


MEMORANDUM

TO: Council, SSC and AP Members
FROM:  Chris Oliver for
Executive Director
DATE: February 2, 2010
SUBJECT: Bering Sea and Aleutian Islands crab issues

ESTIMATED TIME 4 HOURS (All C-4 items)
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ACTION REQUIRED

- (a) Initial Review of right of first refusal modifications
- (b) Initial review of an exemption from West region landing requirement for the Western Aleutian Islands golden king crab fishery

BACKGROUND

- (a) Initial Review of right of first refusal modifications

At its October 2009 meeting, the Council received an analysis of three actions to modify the community right of first refusal on processor quota shares. Under the first action, community representatives holding the right would have an additional 30 days to exercise the right and perform under the contract. The second action would remove any lapse of the right, which occurs under current rules, if the processor shares are used outside of the community for three consecutive years or if a community representative elects not to exercise the right on an applicable transfer. The third action would limit the application of the right to assets located in the community benefiting from the right. Under the current structure, a community representative that exercises the right must accept the contract on its terms, which may include assets that are not located in the subject community.

After public testimony, the Council requested staff to expand the analysis of the third action to include an alternative under which the right would apply only to the processor quota shares. The Council scheduled an initial review of this analysis for this meeting. A copy of the revised analysis is attached (Item C-3(a)).

- (b) Initial review of an exemption from West region landing requirement for the Western Aleutian Islands golden king crab fishery

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 the 2009/2010 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 in 2009. 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 2009, 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 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. The Council letter formalizing that request and the NMFS response letter are attached as **Item C-3 (b)(1)**. 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. A copy of the analysis is attached (see **Item C-3(b)(2)**).

Initial Review Draft

REGULATORY IMPACT REVIEW

and

INITIAL REGULATORY FLEXIBILITY ANALYSIS

MODIFICATIONS TO COMMUNITY RIGHTS OF FIRST REFUSAL

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

February 2010

EXECUTIVE SUMMARY

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the "rationalization program"). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. Since implementation, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests. This amendment package considers actions intended to address the following three of the concerns:

- 1) the lapse of the right after three consecutive years of use of the individual processing quota (IPQ) outside the community or if a community entity elects not to exercise the right on a transaction to which it applies;
- 2) the relatively short period of time allowed for exercising and performing under the right; and
- 3) the requirement that the right apply to all assets involved in a transaction, which could include assets outside the community.

Purpose and Need Statement

The Council has adopted the following purpose and need statement for these actions:

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community "right of first refusal" agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.

To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now holding between 20 percent and 50 percent of the PQS in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.

Alternatives

The Council has identified three actions for this amendment package. In all cases, the actions are defined by a single alternative that is compared to the status quo alternative, under which all aspects of the current right of first refusal structure would be maintained. Under Action 1, the time available for a community entity to exercise a right of first refusal would be extended from 60 days to 90 days, and the time for a community entity to perform under the contract would be extended from 120 days to 150 days. Under Action 2, any provisions under which the right would lapse are removed, requiring the holder of any qualifying PQS to maintain a right of first refusal contract with the community entity for that PQS. Under Action 3, a community entity's right would be applied to either the subject PQS only (Alternative 2) or to the subject PQS and assets located in the community intended to benefit from the right of first refusal (Alternative 3).

Effects of Action 1 – Increase the time for exercise and performance of the right of first refusal

In considering whether to exercise a right of first refusal, a community must examine the merits of the transaction and arrange its performance. These factors suggest that an extending the period to exercise a right and perform under the contract could be beneficial to entities making that decision. The extension is likely to be particularly beneficial for communities that adopted provisions for public notice and meetings to decide whether to exercise the right. Even this extended time period, however, is likely to pose a challenge, for large transactions that include a variety of assets other than the subject PQS. Although lengthening the time for exercise and performance under the right may benefit community entities, lengthening those time periods could complicate transactions for parties affected by the right. Under the terms of the right, a PQS holder and buyer can prevent a community entity from intervening in the transaction, if the buyer agrees to grant a right of first refusal to the community entity and to use a portion of the IPQ yielded by the PQS in the community for a period of years. Although these concessions may affect the value of the assets transferred (including the PQS), the parties to the transaction can effectively limit the ability of the community entity to disrupt the transaction by exercising the right. This ability may limit both the difficulty posed by the time period extensions to PQS holders. As a result, the proposed time period extensions are likely to have only minor effects on PQS holders, the parties they might transact with, and community entities.

Effects of Action 2 – Removal of right of first refusal lapse provisions

Under this alternative, the provision under which the rights of first refusal on PQS lapse would be removed from the contracts establishing those rights. Currently, the right lapses on use of the yielded IPQ outside the community for a period of three consecutive years or if the community entity fails to exercise the right when a transfer is made that is subject to the right. Making the right persist indefinitely would establish a perpetual link between PQS and the community where processing occurred that led to the allocation of that PQS. This community/PQS association would be maintained regardless of whether the PQS holder used the yielded IPQ outside of the community for several years. In addition, once triggered by a transfer, the right would supersede the interests of other parties, including communities where the yielded IPQ have been processed in the intervening years. The exercise of a right in this circumstance could disrupt the dependence on the processing activity that developed in the community that attracted the processing. At the extreme, this dependence could arise from several years of processing activity. Community entities might also have multiple opportunities to acquire the PQS, since all transactions for use outside the community would trigger the right. So, a community entity that was unable or unwilling to intervene in a transaction for PQS will have the opportunity to intervene and acquire the shares in any future transaction subject to the right. These future opportunities may be important, if the circumstances and financing of the community entity change or the second transaction is on more appealing terms, which could occur if fewer PQS are included in the transaction or prices change.

PQS holders are also affected by making the right indefinite in term. To the extent that rights of first refusal diminish the value of these shares, that diminution would be perpetuated. Despite the existence of the right, it remains likely that for most transactions PQS holders and buyers will avoid triggering the right by agreeing to use the IPQ in the community to the extent required for avoiding triggering the right. In the long run, meeting this minimal requirement may be more difficult, particularly if processing activity is discontinued in some communities. To the extent that the right is intended to protect community interests, that protection may be lacking under the status quo, in part, because of its current lack of permanence. Yet, several other aspects of the right limit the effectiveness of the provision in protecting community interests. By its nature, the right only applies to transfers. Absent a transfer, shares may move freely among communities under other processing arrangements (including those internal to a company, as well as custom processing arrangements). This limitation on the right leaves a community entity unable to prevent the movement of processing from its community, as long as the PQS holder chooses not to transfer the shares.

Effects of Action 3 – Apply the right of first refusal to only subject processor shares or subject processor shares and assets in the community of the entity holding the right

Under this alternative, right of first refusal contracts are required to provide that the right shall apply to either 1) only the PQS or 2) the PQS and other assets physically present in the community of the entity holding the right of first refusal. In the event assets not subject to the right are included in the proposed sale, the price of the assets subject to the right shall be determined by an appraiser jointly selected by the PQS holder and the entity holding the right. Several administrative aspects of the process will need to be defined to implement this provision.

Under the second action alternative, the Council must define a method for determining items that are subject to the right (i.e., assets that are “community-based”). Many assets are mobile and can be moved among communities. For example, a company that sells its PQS with its floating platform may be confronted by a community (or processor) claim that the floating platform is (or is not) a community based asset. If the Council wishes to proceed with this alternative, a process would need to be defined for determining the assets based in a community to which the right would apply.

Assuming that assets to which the right will apply are well defined, values must be established for those assets independent of other assets included in the transaction but excluded from the right. The first step in this process is identifying the person (or persons) who will establish the value; a jointly selected assessor is suggested by the current motion. **The motion does not provide for the selection, if the parties are unable to agree on a single assessor. A process for addressing this contingency should be considered. As a part of that process, the Council should consider whether the price is a fair market price and whether the effect of applying the right to only a portion of the assets included in a transaction on assets that are not included in the right should be considered. Specifically, should the loss of value of assets that might rely on the PQS (but are not subject to the right) be considered in determining the price applicable to the right.**

An additional procedural effect that arises from applying the right of first refusal to a subset of the assets included in a transaction is a potential delay in timelines to accommodate determining the price of the transaction. **As a part of the development of a process for determining the price of assets covered by the right of first refusal, the Council should consider a revised timeline that includes a time period for price setting (which may also entail revising the time periods for exercising the right and performing under the contract).**

Notwithstanding the specific development of this action, PQS holders are likely to respond to the application of the right to only PQS (and possibly community based assets) in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement the PQS holder may need to provide something of value to the entity, which could be financial remuneration or a portion of the PQS. A community entity may have little leverage in this negotiation, if the PQS holder knows that the entity is without the wherewithal to exercise the right, but the community could receive some compensation for the security it provides by indicating its intent to allow the sale. CDQ groups that represent communities are likely to be better positioned than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests. Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the requisite period and extending the right to the entity in a second contract. This approach would maintain the community entity’s interest in the PQS under the terms of the right with the new holder. A third way to avoid community entity intervention in a transaction is for the PQS holder.

prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.¹ To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. Lastly, a PQS holder that is undertaking a transaction might also subdivide the transaction. One transaction could be for the PQS and associated community based assets; the other transaction would be for any other assets. By subdividing the transaction in this manner, the PQS holder and the buyer can ensure that the price of PQS and the price of other assets in the transaction are set at an acceptable level, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS and community based assets carrying the bulk of the value of the transaction. Whether this avenue would be effective may depend on the structure of the right developed by the Council. Clearly, a variety of contractual arrangements might be made to ensure that the PQS holder receives reasonable value for assets (including the PQS), particularly in cases where the value of the assets is highly dependent on the accompanying PQS.

¹ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

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1 INTRODUCTION

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the "rationalization program"). The program is unique in several ways, including the allocation of processing shares² corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. Since implementation, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests. This amendment package considers measures intended to address the following three of the concerns:

- 1) the lapse of the right after three consecutive years of use of the individual processing quota (IPQ) outside the community or if a community entity elects not to exercise the right on a transaction to which it applies;
- 2) the relatively short period of time allowed for exercising and performing under the right; and
- 3) the requirement that the right apply to all assets involved in a transaction, which could include assets outside the community.

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of the alternatives to modify rights of first refusal established under the program. Section 4 contains a discussion of the Magnuson Stevens Act 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:

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

² Processor shares include both Processor Quota Shares (PQS), which are long term privileges to receive annual allocations of Individual Processor Quota (IPQ), and IPQ. IPQ are a privilege to receive a specific poundage of crab landings.

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 distribution of processor shares which will affect the crab harvests under the program. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

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

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community "right of first refusal" agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.

To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now owning between 20 percent and 50 percent of the PQS in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.

2.2 Description of Alternatives

The Council has identified three potential actions for this amendment package. In each case, the action alternative is compared to the status quo. Action 1 extends the time available for a community entity to exercise a right of first refusal from 60 days to 90 days, and the time for a community entity to perform under the contract from 120 days to 150 days. Action 2 removes any provisions under which the right would lapse, requiring the holder of any qualifying PQS to maintain a right of first refusal contract with the community entity for that PQS. Under Action 3, a community entity's right would be applied to only the subject PQS (Alternative 2) or to the subject PQS and assets located in the community intended to benefit from the right of first refusal (Alternative 3).

The specific elements and options identified by the Council are:

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 – Increase community protections by removing the provisions under which the right lapses.

- 1) 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
- 2) Require parties to right of first refusal contracts to remove any provision for the right to lapse, if an entity chooses not to exercise its right
- 3) 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 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.

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

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from 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.

The Council should note that additional specificity should be included in Alternative 3

2.2.1 Alternatives considered, but not advanced for analysis

The Council and its crab advisory committee generally considered alternative time periods to those proposed in Action 1. No additional time periods were advanced for analysis, as the suggested time period extensions, when juxtaposed with the existing time periods, are believed to present a reasonable range of time periods for consideration. Any extension beyond that proposed by this action would be excessive by presenting an unacceptable delay to completion of contracts.

No alternatives to Action 2 were considered, as any action short of extending the right indefinitely is unlikely to achieve the lasting benefit intended by the Council for that action.

No additional alternatives to Action 3 were considered, as the two action alternatives are believed to be the only workable options to applying the status quo, which applies the right to all goods in the transaction.

2.3 Existing Conditions

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

2.3.1 Management of the fisheries

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

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

Under the program, holders of License Limitation Program (LLP) licenses, endorsed for a fishery, were issued owner quota shares (QS), which are long term access privileges, based on their qualifying harvest histories in that fishery. Catcher processor license holders were allocated catcher processor vessel owner QS for their LLPs' histories as catcher processors; catcher vessel license holders were issued catcher vessel QS based on their LLPs' histories as a catcher vessel. These owner QS are approximately 97 percent of the QS pool. The remaining three percent of the initial allocation of QS was issued to eligible captains as crew QS or "C shares", based on the individual's harvest histories as captain of a crab vessel. QS annually yields individual fishing quota (IFQ), which represent privileges to harvest a particular amount of crab (in pounds) in a given season. 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 IFQ to harvest 1 percent of the annual total allowable catch (TAC) in the fishery. Ninety percent of the "catcher vessel owner" IFQ are issued as "A shares", or "Class A IFQ," which must be

delivered to a processor holding unused individual processor quota (IPQ).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 shares issued to processors. These PQS yield annual IPQ, which represent a privilege to receive a certain amount of crab harvested with Class A IFQ. IPQ are issued for 90 percent of the catcher vessel owner TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.⁶

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

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

To further protect community interests, the Council included in the program a provision for community rights of first refusal on certain PQS and IPQ transfers. The representative entity of any community that supported in excess of 3 percent of the qualified processing in any fishery received the right on the PQS and derivative IPQ arising from processing in that community.⁷ In addition, entities representing qualified communities in the Gulf of Alaska north of 56°20’ N latitude received a right of first refusal on any PQS issued, based on processing in a community not qualifying for a right of first refusal in that same area of the Gulf. Four fisheries – the Eastern and Western *C. bairdi* and the Western Aleutian Islands red and golden king crab fisheries – are exempt from the rights of first refusal provisions, as allocations of PQS in those fisheries were based on historic processing in other fisheries.

In the case of CDQ communities, the representative entity holding the right is the local CDQ group. In all other communities, the right is held by an entity designated by the community. The right is established by a contract between the community entity and the PQS holder. Under the contract, the right applies to any sale of PQS and sales of IPQ, if more than 20 percent of the PQS holder’s community-based IPQ in the fishery were processed outside the community by another company in 3 of the preceding 5 years. As

⁴ C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ and regional landing requirements.

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

⁷ The community of Adak was excluded from the rights of first refusal, as that community received a direct allocation of 10 percent of the Western Aleutian Islands golden king crab fishery.

currently formulated, to exercise the right, the community entity must accept all terms and conditions of the underlying agreement.

