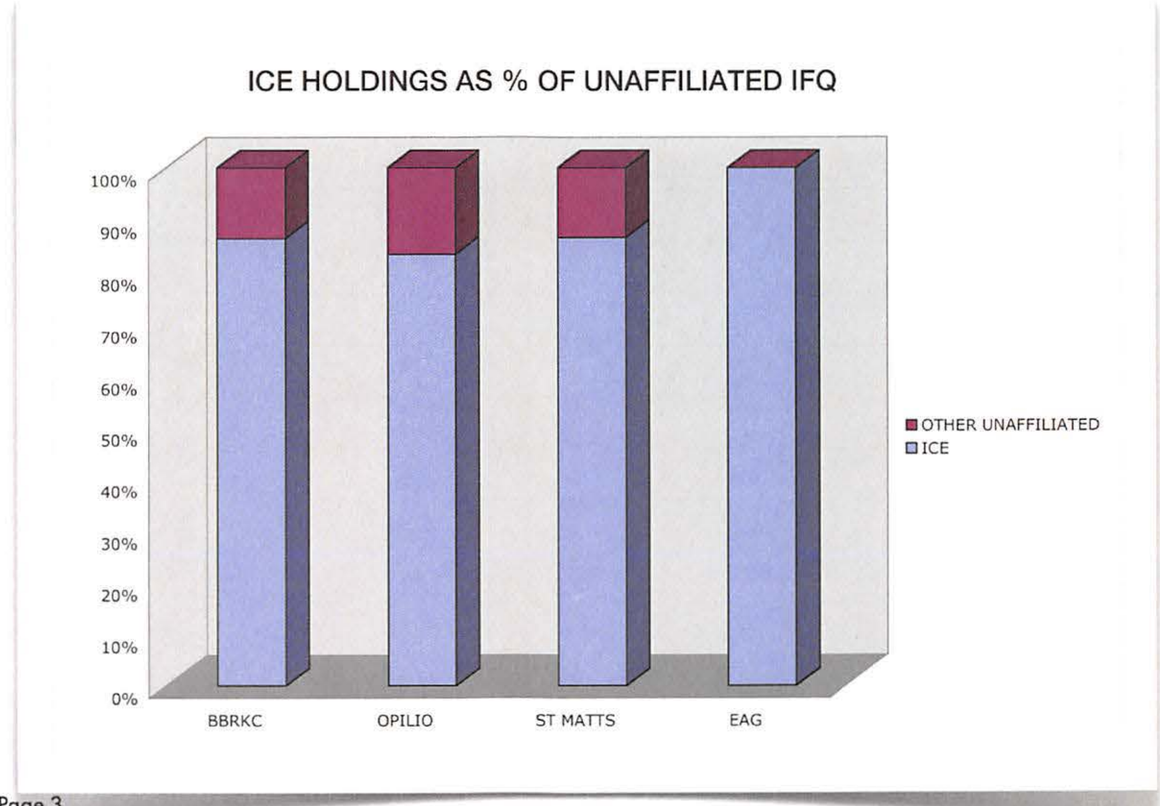
Overview

The intent of the price formation binding/arbitration program, as expressed in the Council motion, Congressional authorization and implementing regulations (50 CFR Parts 679 and 6805) is not being met.

Binding Arbitration was developed primarily as remedy to protect "last man standing" IFQ holders. It was also chosen by the Council from among five alternatives, and the "fleet-wide average pricing" alternative was specifically rejected. At 70 FR 10177:

*"The Arbitration System was developed to resolve failed price negotiations arising from the creation of QS/IFQ and PQS/IPQ. T**he complications include price negotiations that could continue indefinitely and result in costly delays and the "last person standing" problem** where the last Class A IFQ holder deliveries will have a single IPQ holder to contract with, effectively limiting any ability to use other processor markets for negotiating leverage."*

One of the unforeseen events at the time of program design and implementation was IFQ consolidation into a "super coop" that now holds between 85% and 100% of all unaffiliated IFQ in the rationalized fisheries (the Council and Agency, as noted in the implementing regulations, anticipated "...several coops for each fishery" (FR 10204)). The super coop now has perfect price information and they are using the arbitration system and lengthy season agreements as a "true up" tool to maximize fleet-wide average prices and as a strategy to shift all financial risks to the PQS/IPQ holder.