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

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

2.3.2 The processing sector

Processing privileges are relatively concentrated with twenty or fewer PQS share holders in each of the fisheries subject to rights of first refusal requirements (see Table 1). Concentration of processing privileges varies across fisheries. The Eastern Aleutian Islands golden king crab fishery is the most concentrated. The Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, which have had the most participants historically, are the least concentrated. The regional distribution of shares differs with landing patterns that arose from the geographic distribution of fishing grounds and processing activities. In the St. Matthew Island blue king crab and the Pribilof red and blue king crab fisheries, most qualified processing occurred in the Pribilofs or offshore in the North region, resulting in over two-thirds of the processing allocations in those fisheries being designated for processing in the North region. The Bering Sea *C. opilio* fishery allocations are split almost evenly between the North and South regions; while less than 5 percent of the Bristol Bay red king crab PQS is designated for North processing. All qualifying processing in the Eastern Aleutian Island golden king crab fishery occurred in the South region, resulting in all processing shares in that fishery being designated for processing in the South region. The relatively low median share holdings in the large fisheries (the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries) suggest that a large portion of the historic processing was concentrated among fewer than 10 processors. In the smaller fisheries, fewer than 5 processors hold a large majority of the shares. The maximum holding in each fishery was in excess of twenty percent of the pool.

Table 1. Processing quota share holdings as a percent of the processing quota share pool.

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

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

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

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

Table 2. PQS holdings subject to rights of first refusal (2009-2010).

Fishery	Total	PQS holders		
		with rights of first refusal benefiting		
		one community	two communities	three communities
Bristol Bay red king crab	16	5	5	1
Bering Sea <i>C. opilio</i>	19	11	3	1
Eastern Aleutian Island golden king crab	10	9	0	0
St. Matthew Island blue king crab	13	9	3	0
Pribilof red and blue king crab	10	6	2	0

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

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

In the first two years of the program, a large portion of the IPQ pool was subject to the “cooling off” provision, which required processing to occur in the community of the processing history that led to the allocation of the underlying PQS. Consequently, few changes in the distribution of processing of Class A IFQ/IPQ landings occurred in the first two years of the program. Also, for most shares, entities representing the community of origin hold a right of first refusal on the transfer of the PQS and IPQ for use outside the community. This right is relatively weak, because intra-company transfers are exempt from the right, and, under the status quo, the right lapses if the IPQ are used outside of the community of origin for a period of three consecutive years. Despite the end of the cooling off period and the ease with which the right of first refusal may be avoided, in the third year of the program, most processing of IPQ landings have occurred in the community of origin. Discerning the degree of redistribution, however, is not fully possible, as landings on floating processors are often categorized as “at-sea”. In many cases, these floaters operated within community boundaries, at times docked in the community harbor. In the

The prevalence of custom processing relationships is evident in comparing the number of active IPQ accounts with the number of active processing plants (see Table 4). In the first year of the program, custom processing of deliveries occurred most prominently in the Bering Sea *C. opilio* fishery. Custom processing arrangements in that fishery expanded in the second year of the program and appear to have declined in the third and fourth years. The decline may have occurred as relationships between plants and share holders stabilized, with fewer share holders having relationships with more than one plant. Few custom processing arrangements existed in the Bristol Bay red king crab fishery until the third year of the

Under these arrangements, a share holder contracts for the processing of crab, while retaining all interests and obligations associated with the landed and processed crab.

Processing share holders have achieved efficiencies under the program through consolidation of processing activities in fewer plants. A portion of this consolidation has been through traditional transfer of PQS and IPQ; but a substantial portion has also occurred through custom processing arrangements.

Source: FMP IFQ data and RCR permits. * withheld for confidentiality. ** with percentage of IPQ pool

Community	Class A IFQ		Class B IFQ		C share IFQ			
	Number of active plants	Pounds of share type processed	Number of active plants	Pounds of IPQ landings processed	Number of active plants	Pounds of IPQ landings processed		
Bristol Bay red king crab	Akutlan	10,167,245	1	1,409,783	1	480,873		
	Dutch Harbor	666	4	84.3	4	88.3		
	Floater		1		1			
	King Cove		1		1			
	Kodiak		2		1			
	St. Paul		1		1			
	Bering Sea <i>C. opilio</i>	Akutlan	12,650,952	1	3,995,669	4	1,341,384	
		Dutch Harbor	30.4	4	86.3	4	90.2	
		Floater		2		2		
		King Cove		1		1		
Kodiak			1		1			
St. Paul			1		1			
Aleutian Islands		Akutlan		1		2		
		Dutch Harbor		4		4		
		Floater		1		1		
		Adak		1		1		
	Dutch Harbor		3		3			
	King Cove		1		1			
	W. Aleutian Islands golden king crab	Akutlan		1		1		
		Dutch Harbor		3		3		
		Floater		1		1		
		Western Bering Sea <i>C. opilio</i>	Akutlan		1		1	
Dutch Harbor				3		3		
Floater				2		2		
King Cove				1		1		
St. Paul				1		1		
Eastern Bering Sea <i>C. opilio</i>			Akutlan		1		1	
			Dutch Harbor	717,026	3	119,549	3	34,308
	Floater		35.4	2	78.8	2	88.4	
	King Cove			1		1		
	St. Paul			1		1		

Table 3 Processing by share type and community (2008-2009)

most recent year of the program, two years from the lapse of the 'cooling off' provision requirements, some redistribution of processing of Class A IFQ landings is suggested (see Table 3). Dutch Harbor and Akutlan, collectively, have attracted slightly more Class A IFQ landings in the Bristol Bay red king crab fishery than under the cooling off period. These redirected landings reduced landings in King Cove and Kodiak, collectively. In the cooling off period, King Cove and Kodiak received substantially larger percentages of Class A IFQ landings than their rights of first refusals suggest. These likely occurred as landings from within borough boundaries were consolidated in King Cove and as King Cove and Kodiak attracted landings that were unconstrained by the cooling off requirements. Processing of A share IFQ in Akutlan and Dutch Harbor in the Bering Sea *C. opilio* fishery dropped substantially (by almost 25 percent) in the fourth year of the program. Redistribution of these landings to other locations cannot be revealed, because of confidentiality restrictions. The movements of landings suggest that with the cooling off provision expiring, it is possible to see a significant redistribution of landings among communities.

program, when Dutch Harbor plants entered relationships with several buyers. Few custom processing arrangements exist in other fisheries; however, it is possible that extensive custom processing may have occurred under any of those fisheries. Confidentiality protections prevent revealing processing amounts subject to these arrangements because of the relatively few processing participants in the fisheries.

Table 4 Number of active IPQ holder (buyer) accounts and IPQ processing plants by fishery (2005-2006 through 2008-2009).

Fishery	Community of Plant	2005 - 2006		2006 - 2007		2007 - 2008		2008 - 2009	
		Number of delivery accounts	Number of active plants	Number of delivery accounts	Number of active plants	Number of delivery accounts	Number of active plants	Number of delivery accounts	Number of active plants
Bristol Bay red king crab	Akutan	1	1	1	1	2	1	1	1
	Dutch Harbor	3	3	4	4	7	4	7	4
	Floater	3	2	2	2	3	1	4	1
	King Cove	1	1	3	1	1	1	1	1
	Kodiak	2	2	3	3	3	3	2	2
	Sitka	1	1						
	St. Paul	1	1	1	1	2	1	1	1
Bering Sea <i>C. opilio</i>	Akutan	1	1	1	1	1	1	1	1
	Dutch Harbor	6	4	8	4	6	4	4	4
	Floater	6	3	14	2	6	2	4	2
	King Cove	1	1	1	1	1	1	1	1
	Kodiak	2	2	2	2	4	3	2	2
	St. Paul	1	1	1	1	5	1	5	1
E. Aleutian Islands golden king crab	Akutan			1	1			1	1
	Dutch Harbor	3	3	4	4	4	4	4	4
	Floater	1	1						
W. Aleutian Islands golden king crab	Adak	2	1	2	1	1	1	2	1
	Dutch Harbor	2	2	2	2	2	2	4	3
	Floater	3	2					1	1
Eastern Bering Sea <i>C. bairdi</i>	Akutan			1	1	1	1	1	1
	Dutch Harbor			6	4	5	4	4	4
	Floater			1	1	2	2	5	2
	King Cove			1	1	1	1	1	1
Western Bering Sea <i>C. bairdi</i>	Akutan	1	1	1	1			1	1
	Dutch Harbor	4	4	5	3	3	2	4	4
	Floater	4	2	1	1	3	2	3	2
	King Cove	1	1	1	1	1	1	1	1
	Kodiak	1	1						
	St. Paul	1	1			3	1	1	1

Source: RAM IFQ data and RCR permit file

2.3.3 Right of first refusal

Based on the qualifying criteria, 8 community entities received rights of first refusal in the different fisheries governed by the program (see Table 5).⁹ The distribution of rights differs across fisheries, with Akutan, Unalaska, King Cove, St. Paul, and St. George all starting the program with rights on approximately 10 percent or more of the PQS in at least one fishery.

In five cases, community entities holding the right have acquired PQS subject to the right. In one fishery, a portion of the PQS subject to the right was transferred to the community entity holding the right, while the right with respect to another portion of the PQS was allowed to lapse. In another fishery the PQS represented a relatively small portion of the total PQS on which the entity held rights of first refusal and the PQS buyer was a different community entity. Rather than intervene in the transfer, the right holder elected to allow the transaction to proceed, lapsing the right of first refusal. In another instance, a PQS

⁹ Rights established on implementation are included, as even those which have lapsed could be resurrected under one of the alternatives.

holder with a considerable harvest share holding transferred its PQS to the right holding community entity to avoid a potential harvester/processor affiliation that would have prevented participation in the arbitration program. In most cases, right holding community entities have been actively involved in PQS transactions involving shares subject to their rights. In some cases, those entities have acquired shares; in others, they have allowed transactions to proceed. This community involvement in transactions suggests that the right has affected community interests.

Table 5. Distribution of rights of first refusal by community on implementation.

Fishery	Region	Right of first refusal boundary	Number of PQS holders	Percentage of PQS pool
Bristol Bay red king crab	North	None	1	0.0
		St. Paul	2	2.7
		Akutan	1	20.8
	South	False Pass	1	3.9
		King Cove	1	9.8
		Kodiak	3	4.0
		None	4	3.6
		Port Moller	3	3.7
		Unalaska	11	51.5
Bering Sea <i>C. opilio</i>	North	None	3	1.0
		St. George	2	9.7
		St. Paul	6	36.3
	South	Akutan	1	9.7
		King Cove	1	6.3
		Kodiak	4	0.1
		None	4	1.8
		Unalaska	13	35.0
		Eastern Aleutian Islands golden king crab	South	None
Unalaska	7			98.3
Pribilof red and blue king crab	North	None	1	0.3
		St. Paul	5	67.3
	South	Akutan	1	1.2
		King Cove	1	3.8
		Kodiak	4	2.9
		Unalaska	5	24.6
St Matthew Island blue king crab	North	None	5	64.6
		St. Paul	4	13.8
	South	Akutan	1	2.7
		King Cove	1	1.3
		Kodiak	1	0.0
		Unalaska	6	17.6

Source: RAM PQS data 2007-2008.

Assessing the extent to which rights have lapsed beyond those voluntarily reported to NOAA Fisheries is difficult because of the nature of available landings data. While some PQS holders have reported lapsing of rights voluntarily, regulations do not require PQS holders to report lapsing of a right. Although geographic landing requirements are applied in the program, records concerning location of landings are limited by record keeping protocols. Currently, most deliveries to floating processors are recorded as processed by a 'at sea,' without designation of a port. These 'at sea' deliveries may take place within community boundaries, and therefore may not be considered as being outside of the community that benefits from the right of first refusal. On the other hand, landing records will not fully reflect the geographic distribution of landings, which may result in several rights lapsing (because of use of IPQ outside of the community for three consecutive years). In addition, no system is in place for reporting and

documenting the lapse of rights of first refusal. Given this shortcoming, it is possible that other rights of first refusal may have lapsed.

The limitations of the 'cooling off' provision prevented much of the IPQ subject to the right of first refusal from being used outside the community of origin in the first two years of the program. Only in the third year of the program (once the cooling off limitation lapsed) was any sizeable portion of the IPQ permitted to be moved. As a result, rights of first refusal on PQS are believed to have lapsed (as a result of use outside the community) in only a few instances. Most notably, the right has lapsed with respect to PQS arising from historic processing in St. George. The St. George harbor and its entrance were damaged by a storm in 2004. In the first two years of the program, NOAA Fisheries found that damage prevented processing in St. George, and granted an exempting to the cooling off landing requirements. In the third year, the PQS holders used the IPQ outside the community. As a consequence, by its terms, the right of first refusal lapsed on shares for which the Aleutian Pribilof Island Community Development Association (APICDA) held rights of first refusal on behalf of St. George. Despite these circumstances, APICDA is reported to have reached agreements with both PQS holders with respect to these shares. Under the agreement with one of the PQS holders, APICDA acquired the PQS formerly subject to the right. The terms of the other agreement are not known.

In addition to shares subject to the St. George right of first refusal, PQS allocated based on processing in the Aleutians East Borough communities (i.e., Akutan, False Pass, King Cove, and Port Moller) was permitted to be moved within the borough during the cooling off period. As a consequence, rights of first refusal for the benefit of those communities may also have lapsed from movement of processing. Also, certain IPQ have had the right removed as a consequence of other transfers that have occurred in the first few years of the program. In some cases, the PQS has been transferred to the right holder (see Table 6), while in others the right has lapsed because the right holder chose not to exercise the right at the time of a transfer (see Table 7). In one instance, a PQS holder divested of a portion of its PQS holdings to remain within permitted share use caps.

Table 6. Percentage of PQS transferred to right of first refusal holder by fishery (as of 2009).
 tortldr

Fishery	Percent of PQS pool
Bristol Bay red king crab	8.8
Bering Sea <i>C. opilio</i>	6.1
St. Matthew Island blue king crab	0.1

Source: NMFS RAM Division database.

Table 7. Percentage of PQS on which right of first refusal lapse has been reported to NMFS by fishery (as of 2009).
 lpsd

Fishery	Percent of PQS pool
Bristol Bay red king crab	4.0
Eastern Aleutian Island golden king crab	6.9

Source: NMFS RAM Division database.

NOTE – THE ABOVE PARAGRAPH AND TABLES MAY BE UPDATED IN THE NEXT DRAFT TO REFLECT A CHANGE IN CIRCUMSTANCES OF SOME PQS HOLDERS AND RIGHT HOLDERS, AS NEGOTIATIONS ARE CURRENTLY UNDERWAY WITH RESPECT TO CERTAIN PQS.

2.3.4 Communities

Eight communities have historically received substantial landings from the Bering Sea and Aleutian Islands crab fisheries in which the rights of first refusal apply: Unalaska, Akutan, King Cove, St. Paul, St. George, Kodiak, Port Moller, and False Pass. These communities vary in their geographic relation to the fishery; their historical relationship to the fishery; and the nature of their contemporary engagement with the fisheries through local harvesting, processing, and support sector activity or ownership. Each of these factors influences the direction and magnitude of potential social impacts associated with the proposed action (NPFMC, 2008).

Commercial fishing and seafood processing play a significant role in the economic success of Unalaska/Dutch Harbor. This community is home to the greatest concentration of processing and catcher vessel activity of any Alaska community (EDAW, 2005). Pollock accounted for nearly 70 percent of the total wholesale value processed in Dutch Harbor in 2005. The second largest contributor to total wholesale value processed in Dutch Harbor was crab, at nearly 20 percent. Of the crab species, red king crab provided the largest contribution, at \$51 million in 2005, followed by snow crab at \$33 million. Dutch Harbor based processors received a substantial share of the IPQ allocations in most crab fisheries, under the rationalization program. These shares are subject to rights of first refusal of the Dutch Harbor community entity. These shares are unlikely to migrate out of the community, because crab processing at most facilities plays an important part in an integrated operation that serves several fisheries. Under the right of first of refusal, Unalaska/Dutch Harbor is represented by Unalaska Crab, Inc., a community entity created explicitly for the purpose of holding rights of first refusal and crab shares under the program. The City Council is the board of directors for this company.

Once heavily dependent upon salmon, the community of King Cove is now more diversified, processing groundfish and crab from the GOA and BSAI. The community is home to several large crab vessels, and is also home to Peter Pan Seafoods,¹⁰ the only shore based processor located in King Cove. The plant processes salmon, crab, halibut, and groundfish. Approximately 80 percent of King Cove's work force is employed full time in the commercial fishing industry (EDAW, 2005). This likely underestimates the dependency of the local economy on commercial fishing. For several years now, the amount and total value of crab processed in King Cove have been declining, while groundfish processing has increased. The decline in crab production was due primarily to a decline in quotas, related to reduced stocks. In addition, AFA sideboards caps on BSAI crab have also limited the amount of crab that can be processed in King Cove. Under the rationalization program, crab processing has remained an important component of the diversified processing undertaken at the shore plant in King Cove. Yet, rapid fleet contraction under the program, particularly in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, has affected King Cove. Between 10 and 15 crew jobs are estimated to have been lost in each of these two fisheries. In the first year of the program, fleet contraction is also believed to have caused a drop in demand for harbor and moorage services, and goods and services from fishery support businesses in King Cove. Attribution of these effects to the change in crab management is difficult, since data isolating spending of crab vessels and fishery participants from spending associated with other fishery and non-fishery activities, are not available (see Lowe, et al., 2006). Subsequently, King Cove businesses are believed to have received increased demand for services, comparable to pre-rationalization levels, as vessels continuing to participate in the crab fishery are believed to have spent more time in the area during the longer seasons (NPFMC, 2008). Aleutia, Inc. is the community entity representing King Cove. Originally established as a salmon marketing company, the company also represents Sand Point and King Cove as their halibut and sablefish Community Quota Entity for purchases of quota in those fisheries.

¹⁰ Peter Pan Seafoods is a wholly owned subsidiary of Maruha Corp., which also owns Westward Seafood operations in Dutch Harbor.

The economy of Akutan is heavily dependent upon the groundfish and crab fisheries in the BSAI and GOA. The community is home to one of the largest shore based seafood processing plants in the area and is also home to a floating processor. The community also provides some limited support services to the fishing community. In addition, Akutan is a Community Development Quota (CDQ) community. The vast majority of catch landed in Akutan comes from vessels based outside of the community. Most of those vessels focus primarily on pollock, Pacific cod, and crab. The large shore plant is operated by Trident Seafoods. The shore processor is a multi-species plant, processing primarily pollock, Pacific cod, and crab. Given that the plant is an AFA-qualified plant with its own pollock co-op, pollock is the primary species in terms of labor requirements and economic value. However, the shore plant also accounts for a significant amount of the regional crab processing, representing a significant amount of the processing value at the plant (EDAW, 2005). As with plants in Dutch Harbor and King Cove, crab has remained an important part of a diverse operation at the shore plant in Akutan, since implementation of the rationalization program. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of Akutan.

Although the economy of Kodiak is more diversified, compared to King Cove and Akutan, fishing is a significant contributor to the community economy. Excluding the USCG, four of the top ten employers in Kodiak, in 2003, were fish processors. Salmon and herring accounted for 42 percent of the total wholesale value during 2005. Halibut, sablefish, and other groundfish contributed 22 percent of the total wholesale value, while Tanner crab contributed less than 5 percent of the total wholesale value. Unlike Unalaska, King Cove, and Akutan, Kodiak is home to an extensive resident fishing fleet. The total number of vessels is fewer than 600, with fewer than 300 that actively fished in 2002. Total estimated gross revenue of Kodiak permit holders was \$111 million, for 2002. Kodiak is also home to numerous shore based processors, representing diversity in size, volume, and species processed. Species that typically contribute more than 10 percent of the total value are Pacific cod, pollock, and salmon. Rapid fleet contraction associated with the crab rationalization program is also thought to have affected Kodiak. Kodiak crew are estimated to have lost 125 positions in the Bristol Bay red king crab and approximately 60 positions in the Bering Sea snow crab fishery, in the first year of the program. A study of the effects of the rationalization program on Kodiak during the program's first year found anecdotal evidence suggesting declines in spending at some businesses, but evidence of a broad decline in total local spending could not be identified. The study cautioned that effects may lag, so these findings should be viewed as preliminary (Knapp, 2006). The City of Kodiak and the Borough of Kodiak are represented by Kodiak Fisheries Development Association, an entity formed for the sole purpose of holding rights of first refusal and crab quota on behalf of the city and borough.

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

As with St. Paul, St. George has depended primarily on processing of crab from the Bering Sea *C. opilio* fishery. Processing of crab in St. George has been exclusively by floating processors. Since 2000, little or

no crab processing has taken place in St. George. Prior to the rationalization program, the loss of processing activity was primarily attributable to the decline in crab stocks. Under the rationalization program, no processing has returned to St. George. Processing shares were subject to the 'cooling off' provision requiring the processing of landings with those shares to be undertaken in St. George. Yet, harbor breakwater damage caused by a storm has prevented deliveries to the community during the first two years of the program. Whether the community can attract crab landings in the future depends, in large part, on its ability to provide a harbor perceived to be safe by participants and processing capacity for deliveries. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of St. George.

Limited processing of catch from the Bristol Bay red king crab fishery on floating processors occurred in the communities of False Pass and Port Moller in the processor qualifying years. This processing qualified both communities for rights of first refusal under the program. No processing is believed to have occurred in either community since implementation of the program. And, neither community currently has a shore-based processing plant that supports crab processing. Port Moller has a salmon plant that is operated seasonally. Aleutian Pribilof Island Community Development Association, the local CDQ group in False Pass, is in the process of opening a processing plant in that community. At this stage, the plant does not support crab processing. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of False Pass. The right of first refusal for Port Moller is held by Aleutia.

2.3.5 Administration

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

2.4 Analysis of alternatives

This amendment package considers three changes to the current right of first refusal intended to make the right more effective for protecting community interests. Although the changes all serve a related purpose they have limited interactive effects. To simplify the analysis, each action is analyzed independently, with interactive effects discussed after those analyses.

2.4.1 Action 1 – Action to modify period to exercise right and perform under the contract

Alternative 1 – status quo – maintain 60-day period to exercise right and 120-day period for performance.

Under the current right of first refusal contract requirements, a community entity has 60 days from receipt of a contract defining a transfer from a PQS holder to exercise the right of first refusal. Within that time period, the community entity must inform the PQS holder that it is exercising its right and provide earnest money of 10 percent of the transaction amount or \$500,000, whichever is less. The 60 day period in which to exercise the right is intended to provide community entities with the opportunity to assess the merits of intervening in the transaction. For some entities, such as CDQ groups, decisions of whether to enter simple, low value, transactions may be made expeditiously; however, larger more complex transactions, could involve a more extended decision making process for a community entity.

For any transaction, the community entity must assess the value of the various items included in the transaction. PQS alone could be very costly.¹¹ In addition, under the current provision, other items included in the transaction would be subject to the right, which could drive up the transaction price substantially. Depending on its plans for use of the PQS and assets acquired in the transaction, a community entity may need to assess the value of each of these items independently or as groups of items, along with their value as part of the transaction, as a whole. To make these determinations, an entity may need to consult experts or conduct its own appraisals. In addition to the other steps involved in the decision making process, the entity may need to arrange financing. Depending on the purchase, financing arrangements may require substantial due diligence on the part of any financing party. Independent assessments of the transaction, including valuations of possible collateral may be necessary. In some instances the entity may undertake a public meeting process or take formal board action to make a purchase. Notice requirements may be applied to any such meetings. Each of these various steps in the decision making process requires time.

Community entities may also need to undertake considerations beyond those confronted by entities acting as simple business entities. For example, an entity may only wish to exercise the right, if it is confident that the assets will bring some type or level of benefit to the community. Achieving these benefits may depend on relationships with other community-based operations and commitments of residents. These relationships and arrangements may be complex, and commitments may take time to attain.

In addition to having a limited period of time to exercise a right, community entities also have a limited period of time in which to perform under the right of first refusal. Under the current rule, an entity exercising its right has 120 days from receipt of the contract to fully perform under the contract. This added time for performance is intended to provide the entity with adequate time to finalize financing arrangements, including all necessary due diligence by lenders. This extended period may also allow for the entity to make additional arrangements, such as partnerships for use of assets or transactions for portions of the assets that it may not wish to maintain.

The current time periods for exercise and performance of a right of first refusal may be adequate for a community entity that has an opportunity to enter a relatively straightforward transaction for a small amount of PQS; however, these time periods may pose a great challenge for a community entity that faces an opportunity to enter a complex and costly transaction. The complexities of both determining whether it is appropriate to enter a transaction, as well as arranging financing, may prove insurmountable for a community entity that has 60 days in which to make a determination of whether to enter a transaction, and then have only an additional 60 days (or 120 days from notice) to perform.

To date, the existing timelines are not reported to have prevented any community exercise of a right of first refusal; however, the absence of the timeline constraining participants should not be interpreted as suggesting that the timeline provides communities adequate time for decision making and performance. The absence of a constraint has occurred largely because PQS holders have worked with community entities when transferring PQS, rather than risking the exercise of the right by an entity. In effect, the timeline has not applied, as PQS holders have avoided triggering the right. Some community entities, however, have suggested that, based on their experiences attempting to determine whether to pursue a transaction for PQS and arrange financing for the transaction, the existing timeline for exercising the right and performing under the contract may be inadequate, particularly for large transactions.

¹¹ Since few transactions for PQS have taken place in the first few years of the program, price data cannot be released.

Since the time periods have not been affected by PQS sales, they have not directly affected PQS holders. The requirement of waiting 60 days to finalize a sale could affect a PQS holder that chooses to trigger the right, particularly, if timing of the transaction is important. In most cases, it may be expected that PQS holders will avoid triggering the right to prevent a transaction from being interfered with by the exercise of the right. This can be accomplished either by including the right holder in the transaction, or by agreeing to use 80 percent of the yielded IPQ in the community for 2 of the following 5 years. This approach by the PQS holder can also prevent possible delays in the transaction that could arise from the provision allowing the right holder 120 days from notice of the transaction to perform under the contract. Given the avenues available to a PQS holder to avoid triggering the right, the current timeline for exercise of the right and performance of the contract should pose little problem for a PQS holder wishing to transfer shares. Only in a situation where a PQS holder feels compelled to transfer shares quickly, and is negotiating with a buyer that refuses to use the yielded IPQ in the community are the time periods defined in the right of first refusal likely to be problematic for a PQS holder.

In general, the status quo time periods provide right holders with efficient decision making processes and existing financial arrangements with a reasonable opportunity to exercise and perform on a right of first refusal; however, entities that have a more public, time consuming decision making process or without well established credit arrangements are likely to be challenged by the existing time frame. PQS holders, on the other hand, have their business planning disrupted under the current arrangements, as finalizing transactions is delayed up to 60 days by the right.

Alternative 2 – 30-day extension of the periods to exercise and perform under the right

Under alternative 2 (the action alternative), after notice of a transaction and receipt of the contract terms, a community entity would be given 90 days to determine whether to exercise its right of first refusal and 150 days to perform under the contract. This extension of the time periods would be intended to better accommodate community entities, while continuing to recognize that time may be of the essence under a contract.

In considering whether to exercise a right of first refusal, a community must examine the merits of the transaction and arrange its performance. These factors suggest that an extended period for making a decision of whether to exercise a right could be beneficial to entities confronted by that decision. In some circumstances, a 30 day extension to a 90-day period could be adequate for an entity to better evaluate a transaction, access earnest money, make preliminary financing arrangements, and make an appropriate decision concerning the exercise of its right. The extension is likely to be particularly beneficial for decisions that require public notice and meetings. Whether these requirements apply likely depends both on the entity's governing rules and the size of the transaction. Even this extended time period, however, is likely to pose a challenge, if the transaction is large and includes a variety of assets other than the subject PQS. If time to exercise is extended 30 days, concurrently extending the time to perform will maintain the existing 90 day window between the deadline for exercising the right and performing under the contract. Adding 30 days to the periods for exercising the right and performing under the applicable contract may make the right of first refusal more accessible to community entities wishing to enter a contract to protect a community's interests.

Although lengthening the time for exercise and performance under the right may benefit community entities, lengthening those time periods could complicate transactions for parties affected by the right. PQS holders and those wishing to acquire PQS may invest substantial efforts arranging transactions. Time may be of the essence in these transactions, because of the seasonality of fisheries. Allowing an extended period for a community entity to exercise a right of first refusal may impinge on operations, if the time period extends into the fishing season. The extent of this disruption will depend on the transaction and its

timing. If the transaction includes assets other than PQS (such as processing equipment or groundfish fishery assets) the disruption could be of even greater significance. These factors all suggest that an extended time period for the decision of whether to exercise a right could be problematic for the parties to the transaction. Despite the potential benefits to community entities and the disruption for holders and buyers of PQS subject to the right by the proposed time period extensions, the structure of the right overall will limit any effect of the extensions.

Under the terms of the right, a PQS holder and buyer can prevent a community entity from intervening in the transaction, if the buyer agrees to grant a right of first refusal to the entity and to use 80 percent of the IPQ yielded by the transferred PQS in the community in two of the following five years. Although these concessions may affect the value of the assets transferred (including the PQS), the parties to the transaction can effectively limit the ability of the community entity to disrupt the transaction by exercising the right. This ability may limit both the difficulty posed by the time period extensions to PQS holders and the opportunity for community entities to acquire PQS under the right. As a result, the proposed time period extensions are likely to have only minor effects on PQS holders, the parties they might transact with, and community entities.

Overall, this action would have little or no affect on net benefits. The effects of the action are primarily distributional affecting the interests of PQS holders and communities and their representative entities. Any benefits would be derived from the additional power of community entities (and the spillover effects on the communities they represent) that is derived from the additional time to decide whether to exercise the right and the additional time to perform. The costs would arise from the disruption to business and potential loss of business opportunities that could occur from the extended time period to exercise the right and perform.

2.4.2 Action 2 – Action to remove provisions under which the right would lapse

Alternative 1 – status quo – maintain current provisions under which the right lapses

Under the status quo, processors eligible for an initial allocation of PQS that met right of first refusal qualification requirements were required to establish a right of first refusal contract, prior to the issuance of that PQS. Once in place, the contract establishing the right maintains that right until the right holder acquires the PQS, the holder of the PQS uses the yielded IPQ outside of the community for three consecutive years, or the right holder elects not to exercise the right on a transaction on which the right applies.