A close reading of the implementing regulations illustrates the problem. The possibility of a single harvest cooperative using the system to gain perfect price information was raised by a commenter (Comment 166, FR 10214) during the public review period, and the Agency responded specifically:

Comment 166: The binding arbitration procedure described in the proposed rule allows for and provides an incentive for harvesters to join one omnibus FCMA that uses multiple Arbitration Organizations, that could invoke Binding Arbitration for the purpose of securing confidential cost information across all processors, and exert monopoly power, rather than to resolve failed price negotiations. Harvesters would extract maximum rents because they would be able to see all arbitration information across all processors, whereas processors would not be accorded the same privilege. This asymmetry is inconsistent with the zero-risk antitrust concerns expressed throughout the document. Most importantly, such behavior by harvesters would be an antitrust violation.

Response: The Arbitration System limits the release of information received during a particular arbitration proceeding to the parties to that arbitration proceeding (see § 680.20(h)(5)). The limit on the release of data ensures that only the parties to an arbitration, that is the Arbitration IFQ holders and IPQ holders that are in an arbitration proceeding, have access to data submitted to the Contract Arbitrator as part of that proceeding. Section 680.20(h)(5) has been modified to explicitly state that persons who are not parties to an arbitration shall not have access to information from that arbitration proceeding, other than the result of an arbitration decision which will be released. This provision is required so that uncommitted IFQ holders would be able to participate in post-arbitration opt-in. Under this revision, an "omnibus" FCMA cooperative would not have access to an arbitration proceeding unless the omnibus cooperative was directly party to an arbitration proceeding.

If a single FCMA cooperative formed and all members of the cooperative participated in all arbitration proceedings with all IPQ holders, it could be possible for the members of that FCMA cooperative to have access to information from all IPQ holders. If this circumstance did arise, (the) DOJ would have the ability to review the potential antitrust implications of this situation and pursue enforcement actions if necessary. Nothing in Amendment 18 prohibits a cooperative from forming and initiating multiple arbitration proceedings with different IPQ holders. As noted in comment 164, the Program is not intended to amend the FCMA, or other antitrust laws of the United States that permit cooperative negotiations. This is clearly stated in the authorizing language in section 313(j) of the Magnuson-Stevens Act. The rule is not being modified at this time to limit the ability of an FCMA cooperative to participate in multiple binding arbitration proceedings.

Yet this problem, which the Council was trying to avoid, is precisely where we sit today, as evidenced by the Five Year Review.