The two provisions under which the right lapses are intended to sever the right, once the community's tie to PQS is lost. The first provision is based on the premise that a community's nexus to the PQS is lost, if the yielded IPQ are used by the PQS holder outside the community for three consecutive years.¹² Removing this provision would establish a principle that the community's tie to the PQS should persist regardless of whether the IPQ are used outside the community for a continuous, extended period. The second provision is based on the premise that a community's nexus to the PQS is lost, if its representative elects not to exercise the right when it is triggered by a transfer to a buyer that intends to use the IPQ outside of the community.

Under this structure, the right of first refusal provides communities with a limited protection that is intended to survive only as long as the community maintains its connection to the processing shares.

¹² Since custom processing occurs without a transfer of IPQ, those IPQ may be used by a PQS holder outside the community by simply having the crab custom processed in another location.

Depending on the circumstances, over time, connections to processing shares may be lost. The decline in rights will likely vary across communities and processors. A community with several active processors is more likely to maintain its rights, as movement of processing among processors may occur within the community. Communities with a single active processor, and particularly those that have had all processing on floating platforms, are more likely to see their rights dissipate. Regional landing requirements may also affect whether rights are lost, as those limits affect opportunities for relocation of processing. Rights may continue in St. Paul in particular, as few alternative locations are available for processing in the North region. In addition, PQS holders intent on removing rights from their shares can divert processing activity to remove the right. In time, the amount of PQS subject to rights of first refusal will decline. The distribution of the rights among communities and PQS holdings will depend both on the circumstances in the communities benefiting from the rights and the PQS holders' processing choices (including choices that could be made for the purpose of extinguishing the right).

Alternative 2 – remove all provisions under which the right lapses and require holders of applicable PQS to maintain a right of first refusal contract at all times

Under this alternative, the provision under which the rights of first refusal on PQS lapse would be removed from the contracts establishing those rights and any rights that lapsed under the current rules would be required to be reestablished. In addition, the holders of PQS to which the right applied on implementation of the program would be required to maintain right of first refusal contracts at all times. Together, these changes would create a lasting nexus between PQS and the community from which it originated.¹³ The tie would persist regardless of whether the yielded IPQ are used outside the community for extended periods and whether the community might have attracted other IPQ.

Making the right persist indefinitely would establish a perpetual link between PQS and the community where processing occurred that led to the allocation of that PQS. This community/PQS association would be maintained regardless of whether the PQS holder used the yielded IPQ outside of the community for several years. In addition, once triggered by a transfer, the right would supersede the interests of other parties, including communities where the yielded IPQ have been processed in the intervening years. The exercise of a right in this circumstance could disrupt the dependence on the processing activity that developed in the community that attracted the processing. At the extreme, this dependence could arise from several years of processing activity. Community entities might also have multiple opportunities to acquire the PQS, since all transactions for use outside the community would trigger the right. So, a community entity that was unable or unwilling to intervene in a transaction for PQS may have a second opportunity to intervene in a future transaction to acquire those shares. This second opportunity may be important, if the circumstances and financing of the community entity changes or the second transaction is on more appealing terms, which could occur if fewer PQS or different assets are included in the transaction or prices change.

PQS holders are also affected by making the right indefinite in term. PQS would never be free of the right. To the extent that rights of first refusal diminish the value of these shares, that diminution would be perpetuated. Despite the existence of the right, it remains likely that for most transactions PQS holders and buyers will avoid triggering the right by agreeing to use the IPQ in the community to the extent required for avoiding triggering the right. In the long run, meeting this minimal requirement may be more difficult, particularly if processing activity is discontinued in some communities. In these circumstances, a community entity could gain significant leverage over the PQS holder and any potential buyer, who might need to add processing capacity to process landings in the community. In any circumstance, a buyer is

¹³ The only circumstance when a right would not apply would be if the representative community entity holds the PQS.

likely to run some risk, if the right is triggered by a transaction. Even if the community entity is without the wherewithal to exercise the right and perform under the contract, it is possible that the entity could be backed by a competitor of the PQS holder or buyer who wishes to acquire the PQS. The potential for this intervention is likely to lead the parties to most transactions to deal directly with the community, unless they structure the transaction to avoid triggering the right.

To the extent that the right is intended to protect community interests, that protection may be lacking, in part, because of its current lack of permanence. Yet, several other aspects of the right limit the effectiveness of the provision in protecting community interests. By its nature, the right only applies to transfers. Absent a transfer, shares may move freely among communities under other processing arrangements (including those internal to a company, as well as custom processing arrangements). This limitation on the right leaves a community entity unable to prevent the movement of processing from its community, as long as the PQS holder chooses not to transfer the shares. Establishing the right in perpetuity would prevent a PQS holder lapsing the right by moving shares outside of the community for three years prior to putting the PQS on the market. Lapsing of the right in this manner simplifies any transaction to sell the PQS (and other assets) by removing the encumbrance of the right. Extending the right indefinitely, as proposed, would require PQS holders to confront the community entity when transferring the PQS, either through triggering the right or through negotiations to avoid triggering the right. This modification will establish a permanent community interest in the PQS in community entities in the long run.

Administration of this action will require that PQS holders and right of first refusal holders report to NOAA Fisheries that contracts establishing the right of first refusal are maintained. Contracts could be required to be without expiration. No transfer would be approved until the person acquiring the PQS provides NOAA Fisheries with a copy of the required contract. Using this means of administration should ensure that contracts are maintained as required, without excessive burden to the parties to the contract or the administrators.

The overall effect of this action on net benefits is also likely to be very minimal. Any benefit would accrue to entities holding the rights and the communities they represent. By maintaining the right in perpetuity, these entities and communities would maintain an interest in the PQS and associated processing. Communities that attract processing associated with PQS subject to a right intended to benefit another community could experience some loss, if an entity intervenes in a sale of PQS or is otherwise able to attract processing to its representative community. Between communities, these changes are likely to be simple distributive effects, with one community losing activity that is drawn to another community. PQS holders could experience some loss of value of their interests, as PQS remain subject to the right may lose some value. This loss will most likely occur with respect to PQS that are linked by the right to communities that have less efficient processing operations. Most often this will be communities with fewer processors and limited processing activity (where processing operational costs may be greater).

2.4.3 Action 3 – Action to apply the right of first refusal to only PQS and assets in the community benefiting from the right

Alternative 1 – status quo – the right applies to the PQS and all assets included in the transaction regardless of their location

Under the status quo, a community entity's right of first refusal applies to a transaction that includes the subject PQS. The provision requires that an entity exercising the right accept all terms and conditions of the proposed transaction. Transactions may include a variety of assets, including processing equipment and real estate. Some of these assets may have no connection to the crab fisheries or the represented community. In these instances, a community entity may be unable to effectively use its right for several

reasons. Financing may be more difficult to obtain as the cost of these additional assets drive up the transaction price, reducing the feasibility for an entity to exercise the right. The entity may have no justifiable interest in assets unrelated to its host community. Acquiring these unrelated assets under the right may effectively require the entity to act as a broker for the assets to avoid maintaining those assets beyond its local interests. Entities without substantial capital (or that cannot access capital relatively quickly) may be unable to make the commitment necessary to exercise the right on large transactions.

Although application of the right to a transaction in its entirety may limit the effectiveness of the right for communities, it may also overcome difficulties that would arise were the right to apply only to a subset of the assets in the transaction, such as the PQS and assets in the community. If the right applies to a subset of the assets in the transaction, a valuation method must be adopted for determining the contract amount that must be paid on exercise of the right. The process for valuing the assets would be needed and the time allowed for the exercise of the right would likely need to be extended to accommodate that valuation. Applying the right to the transaction in its entirety also ensures that PQS holders will receive the expected compensation on the sale of the PQS and other assets, if the community entity elects to intervene in the transaction. While allowing a community entity to intervene in a transaction, the disruption of that intervention is limited, since the entity is required to perform under the contract as the buyer would have.

Alternative 2 - apply the right of first refusal to only PQS

Under this alternative, right of first refusal contracts are required to provide that the right shall apply only to PQS (excluding all other assets that might be included in the transaction). Any other assets included in the proposed sale would be excluded from the transaction. If assets other than the subject PQS are included in a sale, the price of that PQS shall be determined by agreement of the parties or, if the parties cannot agree on a price, by an appraiser jointly selected by the PQS holder and the entity holding the right. Several administrative aspects of the process are not defined by this simple description of the alternative. **The following discussion includes options for defining the administration of the right, which should adapted as a appropriate and specifically approved by the Council.**

To apply the right to only PQS (particularly when that PQS is a limited portion of a transaction), a method for determining the PQS price must be established. If the parties (i.e., the right holder and the PQS seller) can agree to a price, that price should be accepted. If not, the process for establishing a price must be defined. The first step in this process is indentifying the person (or persons) who will establish the value. **A jointly selected assessor is suggested by the current motion. No contingency is provided, if the parties cannot agree. A commonly used contingency will allow for each party to select one assessor, who jointly select a third. The Council could specify such a contingency, if it believes such an approach is appropriate.**

Even if the transaction includes only PQS, the Council should consider whether the right holder should be permitted to demand that an assessor to establish the price. A PQS holder may choose to sell the PQS separately from other assets, as a means of ensuring that it receives its expected return from a transaction. By subdividing the transaction, the PQS holder and the buyer can ensure that the price of PQS and the price of other assets are set at a level acceptable to both of those parties, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS carrying the bulk of the value of the transaction. In such a case, it may not be unreasonable for the right holder to demand an unbiased assessor to determine an appropriate price for the PQS.

Although it is assumed that the assessor should set a price that represents the fair market value of the PQS, **the Council should specify that the fair market value (or some other specific value) is the**

intended price. In some cases, it might be reasonable to require an assessor to consider the effect of the exercise of the right on other assets, the value of which might be substantially diminished if separated from PQS by the exercise of the right by a community entity. An assessor is likely to use some combination of two approaches to value PQS. Under the first, an assessor would look at comparable transactions for establishing a value. Few trades of PQS have occurred and little public information concerning those sales is likely to be available, as parties often limit access to this proprietary information. Given this dearth of information, assessors may choose to resort to an alternative method for valuing assets. The second approach that could be used is to examine the net revenue generation potential of the PQS. Using this approach, an assessor would consider the production using the PQS applying forecasted prices and costs in an attempt to develop a stream of net returns on the PQS, which should represent its market value. Given the prevalence of custom processing and the information concerning market prices for crab that are developed in the arbitration system, it is likely that at least some information will be available for making such a calculation. Whether reliable information concerning custom processing fees would be available is uncertain. Even with this information, the uncertainties of future markets, TACs, and costs will require that any assessor make assumptions to develop a price. These uncertainties could be a great disincentive to PQS holders considering a sale that includes other assets to which the right of first refusal applies.

An additional procedural effect that arises from applying the right of first refusal to only PQS, if other assets are included in a transaction, is that a potential delay in completion of the sale may be needed to accommodate price setting. The extent of the delay will depend on the specific process identified for selecting the assessor(s) and setting the price. The revised timeline should likely include a period during which the parties select the assessor, a period for the assessor to establish the price, a period for the community entity to determine whether to exercise the right, and a period for the entity to perform under the contract. Since the price determination process may provide time for the entity to determine whether to intervene in the transaction and to arrange financing, it is possible that the current timing structure should be revised (shortening the time period for exercise of the right and performance) to prevent an excessive delay of the transaction. **As a part of the development of a process for determining the price of assets covered by the right of first refusal, the Council should consider revising the timeline for the right to include a time period for price setting (which may entail revising the time periods for exercising the right and performing under the contract).** If the contract is for PQS only, the current timeline could be maintained. A **modified timeline** should specify:

- 1) the time by which parties need to select an assessor (if they cannot agree on a price),
- 2) the time by which the parties each need to select an independent assessor (if they cannot agree on a single assessor),
- 3) the time by which the selected assessors need to select a third assessor,
- 4) the time by which the assessor must set a price (can be the same whether selected by parties or their individually identified assessors),
- 5) the time by which the right holder must notify of its intent to exercise the right,¹⁴ and
- 6) the time by which the right holder must perform.

In considering these requirements, the Council should also consider the distribution of the costs of administration. **The party or parties that are required to pay assessor costs should be specified by the Council as a part of the action.** Requiring a PQS holder to fund assessor costs might be argued to be

¹⁴ It is assumed that the requirement that an entity exercising the right would need to provide earnest money of 10 percent of the contract amount or \$500,000, whichever is less, at the time it exercises the right would continue to apply under this new time frame.

unfair, since the PQS holder receives no benefit from the right and its business is disrupted by the right. On the other hand, right holders may be in a poor position to fund the assessor costs.

Notwithstanding the specific development of this action, PQS holders are likely to respond to the application of the right to only PQS in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement, the PQS holder may need to provide something of value to the entity, which could be financial remuneration, a portion of the PQS, or an agreement to use the yielded IPQ in the community for a period of time. A community entity may have little leverage in this negotiation, if the PQS holder knows that the entity is without the wherewithal to exercise the right, but could receive some compensation for the security it provides by indicating its intent to allow the sale. CDQ groups that represent communities are likely to be better positioned than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests.

Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the requisite period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder (regardless of whether the Council decides to adopt an amendment that extends the right under Action 2). This approach would apply, only if the person acquiring the PQS is willing to use 80 percent of the yielded IPQ in the community for two of the following five years. After meeting that requirement, the IPQ may be used outside the community.

A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.¹⁵ To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. In addition, this tactic may be ruled out, if the Council decides to extend the rights indefinitely under Action 2.

A variety of contractual arrangements can be made to ensure that the PQS holder receives reasonable value for the PQS, particularly in cases where the value of the assets is highly dependent on the accompanying PQS. The extent to which these different arrangements might circumvent the Council purpose for applying the right to the PQS exclusively depends on the Council's goal for this change and the specific terms of the right defined by the Council in this action. If the Council allows PQS holders to separate the PQS from other assets in a transaction without allowing the right holder to compel a review of the price of the PQS, it is possible that PQS holders will inflate price of PQS in a transaction to protect their interests in not only the PQS, but other assets in the transaction.

The right will continue to be a consideration for PQS holders looking to dispose of their PQS interest. Currently, PQS holders considering a transfer of their PQS are reported to typically contact the right holding entity. In some instances, these communications have resulted in the acquisition of the PQS by the entity; in others, the PQS transfers have been accommodated by the right holder. In some instances, the PQS transfers have been structured to avoid triggering the right, signaling that the use of the PQS is intended to be continued in the community. The involvement of right holding entities in these transactions is likely to continue in the same manner with any change in the scope of the right.

¹⁵ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

The administrative burden arising from this alternative cannot be determined until the alternative is fully specified. Most importantly the process for the determination of the value of assets covered by the right is defined. This process is largely intended to operate independent of the agency administration. Yet, it is possible that right holders or PQS holders may ask that the agency to intervene, if one believes that the other party or an assessor is not complying with the requirements. These types of appeals could be very time consuming and challenging, as they may require the agency to establish a value (or at least review an assigned value) for PQS, or review other aspects of a privately conducted process. In either case, the review of the case by the agency would delay the completion of a transaction, which could be problematic for the parties to the transaction.

Overall, this alternative is likely to strengthen the position of right holders by limiting the size of any transaction on which they hold rights of first refusal. Limiting the scope of the right to PQS could also be argued to be more consistent with the rationale for the right, as the community's interest in PQS and associated processing arising from historic processing is the interest that is intended to be protected by the right. Yet, limiting the scope of the right in this manner may be more disruptive to business operations of PQS holders and buyers. By applying the right to PQS, the ability of these parties to finalize business transactions could be jeopardized. This effect is likely to be minimal, as PQS holders and buyers may still avoid the triggering the right by agreeing to use the yielded IPQ in the community for a period of years. The end result could be a slight reduction in PQS prices and processing efficiencies.

Alternative 3 - PQS and assets in the benefiting community

Under this alternative, right of first refusal contracts are required to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. In the event other assets from outside the community are included in the proposed sale, the price of the PQS and community based assets to which the right applies shall be determined by an appraiser jointly selected by the PQS holder and the entity holding the right. As with the previous alternative, several administrative aspects of the process will need to be defined to implement this provision. Since many of these issues apply to both alternatives, the analysis of this alternative relies largely on the analysis of the preceding alternative.

In addition to the need to determine a price for assets, this alternative will require that a process be developed for identifying items that are not based in a community, which would be included in the sale under the right. Many assets are mobile and can be moved among communities. For example, a company that sells its PQS with its floating platform may be confronted by a community (or processor) claim that the floating platform is (or is not) a community based asset. To develop an amendment, the Council must consider a process for resolving which assets are subject to the right. In any case, it is likely that disputes will arise in the case of assets that are not fixtures (or equipment that could be removed from the community). The Council could consider a process for resolving these types of types of disputes, but in most cases, the resolution would be subject to some interpretation of the arbiter of that dispute. **The Council could specify that the same assessor would be used for determining which assets are based in a community, as would be used for determining the price.**¹⁶

In addition to defining the process for specifying community-based assets, the **standard for an asset to be community-based must also be specified.** For example, the Council could provide that an asset that

¹⁶ To avoid this complication the right could be applied only to the PQS. Removing other community based assets from the contract could radically change the position of the PQS holder, who may have little or no use for those assets without the PQS, effectively reducing the value of those assets substantially. The effect of this separation of PQS from other assets will vary depending on the circumstances.

is in a community for more than 185 of the preceding 365 days would be considered to be community based. Alternatively, the Council could define community based in a more operational manner, linking the right application to assets that were used for processing in the community in the preceding season. It should be noted that under either of these provisions, the rule might be applied to a floating processor used in the community, despite the extensive use of the floater in other locations at other times in the year. If the Council intends assets such as floaters to be excluded from the right, it should define "community-based" in a manner that excludes these assets. To avoid the inclusion of these mobile assets, the Council could adopt a definition of community based that includes only real property (including buildings and other fixtures); however, this definition may be problematic, as mobile items on which an operation depends (e.g., fork lifts) would be excluded from the transaction. To ensure that the right satisfies its intended purpose, the Council should carefully define assets to which the right applies. Despite these efforts, it is possible that the parties could dispute the scope of any sale.

Assuming that assets to which the right will apply are well defined, values must be established for those assets independent of other assets (from outside the community) that might be included in the transaction. The establishment of the price could use the same assessment process defined for the previous alternative. Under that structure, the parties either agree on a price, select a single assessor, or each select an assessor who jointly select a third assessor. Whether it favors this process or another, **the Council should fully specify the process for establishing the price for transactions under this alternative, including assigning costs of any assessor to the parties.**

As under the preceding alternative, **the Council should consider revising the timeline for the right.** Under this alternative, the timeline should accommodate the time period for selecting the assessor(s), with **an additional time period for determining which assets will be included in the transaction.** This determination should be followed by a time periods for price setting, exercise of the right and performance.

As under the previous alternative, PQS holders are likely to attempt to limit the disruption of their business by the right. Negotiated agreements with the right holding community entities are likely to be used to prevent intervention in transactions. These agreements are likely to include some concession of the PQS holder, such as financial remuneration, a portion of the PQS, or a commitment by the buyer to use the PQS in the community. These concessions are likely to vary with the negotiating leverage of the right holders. For example, CDQ groups that hold rights are likely to be in a significantly better position to extract concessions that other right holders with fewer assets.

Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the requisite period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder. If the buyer is not willing to use 80 percent of the yielded IPQ in the community for two of the following five years, this method could not be used to limit application of the right.

Depending on the Council's action with respect to the tenure of rights, it could be possible for a PQS holder to eliminate the right by using the PQS outside the community for 3 consecutive years prior to the transfer, causing the right to lapse.¹⁷ Eliminating the right would provide a PQS holder with the greatest flexibility to sell the PQS (provided the Council does not eliminate the provision under which rights lapse).

¹⁷ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

PQS holders might also subdivide the transaction, selling the PQS and community based assets separately from other assets. The ability to use various transaction structures to protect a transaction from the right will depend on the Council's choices for defining assets that are subject to the right and pricing. If pricing is reviewed by an independent assessor, PQS holders may be less inclined to manipulate contract structures prevent exercise of the right. Whether contracts are structured to include or exclude certain assets will depend on the circumstances of the parties, as well as the nature and condition of the assets. In some instances, it is possible that items (including those based in the community under any definition) could carry liabilities that the right holder may wish to avoid, creating a disincentive for exercise of the right. In any case, the potential for a PQS holder and buyer to structure a transaction to discourage exercise of the right should be considered. The less ability of the right holder to challenge the transaction, the more likely the parties are to resort to these tactics. Despite this potential, in fashioning an provisions allowing right holders to challenge the structure of a transaction, the Council should consider that right holders may use challenges to exert leverage on PQS holders. Delaying a transaction may be used to extract concessions from the PQS holder and buyer. The appropriateness of this practice depends on the purpose for establishing the right.

The administrative burden arising from this alternative cannot be determined until the alternative is fully specified. Processes for determining assets covered by the right and prices must be defined. As with the previous alternative, these aspects of the right may require agency oversight, if a party believes that the system is not being adhered to. This oversight could be very time consuming and costly to both the agency and parties, particularly PQS holders who might be unable to complete a transaction because of the delay.¹⁸

Depending on its definition, this alternative should create an opportunity for a community entity to exercise a right of first refusal solely on assets that are of interest to the community that it represents. The effects of the action will depend, in large part, on the specific definition of the right. While right holders will benefit from the changes brought on by the action, PQS holders may see some diminution in the value of PQS subject to the right, as transactions that include PQS will be subject a right that could facilitate greater community entity intervention.

2.4.4 Conclusion

In its current form, the right of first refusal provides a community entity with some leverage in the event a PQS holder wishes to transfer PQS. Yet, a PQS holder may take several measures to limit the effectiveness of the right. The measures proposed in this amendment package will strengthen the position of the community entity slightly; however, these measures are unlikely to substantially change the negotiating position of a right holder, particularly if the PQS holder is determined to undermine that negotiating position. More realistically, the right (either in its current form or as modified by the proposed action) will provide community entities (and the communities that they represent) with both negotiating leverage and political leverage, in the event that a PQS holder wishes (or attempts) to move IPQ use from a community to the detrimental of the community.

2.4.5 Net benefits to the Nation

The actions proposed in this amendment package are largely intended to assist communities in maintaining historic processing interests in the crab fisheries. The overall effect will be a slight

¹⁸ It should be noted that the delay could prevent a transaction that is based largely on assets unrelated to the crab fishery that are brought into the transaction because they are based in the applicable community.

strengthening of the right held by community entities. This change could impose slight efficiency losses on PQS holders and buyers, but the overall effect on net benefits to the Nation are expected to be minimal.

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.

3.1.1 Definition of a Small Entity

The RFA recognizes and defines three kinds of small entities: (1) small businesses; (2) small non-profit organizations; and (3) 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 Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community "right of first refusal" agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.

To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now owning between 20 percent and 50 percent of the PQS in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.

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 clarify and strengthen the opportunity of entities holding rights of first refusals on transactions that include PQS to more effectively exercise those rights. 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

This action directly regulates holders of PQS and community entities holding the rights of first refusal.

Estimates of small entities holding PQS are based on the number of employees of PQS holding entities. Currently, 21 entities hold PQS subject to rights of first refusal. Estimates of large entities were made, based on available records of employment (see Department of Labor and Workforce Development, 2008) and analysts' knowledge of foreign ownership of processing companies. Of these 21 entities, 10 are estimated to be large entities, leaving 11 judged to be small entities.

Five community entities hold rights of first refusal on behalf of eight communities

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

The reporting, record keeping, and other compliance requirements will be increased under the proposed rule. Under Action 1, no change in recording keeping will arise, as the action only changes the time periods for exercise of the right of first refusal and performance under the contract. Under Action 2, reporting, record keeping, and compliance requirements will be increased, as PQS holders will be required to maintain a contract establishing a right of first refusal at all times.

The effects of Action 3 on reporting, recordkeeping, and other compliance requirements cannot be determined at this time.

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

[To be added]

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 while 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 by ensuring that community interests are adequately protected by the rights of first refusal. 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 community interests in establishing the rights of first refusal. The action is intended to ensure that community social and cultural interests are adequately protected.

National Standard 6

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

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.

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.

This action is intended to minimize potential adverse effects on communities and ensure sustained community participation in the fisheries by ensuring that historically dependent communities are adequately protected by the rights of first refusal.

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 do not 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.

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December 23, 2009

Mr. Doug Mecum
Acting Regional Director
National Marine Fisheries Service
P.O. Box 21668
Juneau, AK 99802

Dear Mr. Mecum:

Section 305(c) of the Magnuson Stevens Fishery Conservation and Management Act provides authority for rule making to address an emergency. Under that section, a Council may recommend emergency rule making, if it finds an emergency exists. At its December 2009 meeting, the Council voted 10 to 1 to request that NOAA Fisheries promulgate an emergency regulation to suspend the regional delivery requirement in the Western Aleutian Islands golden king crab fishery for the remainder of the 2009-2010 crab fishing year. In August of 2009, Adak Fisheries, the only operator of a crab processing shore plant in the West region declared bankruptcy. Since that time, the plant has not operated. Although efforts are underway to open the plant this winter, the status of its operation remains very uncertain and, given the circumstances, it is reasonable to believe that the plant will not open. In addition, the Council believes that it is not economically feasibility to make alternative processing arrangements in the region (such as the introduction of a floating processor). In the absence of emergency rulemaking, these circumstances are likely to result in 50 percent of the catcher vessel TAC remaining unharvested, with the fishery failing to meet optimum yield.

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 current fishery is disrupted as no feasible processing capacity will be available this season in the West region. 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, "*controversial 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, thereby suggesting that the action would be non-controversial. While the proposed emergency rule does not appear to be controversial in any way, the circumstances are indeed extraordinary, as the unanticipated closure of the Adak plant leaves harvesters in the fishery without an alternative market for landings in the region.¹

¹ Although harvesters may be able to use the arbitration system to establish a contract for a landing with an IPQ holder, that contract is likely to be ineffective in compelling the IPQ holder to accept deliveries from the fishery in the West region. Instead, the contract would likely only be useful for establishing a claim against the IPQ holder for not accepting the deliveries, as no plants are operational in the West region. Such a course would be wasteful, only supporting litigation, rather than ensuring that the resource is utilized. The emergency rulemaking recommended here would allow for landings by permitting landings to occur outside of the West region, where several plants are operational.

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 first criterion is met, as the recent bankruptcy and closure of the Adak plant prevents deliveries at that facility. It should be noted that the Council took action recently that would exempt custom processing at the plant from the processor share cap, under the assumption that all processing would take place at the Adak plant. Although persistent rumors have suggested that the financial condition of the company operating the Adak plant was questionable, the bankruptcy proceeding and accompanying plant closure introduced new concerns surrounding the ability of the Adak plant to accept deliveries in the current season. This situation differs substantively from the situation in prior years, during which protracted negotiations delayed (but did not present an absolute barrier to) landings.

The second criterion also appears to be met, as the current situation is a result of a management structure under which the West region landing requirement now 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). The Council believes that leaving a substantial portion of the crab in this region unharvested constitutes a management problem.

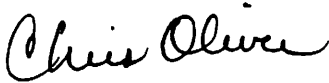
The third criterion is met, as the removal of the West region landing requirement will address the problem providing a clear and direct benefit to fishery participants, who would otherwise be unable to complete the harvest of allocations designated for West region landing. While the normal rulemaking process is the preferred avenue for making regulatory changes, as it provides interested parties the full ability to comment, the Council believes that in this case the cost of lost harvests definitely outweighs the benefit of using the more protracted, normal process that would be ineffective for addressing the immediate issue. While that benefit of the normal rulemaking process should not be diminished, it should be considered that the Council's recommendation came only after putting its consideration of this issue on its December 2009 meeting agenda and receiving a discussion paper describing the emergency rulemaking requirements and their applicability to the present circumstances. While not the normal process for Council decision making, this process provided interested parties with notice of the possible recommendation and opportunity to comment. Representatives of interest parties (including harvesters, processors, and affected communities) testified, all in support of the recommendation for emergency rulemaking.

Clearly, the public and interested parties benefit from additional opportunity to comment in the more protracted, normal rulemaking process. Yet, it should be considered that delaying its recommendation one meeting ensured that notice and opportunity to comment were provided to interested parties, and the Council received updated information concerning the bankruptcy and plant closure situation. This process has ensured that a portion of the value of advance notice, public comment, and deliberative consideration instilled in the normal rulemaking process would not be sacrificed, if emergency rulemaking is undertaken. Further, the Council has also initiated a typical plan amendment process to address this situation in a more permanent manner. This potential action is intended to provide an outlet for landings in the event that unforeseeable events prevent landings in the West region in a future season. The willingness of the Council to consider permanent action demonstrates its ongoing commitment to address this issue.

Doug Mecum
December 23, 2009
Page 3

In summary, given the absence of processing capacity in the West region, the Council believes emergency rulemaking is warranted. Without emergency rulemaking a substantial portion of the fishery will likely remain unharvested to the detriment of all participants. 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. On behalf of the Council, I am transmitting this request with the hope that such rulemaking can be accomplished in time for the upcoming season.

Sincerely,



Chris Oliver
Executive Director

cc: Dr. James Balsiger



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service

P.O. Box 21668

Juneau, Alaska 99802-1668

January 8, 2010

RECEIVED
JAN 13 2010

Mr. Chris Oliver, Executive Director
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99601

Dear Mr. Oliver:

Thank you for your letter, dated December 23, 2009, transmitting the North Pacific Fishery Management Council's (Council's) request that NMFS promulgate an emergency regulation to relieve the existing regional delivery requirement in the Western Aleutian Islands golden king crab fishery. Your letter explains that the Council determined that an emergency exists because, due to a recent unforeseen event, no processing facility is open in the West region yet federal regulations require that a portion of crab be processed in that region. In making this determination, the Council considered the NMFS policy guidelines for the development and approval of regulations to address emergencies.

We are in the process of preparing an emergency rule consistent with the Council's recommendation. If it is approved, we will strive to publish the emergency rule in the *Federal Register* by mid-February to relieve the West region delivery requirement for the remainder of this fishery.

Sincerely,

Robert D. Mecum
Acting Administrator, Alaska Region



Initial 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

February 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 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. 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, in the event that no shoreside processing facility is open to take delivery and process WAG IFQ. In that circumstance, the regional landing requirement needs to be relaxed to 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.

Option 1) In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.