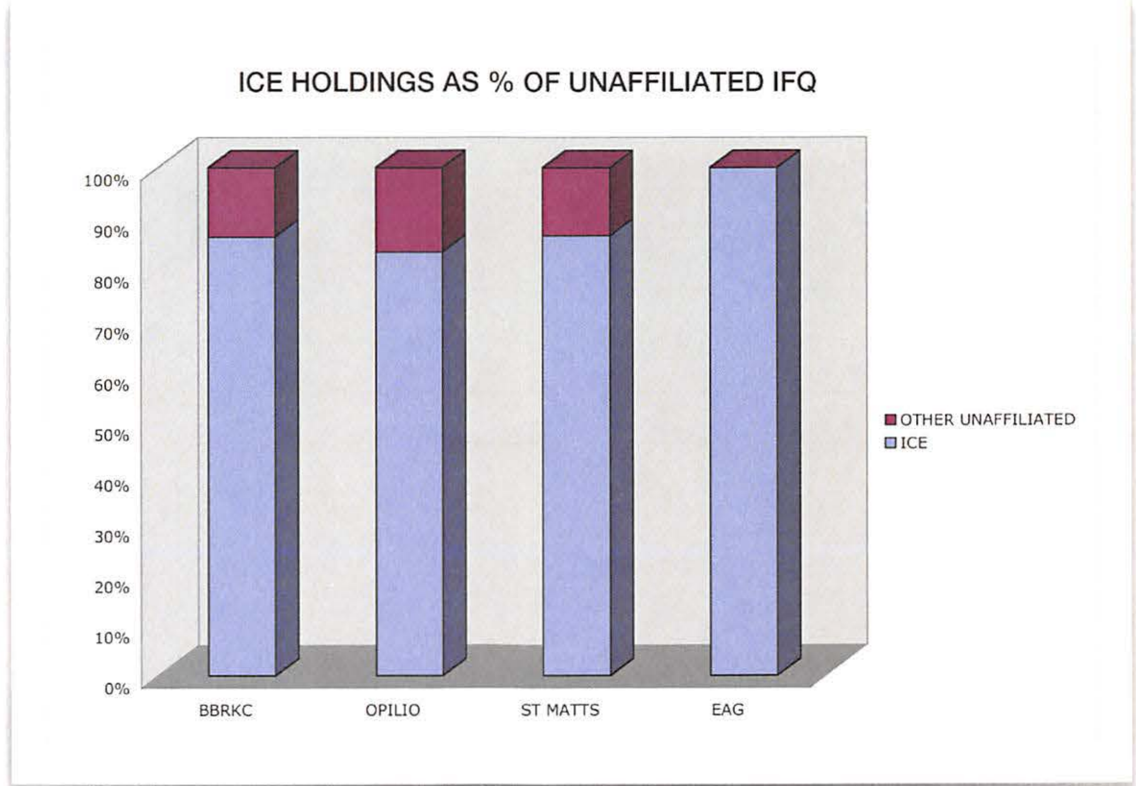
Under this program the independent fleet was granted (1) FCMA status, (2) an unlimited ability to form cooperatives and (3) a unilateral price formation/binding arbitration process. The binding arbitration process, instead of being a "last man standing" alternative, is being used almost exclusively by the super coop to gain perfect price information, to maximize fleet-wide average prices and to shift all market risks to IPQ holders.

Specific Comments and Analysis

Section 4, Harvest Sector, Page 29

As previously illustrated, the analysis accurately describes the consolidation of QS/IFQ shares into a single cooperative (ICE); as well as the seemingly inconsistent fact that the QS/IFQ holders continue to operate as separate districts/sub-groups. <u>The Review does not clearly point out that this cooperative is composed of the unaffiliated QS/IFQ holders; nor does the Review try to address the obvious question: why have the unaffiliated QS/IFQ holders come together as a single cooperative, when in fact they still operate as independent sub-groups?</u>

The reason the sub-groups initially came together is to gain perfect price information and ultimately, a fleet-wide average price, which was specifically rejected by the Council during the development of the program. And although the super coop is now working diligently to create a reserve pool to improve their ability to respond to regional delivery issues, that same structure can be established on an inter-cooperative basis.

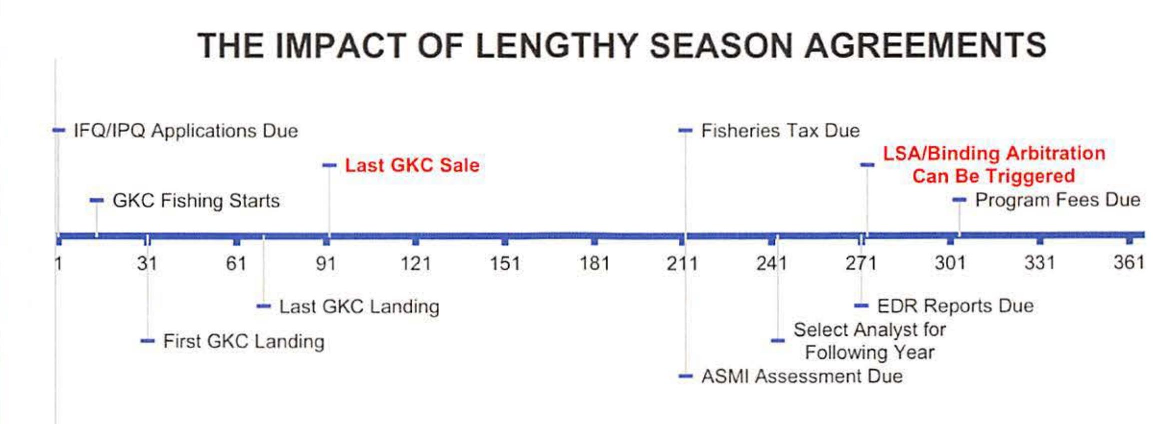


This problem is amplified by what the NPCA has concluded is a misuse of Lengthy Season Agreements.