Option 2) In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing, which shall not be unreasonably withheld. A contracting party's refusal to approve an exemption from the regional landing requirement is subject to binding arbitration. The arbitrator shall be selected from the list of arbitrators identified under the crab rationalization program, and the costs of the arbitration shall be split among the contracting parties. If the arbitrator finds that the contract party unreasonably withheld its approval of an exemption, the arbitrator may order that the requirement for that party's approval be waived and the exemption approved, provided that all other requirements for an exemption are satisfied.

Alternative 3:

Remove the West designation from IFQ and IPQ in Western Aleutian Islands golden king crab fishery.

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 second 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 holder most likely to operate in the West is the largest PQS holder, who also is the CDQ representative of Atka. 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.

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 shore plants in those communities by allowing the communities to intervene on their behalf; however, **to fully understand the implications of this requirement the entity that acts on behalf of the community will need to be specified.** Possible choices include the local government or some other representative community group (such as a CDQ group or an entity that otherwise represents the community under the crab program). 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 the intent of West regionalization is not fully forsaken by an exemption.

The exemption is generally established by an annual agreement of the required parties. Once those parties file and affidavit with NOAA Fisheries affirming the existence of such a contract, the exemption would be granted. Two options could be used to define when the exemption is available. Under the first option, 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.

Under the second option, required parties to the agreement are not permitted to unreasonably withhold consent to the agreement. Whether a decision of a party to withhold consent is reasonable could be challenged in an arbitration proceeding. If the arbiter were to determine that consent was unreasonably withheld, the consent of that party would not be required for approval of the exemption. Several possible concerns arise under this second alternative. First, no standard for determining when consent is unreasonably withheld is provided. Several issues arise under the arbitration system proposed. As with the first option, this option sets no timeline for filing of the agreement and establishing the exemption. While the flexibility of the absence of a timeline to apply for the exemption may benefit parties, omitting a timeline from this option could greatly complicate any effort to achieve the intent of the additional requirement that parties not unreasonably withhold consent to the exemption. In addition, the Council should consider whether other aspects of the arbitration system should be defined. Selection of an arbiter could be critical to the system functioning, as a party that opposes the exemption could simply delay in the selection to avoid arbitration altogether. Additionally, the scope of authority of the arbiter may be critical to the system serving its purpose. For example, a party to a proceeding may suggest that a community's interests are provided for by a payment to offset lost tax revenues. Alternatively, a processor may suggest that the exemption is appropriate, as it is willing to compensate a harvester for additional costs of delivering to a port outside of the West region. If the arbiter is without authority to require such a payment as a part of an arbitration decision, those offers of payment may not be relevant to the arbiters finding.

Overall, the effect of the first option 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.

Although the second option adds a limitation that would prevent a required party from unreasonably withholding consent to the exemption, the effects of the exemption are not much more predictable. Given that the purpose of the exemption is not fully described, judgment of whether consent was unreasonably withheld may vary with over time and with the person making the determination. If the Council wishes to add certainty to the exemption, it could define circumstances that the exemption will apply. In adding this definition, the Council would need to very specifically define circumstances in which the exemption applies, including the timing of those circumstances. In addition, the circumstances would need to be easy to assess, as fact-based determinations would need to be reviewed by NOAA Fisheries. Although NOAA Fisheries is capable of review of such determinations, verifying findings such as the lack of available processing capacity in a broad geographic region as of a particular date may be confounding. To develop an exemption that hinges on a contingency will require a very specific, easily verifiable standard.

Effects of removal of the West region landing requirement (alternative 3)

Under the third alternative, the West region landing requirement would be removed, allowing all IFQ catch in the fishery to be landed in any location. This clearly would remove any regulatory impediment to the delivery of IFQ arising from the absence of processing capacity in the West region. The overall effects of the action, however, are difficult to predict and are likely to depend on not only actions of harvesters and processors in the fishery, but also any outcomes from the arbitration system and conditions in other Aleutian Islands fisheries.

Processors maintain that prohibitive operating costs in the West region are a barrier to the development of additional shore-based processing capacity in the region. The operator of the one shore plant that has operated in the region recently declared bankruptcy. Whether a successor can operate the plant profitably is not known, and will likely depend on the success of groundfish operations in the region that are likely to be the foundation of any West region shore based processing operation.

Assuming a shore-based operation is maintained in the region, whether landings will occur at the plant (in the absence of the West region landing requirement) will depend on the cost of that operation and the operator. Clearly, if a holder of substantial PQS in the fishery operates the West region plant, its access to landings will be secure. To obtain landings beyond its PQS holdings, processing costs at the West region plant must be competitive with processing costs at plants outside the West region. The potential for IPQ leases and custom processing arrangements to bring processing to a West region plant will depend on several factors, including operational efficiencies at PQS holders' plants.

Among participants in the fishery, it is generally agreed that the proximity of any West region plant to the grounds will reduce harvester operating costs. In addition, the remoteness of the area contributes to increased costs for any processor operating in the region. If West region ex vessel prices were reduced as a result of these operating efficiency differences, it is possible that additional landings could be drawn to a West region plant. Price adjustments could arise from one of two sources. First, IFQ holders and IPQ holders that recognize these efficiency differences could negotiate a lower price for landings. Harvesters might be willing to sacrifice some price benefit to gain operational efficiencies, while the West region plant may attempt to pass on some of its added costs to harvesters through the lower ex vessel price. Although negotiations could be used to determine whether an ex vessel price discount might be applied in the West region, it is also possible that the arbitration system could determine whether such a discount arises.

While PQS holders benefit from flexibility of moving landings out of the West under this alternative, individual plant operators in the West may (or may not) be better off under this alternative than under the status quo. Under this alternative, a West region plant would need to be competitive with not only other plants in the West, but also plants outside of the West region. With the small fishery, the entry of a second processor in the region could undercut the position of the existing processor. Mobile processors may be adept at opportunistically entering and exiting the fishery in the West region, in response to crab markets and operating costs and other considerations. Only in the case of a plant owned by a substantial PQS holder will the plant have secure access to future deliveries. Vulnerability is likely greatest for any small, independent shore plant that might be unable to withstand competition over the course of a year or two. A larger, more established operation (with other plants and fishery operations) would be better positioned to maintain its operations at a West region plant despite a competing plant.

As with West region plants, community effects of this alternative are not fully predictable and may change over time. If a plant operates in a community in the West, it may be possible for that plant to attract a substantial portion of the processing in the fishery to the benefit of its host community. Attracting these landings will be contingent on a few factors. The plant's ability to maintain landings will clearly be increased by any PQS held by its owner. Since landings from this fishery are likely a small portion of any plant's portfolio, it is unlikely that landings from this fishery will be determinative of a plant's overall success. In the absence of the West region landing requirement, it seems unlikely that any mobile plant would be moved to the region to handle crab deliveries, as most PQS holders could access other processing facilities. As a result, any stable and reliable community benefit that would arise under this alternative is likely to come from a multispecies plant that depends primarily on groundfish. Adak is the most likely location to support this processing in the near term. Whether the Adak shore plant can successfully attract landings in the fishery is uncertain. The current owner of the plant holds PQS in the fishery that can support approximately one delivery; additional deliveries would likely be needed to

justify a processing operation and to have a noticeable community benefit. Atka could also benefit from landings in the future, should the plant owner expand operations to include crab processing capacity. The owner of that plant holds a larger portion of the PQS pool to use as a basis for the operation; however, any capacity development in the area would depend on whether the operation could be competitive with plants outside the region. If subsidized by the PQS holder, who is also a CDQ group, the operation could likely be successful, but if and when this expansion of the Atka facility is pursued will depend on its priority relative to other community projects.

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 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 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. In response, the Council recommended that NOAA Fisheries undertake emergency rulemaking providing an exemption in the current (2009-2010) season² 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.

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, in the event that no shoreside processing facility is open to take delivery and process WAG IFQ. In that circumstance, the regional landing requirement needs to be relaxed to 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 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.

- Option 1) In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.
- Option 2) In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing, which shall not be unreasonably withheld. A contracting party's refusal to approve an exemption from the regional landing requirement is subject to binding arbitration. The arbitrator shall be selected from the list of arbitrators identified under the crab rationalization program, and the costs of the arbitration shall be split among the contracting parties. If the arbitrator finds that the contract party unreasonably withheld its approval of an exemption, the arbitrator may order that the requirement for that party's approval be waived and the exemption approved, provided that all other requirements for an exemption are satisfied.

Alternative 3:

Remove the West designation from IFQ and IPQ in Western Aleutian Islands golden king crab fishery.

The Council should consider that the alternatives do not closely parallel the above purpose and need statement. Neither alternative includes a specific requirement that no shoreside processing facility be operational prior to exempting IFQ and IPQ from the regional landing requirements. To address this inconsistency, the Council should consider revising either the purpose and need statement or alternatives. A revision to the purpose and need statement could simply identify the absence of reliable shore-based processing capacity in the region as the problem. That problem might be addressed by either of the alternatives.

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 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 in the few years leading up to implementation of the program (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 shares, 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 IFQ, 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 IFQ to harvest 1 percent of the annual total allowable catch (TAC) in the fishery. Ninety percent of the catcher vessel owner IFQ are issued as "A shares" or "Class A IFQ," which must be delivered to a

processor holding unused IPQ.⁴ The remaining 10 percent of these annual IFQ are issued as “B shares” or “Class B IFQ,” which may be delivered to any processor.⁵ Processor quota shares (PQS) are long term shares issued to processors. These PQS yield annual IPQ, which represent a privilege to receive a certain amount of crab harvested with Class A IFQ. IPQ are issued for 90 percent of the 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 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 are 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 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 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.

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.

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).

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 to 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).

pqs

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 harvesters 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 has increased catch rates.

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 2005, the first year of the rationalization program (Table 8).⁷ In the second year, an abundance of competing small sized red king crab imports further weakened prices. Going into the third year of the program it was thought that the price could remain at a lower level because the demand for golden king crab does not seem to have increased substantially. Overall, the increase in demand for crab products was expected to result in either stable or perhaps slightly rising prices for golden king crab in 2008 (Sackton, 2007). In the 2008/9 season, Alaska crab fishermen and processors were the beneficiaries of good timing, as king crab inventories were depleted. This situation, together with a relatively strong Japanese market, led to golden king crab prices approaching historic highs. Since that time, the weakness of the market, particularly large retail and food service markets 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) concluded that “[t]here is a very real potential...that the value of golden king crab could decline to a point where 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).

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.

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 dominates these data, in some cases 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.

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 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 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 August 2009, a different company assumed majority ownership of Adak Fisheries, and in early September, Adak Fisheries officially filed for Chapter 11 bankruptcy.⁸ The company had several unpaid creditors, 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 Enterprise's lease to Adak Fisheries was scheduled 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 the 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 in

⁸Source: Seafoodnews.com.

⁹Case 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.

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 Seafoods Corporation, which expressed an interest in purchasing certain assets, and after adjustment for differences between 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 Because the sale order specifically states that all parties reserve all rights with respect to the lease, the complaint is still before the Court. Since the beginning of the year (the scheduled expiration of the lease), Aleut Enterprises has filed papers to remove Adak Fisheries from the leased premises. To date, Adak Fisheries is believed to have maintained occupancy of the plant. Given these circumstances, it remains uncertain whether a shore-based plant will be operational in Adak in the near or long-term future. NOTE - THIS WILL BE UPDATED AS CIRCUMSTANCES CHANGE.

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

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.

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 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 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 outweigh the benefit of using the more protracted, normal 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 processing capacity in the region presents an unacceptable problem.

2.4.2 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 expected 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 from 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

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).

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 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 regionalization of the Western Aleutian Islands golden king crab fishery in the crab program, the Council was aware that Atka would be positioned to 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.

2.5 Analysis of alternatives

This section of 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 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. It is clear that an arbiter cannot compel an IPQ holder 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

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.

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 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 stranded 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 for 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.

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 with a 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).

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, 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 is another 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.

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.

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 and 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, 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 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 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 (and any other available shore plant in the region). This competition will occur, only if the processor is able to compete profitably, which is not known.

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.

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 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 relative 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 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. 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 other side, a new plant may be planning to (and be fully capable of opening) but have no ability to ensure

¹⁹ In the past, the 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.

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 shore plants in those communities by allowing the communities to intervene on their behalf; however, **to fully understand the implications of this requirement the entity that acts on behalf of the community will need to be specified.** Possible choices include the local government or some other representative community group (such as a CDQ group or an entity that otherwise represents the community under the crab program). 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, the Aleut Enterprise Corporation has opposed a continuation of its lease to Adak Seafood in court proceedings, seeming to have lost faith in Adak Seafood ability to operate the plant profitably and perform under the lease. The Aleut Enterprise Corporation is also the representative of Adak for purposes of managing its allocation of crab under the program. If the Aleut Enterprise Corporation were to be the community representative for purposes of the exemption, it is possible that the Aleut Enterprise Corporation would consent to the exemption, in part to ensure that a market exists for landings from the fishery in the event that Adak Seafood is unable to operate the Adak plant. It should be noted that this discussion is largely speculative, as no exemption provision currently exists and the Aleut Enterprise Corporation is not known to have a position with respect to any exemption.

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 the intent of West regionalization is not fully forsaken by an exemption. 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 efficiency of scale is 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. Two options (contained in the following provisions) could 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.

Option 1) In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing.

Option 2) In the affidavit, each of the parties as defined above, or their authorized representative, must signify their approval of the exemption in writing, which shall not be unreasonably withheld. A contracting party's refusal to approve an exemption from the regional landing requirement is subject to binding arbitration. The arbitrator shall be selected from the list of arbitrators identified under the crab rationalization program, and the costs of the arbitration shall be split among the contracting parties. If the arbitrator finds that the contract party unreasonably withheld its approval of an exemption, the arbitrator may order that the requirement for that party's approval be waived and the exemption approved, provided that all other requirements for an exemption are satisfied.

Under the first option, 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.

Under the second option, required parties to the agreement are not permitted to unreasonably withhold consent to the agreement. Whether a decision of a party to withhold consent is reasonable could be challenged in an arbitration proceeding. If the arbiter were to determine that consent was unreasonably withheld, the consent of that party would not be required for approval of the exemption.

Several possible concerns arise under this second alternative. First, no standard for determining when consent is unreasonably withheld is provided. The term generally means "not conformable to reason, irrational, beyond the bounds of reason or moderation".²⁰ Although this general definition may provide some assurance that an arbiter will have broad authority to judge the circumstances, the use of this general term provides little certainty to parties assessing whether consent can be denied. For example, it is not clear that a community could not reasonably withhold consent based on an argument that the West region landing requirement is intended to require PQS holders to establish processing capacity in the West region, except when prevented by circumstances beyond their control. While the closure of the Adak plant this year may have be argued to be an unanticipated circumstance that justifies the exemption, that circumstance may not justify the exemption in a future year should a community suggest that the purpose of the West region landing requirement is to ensure processing occurs in the region. Given this

²⁰ See Gifis, Steven, Law Dictionary, Second Edition, Barron's Educational Series (1984).

uncertainty, the Council should consider whether to provide additional direction to any arbiter to ensure the exemption is available as intended (and only as intended).

Several issues arise under the arbitration system proposed. As with the first option, this option sets no timeline for filing of the agreement and establishing the exemption. While the flexibility of the absence of a timeline to apply for the exemption may benefit parties, omitting a timeline from this option could greatly complicate any effort to achieve the intent of the additional requirement that parties not unreasonably withhold consent to the exemption. To implement such a limitation, the party objecting to a party withholding consent would need to know when arbitration comes available. Delaying arbitration into a season may be reasonable, if processor capacity that is being developed may be available (or if a reasonable effort is being made to access capacity). On the other hand, if processing capacity is clearly unavailable, it may not be reasonable to delay a determination. To make the arbitration system administrable, the process for the selection of an arbiter should also be defined. In addition, the Council should consider whether other aspects of the arbitration system should be defined. Selection of an arbiter could be critical to the system functioning, as a party that opposes the exemption could simply delay in the selection to avoid arbitration altogether. Additionally, the scope of authority of the arbiter may be critical to the system serving its purpose. For example, a party to a proceeding may suggest that a community's interests are provided for by a payment to offset lost tax revenues. Alternatively, a processor may suggest that the exemption is appropriate, as it is willing to compensate a harvester for additional costs of delivering to a port outside of the West region. If the arbiter is without authority to require such a payment as a part of an arbitration decision, those offers of payment may not be relevant to the arbiters finding.

In developing the administrative aspects of the option and considering the appropriateness of this option, the Council should consider that any arbitration decision must be appealable to NOAA Fisheries, as NOAA Fisheries cannot delegate its authority over administration of the fishery. During an appeal, the exemption would not be available, as the respective interests of the parties would be lost, if landings under the exemption occurred. As a consequence, any timeline for administration of the arbitration system should include time not only for the arbitration but for a subsequent appeal to the agency. These appeals are known to be time consuming suggesting that the timeline should allow considerable time for any appeal. If the Council wishes to pursue this option, it should consider more fully developing these administrative aspects of the arbitration system.

Overall, the effect of the first option 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.

Although the second option adds a limitation that would prevent a required party from unreasonably withholding consent to the exemption, the effects of the exemption are not much more predictable. Given that the purpose of the exemption is not fully described, judgment of whether consent was unreasonably withheld may vary with over time and with the person making the determination. If the Council wishes to add certainty to the exemption, it could define circumstances that the exemption will apply. In adding this definition, the Council would need to very specifically define circumstances in which the exemption

applies, including the timing of those circumstances. In addition, the circumstances would need to be easy to assess, as fact-based determinations would need to be reviewed by NOAA Fisheries. Although NOAA Fisheries is capable of review of such determinations, verifying findings such as the lack of available processing capacity in a broad geographic region as of a particular date may be confounding. To develop an exemption that hinges on a contingency will require a very specific, easily verifiable standard.

As proposed, the exemption would apply if the parties agree that no shoreside processing plant would be available for the processing of crab in the region for the season.²¹ This requirement could lead to complications in administration of the exemption, particularly if a person (including one not required to be a party to the agreement) contends that processing capacity is available in the region. Such an assertion could require a NOAA Fisheries finding of the absence of an available West region processing plant, which may be difficult to establish. If the Council believes that all relevant interests are represented by the identified parties to the agreement, it could simply allow the parties to establish the exemption on an annual basis by agreement. An alternative could be to simply require that the required parties all agree to the exemption, in which case NOAA Fisheries would grant the exemption.

2.5.3 Alternative 3 – Removal of West region landing requirements

Under the third alternative, the West region landing requirement would be removed, allowing all IFQ catch in the fishery to be landed in any location. This clearly would remove any regulatory impediment to the delivery of IFQ arising from the absence of processing capacity in the West region. The overall effects of the action, however, are difficult to predict and are likely to depend on not only actions of harvesters and processors in the fishery, but also any outcomes from the arbitration system and conditions in other Aleutian Islands fisheries.

Processors maintain that prohibitive operating costs in the West region are a barrier to the development of additional shore-based processing capacity in the region. The operator of the one shore plant that has operated in the region recently declared bankruptcy. Whether a successor can operate the plant profitably is not known, and will likely depend on the success of groundfish operations in the region that are likely to be the foundation of any West region shore based processing operation.

Assuming a shore-based operation is maintained in the region, whether landings will occur at the plant (in the absence of the West region landing requirement) will depend on the cost of that operation and the operator. Clearly, if a holder of substantial PQS in the fishery operates the West region plant, its access to landings will be secure. To obtain landings beyond its PQS holdings, processing costs at the West region plant must be competitive with processing costs at plants outside the West region. If costs are competitive, the plant could attract landings through IPQ leases or custom processing arrangements. In the case of Akutan, if the local CDQ group were to develop crab processing capacity, it is possible that a premium price might be offered to obtain community development benefits. Similarly, in Adak, if the Aleut Enterprise Corporation were to develop capacity, it might subsidize processing to ensure landings for community development purposes. In both cases, these decisions would depend on the ability of the community entity's ability to provide subsidization. Akutan's CDQ group is likely more financially capable of developing this subsidy, but the Aleut Enterprise Corporation might use its allocation of golden king crab (of 10 percent of the TAC in the Western fishery) as a basis for any subsidy. While

²¹ If the Council elects to maintain a requirement that no processing capacity be available in the region for the exemption to be merited, it should consider whether the presence of floating processing capacity should affect the exemption. In its recent action concerning processor share use caps, the Council elected to exempt from the use cap custom processing at a floating processor docked in a community and custom processing any floating processor in the community of Atka.

private interests are not likely to subsidize operations in the same manner, it is possible that operational considerations, such as ensuring that crews in residence have work, could affect pricing of IPQ leases and custom processing arrangements. The potential for these leases and custom processing arrangements to bring processing to a West region plant will depend on several factors, including operational efficiencies at PQS holders' plants. For example, a PQS holder with a plant outside of the West region that uses periodic landings of golden king crab at that plant to level its production and make better use of plant crew might be unwilling to reroute deliveries to a West region plant.

Among participants in the fishery, it is generally agreed that the proximity of any West region plant to the grounds will reduce harvester operating costs. In addition, the remoteness of the area contributes to increased costs for any processor operating in the region. If West region ex vessel prices were reduced as a result of these operating efficiency differences, it is possible that additional landings could be drawn to a West region plant. Price adjustments could arise from one of two sources. First, IFQ holders and IPQ holders that recognize these efficiency differences could negotiate a lower price for landings. Harvesters might be willing to sacrifice some price benefit to gain operational efficiencies, while the West region plant may attempt to pass on some of its added costs to harvesters through the lower ex vessel price. Although negotiations could be used to determine whether an ex vessel price discount might be applied in the West region, it is also possible that the arbitration system could determine whether such a discount arises. Under the arbitration system, the arbiter is directed to establish a price that preserves the historic division of the first wholesale price between harvesters and processors while considering a variety of other factors, including the timing and location of deliveries and efficiency of the harvesting and processing sectors. It is unclear whether an arbiter might find that a price adjustment is appropriate for deliveries in the West region. In addition, it may be difficult to fully understand the influence of delivery location on a finding, because of the last best offer structure of the arbitration and the possible influence of other factors on the finding.

In considering the effects of this alternative on harvesters, the dynamics of the scheduling and pricing of deliveries must be considered. Under the status quo, it is not clear whether harvesters could compel a processor to pay equal prices for deliveries in the West region and outside of the West region through the arbitration system. In other words, it is not known whether an arbitrator would establish a contract for West region deliveries that effectively binds processors to accept deliveries using West region IPQ on similar terms to deliveries of undesignated IPQ. If so, it is possible that harvesters might be better off under the status quo.²² On the other hand, if an arbitrator were to discount the ex vessel price for landings in the arbitration system, it is possible that the removal of the West region landing requirement under this alternative could be beneficial to harvesters by providing more certainty for deliveries, albeit with higher operating costs.

As with QS holders, the extent to which PQS holders will benefit from this alternative is unclear. If arbiters were to establish contracts for West region deliveries at the same price as deliveries outside the region, it is likely that PQS holders would receive a clear benefit from removal of the West delivery requirement. If arbiters discount ex vessel prices on West region landings, it is possible that the costs associated with complying with those requirements under the status quo would be reduced; however, it is unclear whether adjustments to ex vessel pricing would be adequate to cover the capital costs associated with operating a facility in the West region (either a mobile processor or shore plant). In addition, an ex vessel price that is adequate to cover the costs, with all West region processing consolidated in one facility would not be adequate to cover the costs, if a PQS holders operated its own facility. These start up

²² It is possible that QS holders could reap a windfall from such a finding by arranging all deliveries (including deliveries of catches using undesignated IFQ) in the West region, thereby reducing their operating costs in the fishery.

costs provide the operator of an existing plant with substantial leverage in any negotiation with PQS holders without a plant in the region under the status quo. This leverage has been alluded to by former PQS holders, who assert that they transferred their West IPQ at no cost to the operator of the West region plant, as the costs of operating a separate facility were cost prohibitive.²³ Under this alternative, West region plants might attract deliveries through IPQ leases and custom processing arrangements, but PQS holders would be able to negotiate prices under those contracts based on processing alternatives outside of the West region (instead of based on the costs of adding capacity to the West region). This additional negotiating leverage should advantage PQS holders under this alternative, with an increase in benefits over the status quo.

While PQS holders benefit from flexibility of moving landings out of the West under this alternative, individual plant operators in the West may (or may not) be better off under this alternative than under the status quo. Under this alternative, a West region plant would need to be competitive with not only other plants in the West, but also plants outside of the West region. With the small fishery, the entry of a second processor in the region could undercut the position of the existing processor. Mobile processors may be adept at opportunistically entering and exiting the fishery in the West region, in response to crab markets and operating costs and other considerations. Only in the case of a plant owned by a substantial PQS holder will the plant have secure access to future deliveries. Vulnerability is likely greatest for any small, independent shore plant that might be unable to withstand competition over the course of a year or two. A larger, more established operation (with other plants and fishery operations) would be better positioned to maintain its operations at a West region plant despite a competing plant.

As with West region plants, community effects of this alternative are not fully predictable and may change over time. If a plant operates in a community in the West, it may be possible for that plant to attract a substantial portion of the processing in the fishery to the benefit of its host community. Attracting these landings will be contingent on a few factors. The plant's ability to maintain landings will clearly be increased by any PQS held by its owner. To attract other landings, the plant will need to be competitive with plants in any location. West region plants will remain vulnerable to competition from both plants inside and outside the region. Since landings from this fishery are likely a small portion of any plant's portfolio, it is unlikely that landings from this fishery will be determinative of a plant's overall success. In the absence of the West region landing requirement, it seems unlikely that any mobile plant would be moved to the region to handle crab deliveries, as most PQS holders could access other processing facilities. As a result, any stable and reliable community benefit that would arise under this alternative is likely to come from a multispecies plant that depends primarily on groundfish. Adak is the most likely location to support this processing in the near term. Whether the Adak shore plant can successfully attract landings in the fishery is uncertain. The current owner of the plant holds PQS in the fishery that can support approximately one delivery; additional deliveries would likely be needed to justify a processing operation and to have a noticeable community benefit. Atka could also benefit from landings in the future, should the plant owner expand operations to include crab processing capacity. The owner of that plant holds a larger portion of the PQS pool to use as a basis for the operation; however, any capacity development in the area would depend on whether the operation could be competitive with plants outside the region. If subsidized by the PQS holder, who is also a CDQ group, the operation could likely be successful, but if and when this expansion of the Atka facility is pursued will depend on its priority relative to other community projects.

²³ In other words, the West region may have some characteristics of a natural monopoly, with production quantities able to support only a single processing facility.

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, in the event that no shoreside processing facility is open to take delivery and process WAG IFQ. In that circumstance, the regional landing requirement needs to be relaxed to 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

Alternative 2 directly regulates QS holders, IFQ holders, PQS holders, IPQ holders, and the communities of Adak and Atka.

Alternative 3 directly regulates IFQ holders and IPQ holders.

TO BE COMPLETED

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 Alternative 2, if parties agree to pursue and 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.

Under Alternative 3, no change in reporting or recordkeeping would occur, but parties would benefit from a relaxation of West region landing requirements.

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

To be added

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.

To be added

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

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February 2nd, 2010

Eric Olson, Chairman NPFMC
605 W. 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

Re: C-3b WAG Regionalization

Dear Chairman Olson,

When the Council asked for Communities, Harvesters and Processors to form a working group to address the Regionalization issue for WAG crab, Adak Community Development Corporation worked with that group on behalf of the community of Adak to help develop a consensus position on options for analysis.

Options for Analysis

Those consensus recommendations were endorsed by all parties and presented to the Council in October and again in December 2009, and did not include removing Regionalization altogether from the WAG fishery. ACDC supported the Emergency Rule recommendation the Council made in December. Part of the reason that action was non-controversial, despite the possibility that there may be processing capacity available this season in Adak, was on the basis of trust with the other parties that we had a consensus position both on the Emergency Rule and options for analysis.

We strongly oppose inclusion of Alternative 3 in this analysis. As the analysis states, it is an alternative that "does not closely parallel the above purposes and needs statement."

We further oppose the re-writing of the problem statement to include Alternative 3 in a way that removes the "community" leg of the "three legged stool." If the Council does engage in broadening that problem statement, then it should do so in a way that allows for inclusion of an alternative that removes PQS from the WAG fishery as well.

Section 2.4 Management

There is repeated reference to past "lack of available processing capacity in the West region." We think these statements can be easily misconstrued. "Capacity" should be the physical infrastructure necessary to process the crab. That capacity has existed in Adak for over a decade, and has been used to process 2 Million pounds of crab in one season. Processing the 600,000 pounds of Regionalized WAG crab is not a challenge to existing capacity.

It has been the legal barriers created by the Rationalization program that limited the utilization of that capacity. First, the requirement to hold IPQ; and second, the custom processing cap of 30% of the IPQ which is no longer a factor.

Section 2.4.2 Communities

This section of the analysis is inadequate and glosses over the importance that crab has had to the community of Adak. It also lacks a cumulative impact focus on how other aspects of the program (i.e.: lack of processing sideboards, lack of ROFR protections) have impacted the community. The statement that "further description of processing activity in the Adak area cannot be included in the profile due to confidentiality restrictions" ignores data that is publicly available.

Table 12 Dec. 2009 Review Draft for AI Processing sideboards did show crab landings in Adak for the pre-Rationalization years 2002, 03, and 04, which ranged from 1.5 Million to 1.9 Million lbs, or an average of 66% of the total WAG harvest in those years.

Using the price information in table 8, the landings in those three pre-Ratz years would have generated sales taxes to the city of Adak of \$500,000 not including raw fish tax revenue. Those landings would have generated over \$21 Million in sales for the plant. Despite processing 65% of the GHIL in the three pre-Ratz year, the facility in Adak received only 2.5% of the WAG PQS.

This is important context to understand the reality of what has already been lost under Rationalization, even with Regionalization, by the community of Adak.

While the loss of crab revenue was not the only factor in the bankruptcy of the Adak processing plant, it was certainly significant.

The statement on page 13 that "A few aspects of the rationalization are structured specifically to support Adak" stretches the meaning of "a few."