The Five Year Review, in its discussion of Lengthy Season Agreements, observes that:

"*In the first five years of the program, all participants who have used the binding arbitration process have relied on the lengthy season approach, whereby arbitration proceedings are delayed until a time during the the crab fishing year. To date, all proceedings have occurred at the earliest in the late spring or summer, more than 6 months after the original deadline for initiation of arbitration proceedings in these fisheries.*
In two cases, the proceeding was delayed well into the following season. Use of this approach has relieved the time pressure under the standard arbitration timeline and has allowed participants to negotiate with more complete market information. On the other hand, some processors contend that the reliance on the lengthy season approach (particularly, if arbitration is delayed beyond the season end) unduly burdens processors by preventing them from timely reconciling their books." (Page 108)

Let us first illustrate this using an example of an LSA for the current crab year, which called for an arbitration deadline more than 240 days (seven months) after final product sales:



The analysis of Lengthy Season Agreements in the Five Year Review is incomplete and it does not capture the concerns of the NPCA, or fully examine the public record. Because of inconsistencies in the implementing regulations, the NPCA believes that Lengthy Season Agreements are being used in a coercive manner.

Let's turn to the public record.

The Arbitration System was designed specifically to *"...eliminate failed price negotiations arising from the creation of QS/IFQ and PQS/IPQ."*

The Arbitration System also includes a provision for "Lengthy Season Agreements" and the FR Notice, at 10177 correctly states the intent of this process:

b) *a lengthy season approach allows parties to postpone binding arbitration until sometime **during the season**;"*

What is meant by this statement?

The evidence of Council, Congressional and program intent runs throughout the preamble to the implementing regulations:

Comment 139 at FR 10209:

Comment 139: The proposed rule at § 680.20(a)(2) should not limit negotiations to the preseason period. Although the process for arbitration states that negotiations should be conducted in the preseason, the purpose of that language is to define the matching of shares for purposes of the arbitration procedure. The regulation suggests that IFQ and IPQ cannot be used if parties do not reach a preseason negotiation. Nothing is lost in the arbitration process from allowing voluntary negotiations between holders of uncommitted shares to occur after the season is begun.

Response: Amendments 18 and 19 state that "at any time prior to the season opening date, any IFQ holders may negotiate with any IPQ holder on price and delivery terms for that season (price/price formula; time of delivery; place of delivery; etc.)." Although this statement could suggest that the open negotiation process was anticipated to be limited to the preseason period, the use of the word "may" as opposed to "must" would allow the process to extend beyond the preseason period. This statement is made under the general heading of "Last Best Offer Binding Arbitration." It is presumed that the limitation on the use of open negotiations would apply to persons who are using the negotiation methods that are established under the Arbitration System (i.e., share matching and binding arbitration), but not necessarily to those IFQ and IPQ holders who are ineligible to use the Arbitration System or to those Arbitration IFQ holders that have not yet committed shares to a specific IPQ holder. Under this revision, an Arbitration IFQ holder that has committed shares to a specific IFQ holder would not be permitted to reenter open negotiations as is expressed under Amendments 18 and 19. However, if an Arbitration IFQ holder

has not yet committed shares, open negotiation would be available to that person after the season has begun.