Precisely two aspects of the program mitigate the impact of Rationalization on Adak. One is the community allocation of 10%, which was no substitute for the lost of 66% of the GHIL. The other is Regionalization, which is not applied to "one half of the shares in the Western Aleutian Islands golden king crab fishery" as stated on 13, but only to one half of the class A CV shares, which is closer to "24% of the non-CDQ TAC" as stated on page 1. Even so, the potential limited benefit of Regionalization "will depend on the choices of IFQ holders and IPQ holders" as noted on page 16.

Section 2.5.2 Alternative 2

We agree with the analysts that if the arbitration sub-option is to be adopted, the Council will need to provide more detail on the timelines, scope of authority, and criteria for the arbitration system.

Section 2.5.3 Alternative 3

While Regionalization is a weak community protection measure as it applies to the WAG fishery, it is better than nothing. The cumulative impact of losing this measure is not adequately addressed in the analysis.

The idea that the community or a plant operator in Adak, "may be better off under this alternative than under status quo" is unrealistic. As the discussion makes clear, the only way the community or

a plant operator in Adak would be better off if they controlled PQS, which is not as a function of the removal of Regionalization.

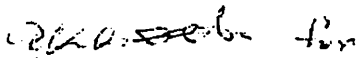
The analysis should unequivocally state that the removal of Regionalization is much more likely to be negative in its impacts on the community of Adak than it is to be neutral, and that it certainly would not be positive. As such Alternative 3 is contrary to the National Standard 8 mandate to: *"(A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities."*

Conclusion

ACDC requests that the Council remove Alternative 3 and confine the analysis to the consensus options that were presented by the working group to address the specific circumstance of when *"no shoreside processing facility is open to take delivery and process WAG IFQ."*

Thank you for consideration of our comments.

Sincerely,



Michael Swetzof, President

Date: January 29, 2010

To: Eric A. Olson, Chairman
Chris Oliver, Executive Director
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

(Total 4 pages)

From: The "Alaska Bering Sea Crabbers", a joint effort of the Alaska Crab Coalition, the Crab Group of Independent Harvesters and the Inter-Cooperative Exchange Policy Advocacy Committee (ICEPAC)

Re: Agenda item, C 3(b), Western Aleutian golden king crab regional delivery (T)

The "Alaska Bering Sea Crabbers", a joint effort of the Alaska Crab Coalition, the Crab Group of Independent Harvesters, and the Inter-Cooperative Exchange Policy Advocacy Committee (ICEPAC) request that the NPFMC move forward with elements and options for Emergency Relief in the Bering Sea as part of the Bering Sea/ Aleutian Island Crab Rationalization Program. We request that this Emergency Relief package be modeled after the current Western Aleutians golden king crab Emergency Relief package. The Western Aleutians golden king crab Emergency Relief package was initially based on the Bering Sea package, however it has now been simplified to the point that a requisite civil contract is no longer defined in the preferred alternative.

We specifically request that the Council move forward with the Exemption from Regional Landing Requirements package that was tabled during the October, 2009 meeting that was to address Emergency Relief in the Bering Sea. We further request that the Council simplify the elements and options in the tabled package to follow the approach of the Western Aleutians golden king crab Emergency Relief package.

We recommend using the following purpose and need statement, which is reprinted from the October 2009, NPMFC EA/RIR:

"In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require the associated catch to be delivered and processed in the designated region. In the first four years of the program, all the crab IFQ was harvested and delivered. However, icing conditions in the Northern Region did create 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 or limit the available processing capacity in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements. Such an exemption should also provide a mechanism for reasonable compensation to communities and IPQ holders harmed by the granting of the exemption to ensure that the protections intended by the regional designations continue to be realized despite the exemption."

Significant time and effort has been invested by harvesters, processors and communities to come to agreement on a civil contract-based and compensatory solution for temporary relief from the regionalization of landings requirement. The December 2004 Selandang Ayu grounding and oil spill near the port of Unalaska and the January 2007 fire aboard the Stellar Sea which decommissioned the ship representing 50% of the Northern District processing capacity for six weeks, are examples of potential issues that can cause long term processing shutdowns, and result in "foregone harvest" of a large percentage of the TAC. Prolonged ice events that close off St. Paul Island harbor, could have a similar effect and also result in "foregone harvest."

Over the summer of 2009, harvesters, processors, and community representatives met numerous times to discuss emergency relief efforts. It was agreed to follow an approach almost identical to that being taken by the Western Aleutian golden king crab representatives- which is simply that if a contract between all affected parties (as defined by the Council) is signed, NMFS would grant an emergency exemption to regionalization, based upon the civil contract and an affidavit provided to NMFS. This approach relieves NMFS of the burden of judgment and relieves the Council of the burden of defining details such as compensation as these will all be defined in the contract that must be signed by all parties.

The Bering Sea crab harvesters, processors and communities spent a significant amount of time trying to work out a contract for short term relief that could be agreed to by all the parties prior to anticipated Council action in October of 2009. Although the parties were close to an agreement regarding short-term relief, in the end we were not able to come to agreement for the October 2009 Council meeting and the agenda item was tabled. As agreed during the negotiations, harvesters drafted a contract for short term relief (at considerable time and cost to harvesters) using our best efforts to be neutral and fair so as to have an appropriate starting place for all parties to negotiate. This contract was released to processor and community representatives September 16, 2009. We received quick and constructive feedback from community representatives but have yet to receive substantive comments on the contract from processors. There have been numerous requests by harvesters to meet with processors regarding emergency relief over the past 4 ½ months to no avail. Harvesters understand that the Council's desire is that this issue be resolved through a consensus-based approach. This is not possible though if one of the parties refuses to negotiate.

It is very important to note that all parties did agree that long-term relief issues would need to be dealt with at the time of the emergency as each major emergency would differ and would likely result in specific language for that emergency. With the Exemption from Regional Landing Requirements package being tabled in October, 2009, the industry is lacking the tools to deal with both long term and short term emergencies that could arise.

It should also be noted that harvesters have spent a significant amount of effort to attempt to deal with short term issues internally through the recently established "super-cooperative" and a set aside of quota share in a "reserve pool". Harvesters are currently scoping numerous reserve pool options with the goal of having one or more of these options being instituted as a policy for the ICE "super-cooperative." This effort will appropriately reduce the harvester's dependence upon short term regulatory relief. However, regulatory relief will still be necessary to deal with last vessel issues, issues when there are simply no South shares to trade, as well as for longer term issues of extended ice coverage, oil spills or other catastrophes.

Last week, NOAA Oceanographers, Jim Overland and Phyllis Stabeno, in their presentations on the Bering Sea climate at the Alaska Marine Science Symposium in Anchorage, forecasted that the Bering Sea, independent of the Arctic continuing trend of diminishing ice, could continue with its normal decadal cycle and remain in a cold "mode" for the next 30 to 50 years. (See the attached abstracts from the Symposium, 2010). This further justifies the necessity of moving forward with regulatory relief to deal with potential prolonged ice events affecting crab deliveries around the Pribilof Islands.

cc: Vince Webster, Chairman, Alaska Board of Fisheries

Bering Sea - Climate and Oceanography**When will the Bering Sea be warm again?**

James E. Overland, james.e.overland@noaa.gov, NOAA/Pacific Marine Environmental Laboratory
Nick A. Bond, Nick.bond@noaa.gov, JISAO/U of Washington
Muyin Wang, muyin.wang@noaa.gov, JISAO/U of Washington
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Although most of the Arctic during summer through late fall 2007, 2008 and 2009 had unprecedented reductions of sea ice and record warm air temperatures, the Bering Sea, in contrast, had near record cold temperatures and maximum ice extents during spring. The 2007 to 2009 cold period in the Bering Sea followed a major warm event from 2000 to 2005. While species moved north during this warm event, since then cold species such as Arctic cod and euphausiids have returned in force to the SE Bering Sea. While Arctic change proper is driven by radiation and amplified by ice albedo feedback, we consider that the climate of the Bering Sea for the present and future will mainly be driven by natural variability due to the relative dominance between warm storms and cold air masses. Since 1916, ten similar, multi-year (MY) but less-than decade warm and cold events occur in the data record from St Paul Island. Little is known about these events compared to the longer Pacific Decadal Oscillation (PDO), but one may possibly argue that the transitions that occur as interdecadal PDO shifts are also related to rapid shifts between extreme MY warm and cold year events as in the 1940s and 1970s. Our hypothesis is that Bering Sea ocean temperatures, modified by seasonal sea ice and other factors, have sufficient memory that only large hemispheric changes in the atmospheric general circulation, including those forced by El Nino-Southern Oscillation (ENSO), can shift the MY events from cold to warm or the reverse. Further, improved knowledge of these events is important for understanding the impact of natural variability on forcing shifts in non-stationary food webs. While for 2010 the North Pacific is shifting to El Nino conditions which would imply a warmer Bering Sea, the potential weakness of northward teleconnections signals and the shortness of the present cold event compared to their more normal duration suggest that we may not shift back to warm conditions this year.

Comparison between a cold year (2009) and a warm year (2005) and implications for the ecosystem on response to changes in climate

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The status of the eastern Bering Sea in 2009 was unusually cold, with much greater than normal sea-ice extent and duration over the southeastern shelf. This contributed to the unusually cold sea surface temperatures (<9.5°C) during summer and an extensive cold pool covering much of the middle shelf. Depth-averaged, summer temperature at M2 remained below 5°C. In contrast during 2005, the southeastern shelf was unusually warm, with a much reduced ice extent and an early ice retreat. This contributed to warm sea surface temperatures (>12°C) and a cold pool limited to the northern middle shelf. The maximum depth-averaged temperature at M2 was above 8°C. Differences in environmental conditions between the two years were greater over the southern portion of the middle shelf than over the northern portion. For instance, the duration of ice over the northern shelf was approximately the same in 2005 and 2009. These regional differences are important to consider when making broad statements about the state of the ecosystem during any one year. The anomalously warm year of 2005 represents a harbinger of what is predicted in the IPCC assessments for the next few decades and can provide insight into potential future environmental forcing and subsequent ecosystem change. In particular, global climate models indicate that the southern shelf will warm substantially, but for the northern shelf the warming will be more moderate. This combined with other differences between the southern and northern regions in environmental forcing (e.g. tidal strength, solar radiation, freshwater input) will prevent a simple shift or expansion of the southern ecosystem to the northern shelf in response to climate change.

PUBLIC TESTIMONY SIGN-UP SHEET

Agenda Item: C-3(a) Bering Sea Crab ROFR

	NAME (PLEASE PRINT)	TESTIFYING ON BEHALF OF:
1	Steve Minor	NPCA
2	Mateo Paz-Soldan	City of St Paul
3	Frank Kelly	City of UNA Alaska
4	Karen Montoya	Aleutia
5	Heather McCarthy	CBSEA
6	Paul Gronholdt	AEB
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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.

Karen Montoya

- Require appraisals of all PQS sales to community ECCOs whether or not ROFR is triggered. *Alaska*
- Allow review of all contractual details of sales to community entities by a neutral third party.
- Review current contracts between processors and communities with an emphasis on identifying potential control issues and mechanisms to address these concerns.

Frank Kelty

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February 10, 2010

Eric Olson, Chairman
North Pacific Fishery Management Council
605 4th Avenue Suite306
Anchorage, Alaska 99501

Subject C-3(a) Initial Review right of first refusal (ROFR) modifications

Dear Chairman Olson,

On behalf of the City of Unalaska I submit the following comment on c-3 (a) initial review right of first refusal modifications.

The City of Unalaska has been a major supporter of the crab rationalization plan since its inception; we feel that the plan is achieving its intended purpose, as laid out in the 2002 problem statement. In Unalaska we've seen many of those benefits of the plan, crab revenues in the community have increased, TAC's on Red King Crab and Opilio Snow Crab have also increased or remained stable the past four years, leading to longer seasons and more economic activity in the community that benefits the local support sector businesses. During the past five years of the plan we have seen increased investments by Alaskan communities and CDQ groups into the BSAI crab fisheries, this investment in purchasing quotas is in the millions of dollars and shouldn't be overlooked. The program is just completing its fifth year, the program isn't broken, and is a very successful in our estimation. The Council should move forward with the five year review.

The City of Unalaska supports the NPFMC Advisory Panel motions on the following actions.

ACTION 1: Increase a right holding entities' time to exercise the right of first refusal and perform as required.

Unalaska supports Alternative 2: changing the period for exercising the rights of first refusal from 60 days to 90 days we supported this at the crab committee and this gives ECCO community entities extra time to see if they want to exercise the right. The second amendment would extend the period for performing under the contract from 120 days to 150 days after receiving the contract. This time may be needed to acquire financing and negotiate for the purchase.

ACTION 2: Increase community protections by removing the ROFR lapse provision.

By making the RORF permanent a permanent link will be created between the PQS and the place where the processing occurred we strongly support this. Unalaska supports Alternative 2 with the new language provided by the AP panel for this section.

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

At this time will feel this action needs further work, previously Unalaska stated position was to support Alternative 2 apply the right to the PQS only, and if we had to make a choice today that would be the position we would support. But we don't have to make that choice today, Dr. Fina discussion paper on this action lays out many issues that need to be reviewed and analyzed.

In conclusion; Unalaska supports the AP motion on actions listed as 1, 2 and 3 under item C-3 (a) of initial review right of first refusal modifications. Thank you for the consideration of our comments.

Sincerely



Frank Kelty,
City of Unalaska
Resource Analyst

CC: Shirley Marquardt, Mayor
Unalaska City Council Members
Chris Hladick, City Manager

Sam Coffey

ROFR

Action 3 – Alternative 2

The assessor will be selected by:

- 1) mutual agreement of the parties or
- 2) the PQS holder and the community representative each selecting an assessor and by those assessors selecting a third assessor. This panel of assessors will then perform the duties of the assessor.

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

The assessor 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.

Within 10 days of receipt of a contract that is for PQS only, the community entity may request that an assessor establish a price for the PQS. If the community entity fails to request an assessor establish the price, the price in the contract will apply.

The parties shall select the assessor (or each shall select an assessor) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single assessor is not selected by agreement of the parties, the two selected assessors shall select a third assessor within 30 days of the community representative receiving the contract.

The assessors shall establish the price for the PQS within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the assessor, within 120 days of receipt of the contract.

The cost of a mutually selected assessor shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single assessor, each party shall pay the costs of the assessor it chooses, and the parties shall pay equally for the third assessor.

Alternative 3

The assessor will be selected by:

- 3) mutual agreement of the parties or
- 4) the PQS holder and the community representative each selecting an assessor and by those assessors selecting a third assessor. This panel of assessors will then perform the duties of the assessor.

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

Within 10 days of receipt of a contract that includes PQS subject to the right, the community entity may request that an assessor identify community based assets in the transaction and establish a price for the PQS and community based assets. If the assessor's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the assessor. If the community entity fails to request that an assessor establish the price, the price in the contract will apply and the right will apply to all assets in the transaction.

For any transaction that includes assets in addition to PQS, the assessor shall determine which assets are community based.

If an assessor is requested by the community entity, the parties shall select the assessor (or each shall select an assessor) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single assessor is not selected by agreement of the parties, the two selected assessors shall select a third assessor within 30 days of the community representative receiving the contract.

The assessors shall establish the price for the PQS and community based assets within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the assessor, within 120 days of receipt of the contract.

The cost of a mutually selected assessor shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single assessor, each party shall pay the costs of the assessor it chooses, and the parties shall pay equally for the third assessor.