NMFS is revising this portion of the regulations at § 680.20(a)(3) to clarify that if Arbitration IFQ holders choose to use the Arbitration System, they may enter into open negotiation prior to, and <u>during the crab fishing season.</u> *Once the season begins, those persons who have committed shares to an IPQ holder would be subject to the limitations established under Amendments 18 and 19. Persons who are affiliated with PQS or IPQ holders would continue to be eligible to use open negotiation after the fishing season has begun."*

The Agency reinforces this intent in response to Comment 150, FR 10211:

Comment 150: The inclusion of the provisions at § 680.20(h)(3)(iii) concerning the "Lengthy Season approach" at this point in the regulations adds confusion to the arbitration process. This paragraph primarily concerns the commitment of shares and the process that shareholders undertake preceding, and possibly leading up to, Binding Arbitration. The lengthy season approach is an alternative to that standard procedure. The provisions concerning the lengthy season approach should be included in the contract for the Contract Arbitrators, but as a separate provision outside the process description here.

Response: The Lengthy season approach is described as an alternative mechanism to allow for committed Arbitration IFQ holders and committed IPQ holders to negotiate specific contract terms ***later in the season,*** *or enter into binding arbitration if those processes are unsuccessful. The regulations at § 680.20(h)(3)(iii) have been modified to more clearly state that the Lengthy Season approach is an alternative approach to the standard binding arbitration procedure.*

And finally, the Agency took a seemingly firm position about the use of the Lengthy Season Approach, in response to Comment 151 at FR 10211:

Comment 151: The process for arbitration of the lengthy season approach is not well defined in the Council motion. The regulation at § 680.20(h)(3)(iii) should not attempt to specifically define that process. ***The regulation should state that industry should define the procedure for arbitration of the lengthy season approach,*** *including the timing of the proceeding and the ability of any IFQ holders to join the proceeding or opt-in to the outcome of the proceeding.*

Response: The requirements of when binding arbitration may occur under a Lengthy Season approach provide considerable flexibility to the participants. The regulation has not been modified.

Yet the implementing regulations themselves, and the Five Year Review in Section. 8.7.4, incorrectly substitute "Crab Fishing Year" in place of the more precise "in-season" process intended under this program. Here are our specific comments about this error:

The term “Crab Fishing Year” was never used in the Proposed Rule (September 1, 2004; FR 53397). The first time that the term “Crab Fishing Year” appears in the Final Rule is in response to Comment 221 (FR 10224), which pertains to fee collection, not binding arbitration.

The “Crab Fishing Year” is used as a benchmark for several reporting and application deadlines throughout the implementing regulations. This is appropriate; but to use it to define the Lengthy Season process is inappropriate.

The use of the term “Crab Fishing Year” does not appear in the Proposed Rule or the Preamble to the Final Rule in relationship to Lengthy Season Agreements. We believe that the use of the “Crab Fishing Year” in the Final Rule at FR 10265 was probably inadvertent; nonetheless it fundamentally undermines Council and Congressional intent, as well as the Agency’s own Preamble and response to public comment.

The first time that the “Crab Fishing Year” shows up in relation to the actual Binding Arbitration process is not until the Final Rule was published, at FR 10265; and then it was used in a manner that contradicts intent:

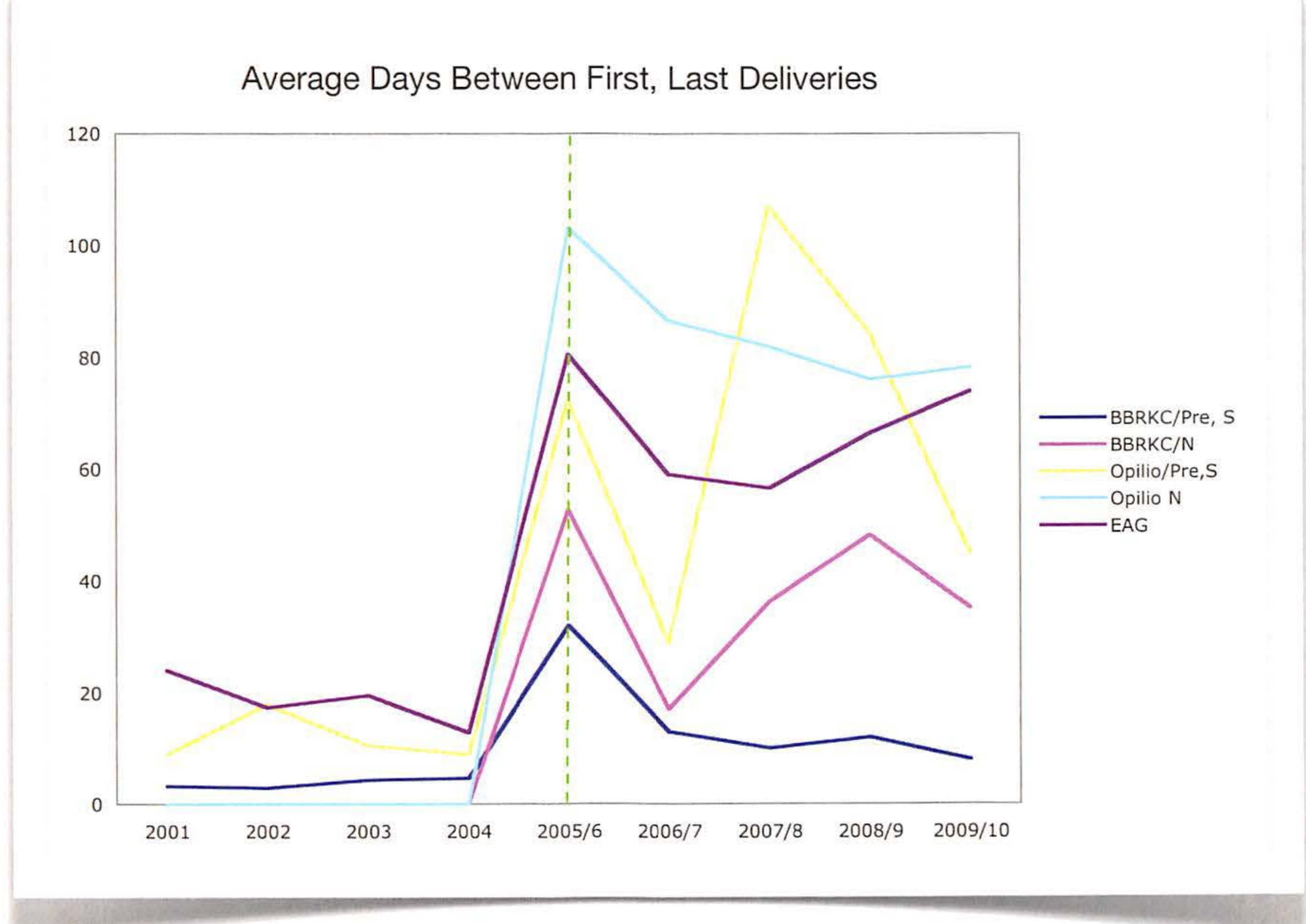
“A Lengthy Season approach allows a committed IPQ holder and a committed Arbitration IFQ holder to agree to postpone negotiation of specific contract terms until a time ***during the crab fishing year*** *as agreed upon by the Arbitration IFQ holder and IPQ holder participating in the negotiation. The Lengthy Season approach allows the Arbitration IFQ holders and IPQ holder involved in the negotiation to postpone Binding Arbitration, if necessary, until a time* ***during the crab fishing year.*** *If the parties ready a final agreement on the contract terms, Binding Arbitration is not necessary.”*

This is more than just a process problem: it has substantially undermined program intent and shifted all market risk to the IPQ holder without any hope of expected reward; it has had a chilling effect on new market and product development and created significant uncertainty.

Further Comments on Price Formation and Equitable Risk/Reward

1. The Binding Arbitration process is unilateral in nature. It can only be triggered by the QS/IFQ holder. As the fleet has consolidate into the super coop (and the process has lost it's utility as a "last man standing" protection), this inequity has been used to further leverage the processing sector. IPQ holders should have equal access to the process.

2. The inequities created by the unilateral price formation/binding arbitration process are exacerbated by the shift of industry inefficiencies almost entirely to the processing sector. Although the Five Year Review discusses this issue at several points, it is best illustrated by taking the key data from Table 6-17 and 6-18 and presenting it as a chart instead of a numeric table:



Contrast this with the efficiency gains of the fleet as illustrated on Page 33 (Table 4-15) and Page 35 (Table 4-16), which illustrates that the average vessel participating in the Red King Crab or Opilio fisheries is now harvesting 300% to 400% more crab per year than prior to the program.

3. Processor efficiency has become such a central issue that it is one of the major "Performance Standards" in the anticipated "Emergency Relief from Regional Delivery Requirements" package. The need to do this is illustrated by the following NPCA analysis of North Region delivery patterns:

Underutilized Processing Capacity Relative to Harvesting Capacity, North Region. DRAFT

Season	2007/08	2008/09	2009/10
TAC	63,034,000	58,550,000	48,017,000
Less 10% CDQ	6,303,400	5,855,000	4,801,700
Less 10% of Remainder to B shares	5,673,060	5,269,500	4,321,530
Less 3% Remainder to C shares	1,531,726	1,422,765	1,166,813
Net A Share IFQ= PQS	49,525,814	46,002,735	37,726,957
Northern Share = 46.97%	23,262,275	21,607,485	17,720,352
% of northern IFQ harvested	1.000	1.000	1.000
# of pounds harvested	23,262,275	21,607,485	17,720,352
Actual No. of Days Processing Facilities Open			
Icicle	110	78	46
Trident/Other	110	102	46
Processing Capacity Available, Per day			
Icicle	140,000	140,000	140,000
Trident or Other	400,000	400,000	400,000
(Minus) Ice Closure Days			
Icicle	21	19	0
Trident	11	39	0
Total processing capacity	52,060,000	33,460,000	24,840,000
Processing Capacity Utilization	44.7%	64.6%	71.3%

4. Finally, as noted in the Five Year Review on Page 109, the lack of a clear definition of the "historic division of revenues" continues to stress the system. This in itself is reason enough to address the issue the NPCA has raised.

"As with the formula arbitrator, the contract arbitrator is directed to consider other relevant factors when establishing a price that preserves the historic division of revenues. The complexity (and multidimensionality) of delivery terms and negotiations together with the broad list of considerations in the standard create some uncertainty in the application of the standard. In the first five years of the program, participants in both sectors and arbitrators have worked to interpret the standard and its application to their circumstances. The novelty of the arbitration system and the absence of information from the few binding proceedings that have occurred have contributed to this anxiety."

Recommendations to the Council

1. Give IPQ holders the same access to the Binding Arbitration system.

2. In the event of an arbitration, require the arbitrator to publish a summary of his/her basis for the final decision so that (a) there is a more consistent approach to price settlements and (b) the Council itself is better informed about the process.

3. Fix the regulatory error as it pertains to the definition of Lengthy Season Agreements.

NEW!

Tim Hinkel

The management program for the BSAI crab fisheries has largely achieved the conservation, safety, and efficiency goals established by Council and Congressional intent.

However, the Five Year Review also documents that entry level opportunities are scarce and costly; and crew compensation, expressed as the crew share of vessel gross revenues is in decline.

The alternatives and options included in this motion are intended to support the analysis of a compensated conversion of owner QS (and matching PQS) to crew QS, with the compensation to be shared by both the impacted owner QS share holders and the PQS holders to improve entry opportunities and crew compensation for active crew.

Alternative 1:

No action, status quo.

Alternative 2:

Increase investment opportunities for active participants by increasing the proportion of C share quota in all rationalized fisheries through a market-based reallocation.

Change the 3 percent C share allocation to:

a) 6 percent
b) 8 percent

Use the following mechanism to achieve the increase :

A pro-rata reduction in owner QS and PQS shares (distributed over a period not to exceed 5, 7, or 10 years) to create C share QS available for active participants to purchase. Owner QS share holders who meet active participation requirements would be able to retain their converted C shares, with appropriate compensation to the PQS holder upon conversion.

Suboption: Applicable only to b) above (increase to 8 percent), redesignated C shares will be subject to:

1) the A share/B share split (including regionalization)
2) Regionalization

QS/IFQ and PQS Compensation Rates

In all crab fisheries subject to C share conversion, the compensation rate for the QS and PQS holders shall be 50% to the QS holder and 50% to the PQS holder.

C Share Ownership Caps

The current C share ownership caps shall remain unchanged as a percent of the C share pool.