

MEMORANDUM

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

ESTIMATED TIME 8 HOURS (all C-3 items)
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ACTION REQUIRED

- (a) Amendment to cost recovery fee program, selection of a preferred alternative.

BACKGROUND

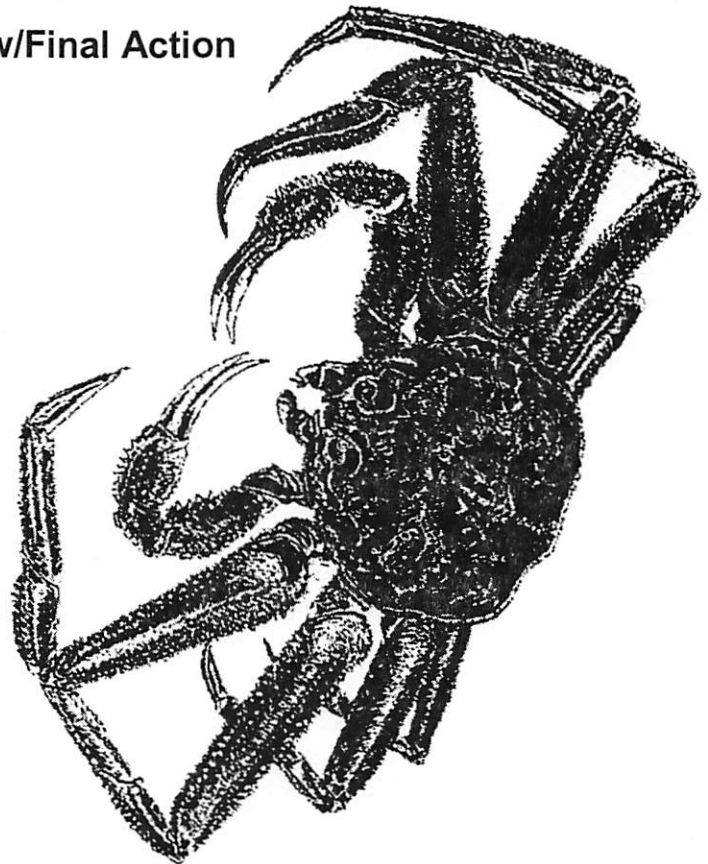
Under the Fishery Management Plan for the Bering Sea/Aleutian Islands King and Tanner Crabs, NOAA Fisheries collects fees to cover the costs of implementation of the rationalization program and to subsidize the Federal loan program for quota share purchases. The action is necessary to allow NOAA Fisheries the flexibility to reduce the portion of collected fees that are allocated to subsidize loans. The action would not affect timing of implementation of the loan program or the terms of that program. A copy of the analysis is attached (Item C-3(a)(1)).

**AMENDMENT 33 TO THE BERING SEA AND
ALEUTIAN ISLANDS
KING AND TANNER CRAB FISHERY MANAGEMENT PLAN**

June 2008

Initial Review/Final Action

Alaska Regional Office
National Marine Fisheries Service
Juneau, Alaska



Abstract: This action would amend the Fishery Management Plan for Bering Sea/Aleutian Islands King and Tanner Crabs (FMP) to allow NMFS to decrease the portion of fees collected under the Crab Rationalization Program that are allocated to the Federal loan program for quota share purchase. Under the alternatives presented, NMFS would assign no fees, or only the minimum amount of fees necessary to the loan program. This action is necessary to ensure that fishery participants do not pay fees for loan program financing in excess of the fees needed to subsidize the loan program. This action would not (1) affect the amount of loans currently authorized by Congress, (2) affect the loan financing costs, or (3) delay the implementation of the loan program regulations currently under development. This document provides an overview of the Crab Rationalization Program's fee collection and loan program, a description and purpose of the action, and an analysis of alternatives. This FMP amendment would not result in modifications to Federal regulations.

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1 Introduction

1.1 Background

In 2002 and 2003, after several years of development, the North Pacific Fishery Management Council (Council), adopted Amendments 18 and 19 to the Bering Sea Aleutian Islands (BSAI) King and Tanner Crab Fishery Management Plan (FMP) to establish a new limited access privilege program (LAPP) for the BSAI crab fisheries. This LAPP is commonly called the Crab Rationalization Program (Program). At its most basic, the Program recommended by the Council: (1) allocated long term harvest privileges known as quota share (QS) based on the catch history of vessel owners and captains during a specific period that can yield exclusive annual harvest privileges for QS holders, (2) allocated long term processing privileges known as processor quota share (PQS) to processors based on their processing history during a specific time period that can yield exclusive annual processing privileges for PQS holders, and (3) included provisions to limit the delivery of much of the catch to specific geographic regions and required linkages with communities that have been historically dependent on the crab fisheries. The Program also includes a suite of other measures limiting the amount of QS and PQS a person can hold, specific catch accounting and monitoring requirements, mechanisms for transferring QS and PQS, price and delivery negotiation standards, economic data collection provisions, and other measures.

Relevant to this action, the Council's Program included provisions for a fee collection program consistent with the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The MSA requires that NMFS collect fees on all LAPPs of not greater than 3 percent of the exvessel value of a fishery to recover the actual direct management, enforcement, and data collection costs in the fishery. NMFS may reimburse itself and other agencies for the actual direct costs of Program administration. The MSA also allows NMFS to set aside a portion of LAPP cost recovery fees to aid in loan financing if such a set aside is recommended by the Council. The Council adopted a provision under the Program for a loan program to aid entry-level and small boat captains and crew who are active in the fishery purchase QS consistent with the MSA. The Council recommended that 25 percent of the fees collected should be set aside to provide for financing a loan program. The Council also provided that NMFS should collect up to 133 percent of its actual direct costs to ensure that NMFS could fully recover actual management costs and set aside 25 percent of the fees collected, provided the sum of all fees collected does not exceed 3 percent of the exvessel value of the fishery.

In January 2004, the U.S. Congress amended section 313(j) of the MSA through the Consolidated Appropriations Act of 2004 (Pub. L. 108-199, section 801). As amended, section 313(j)(1) requires the Secretary to approve and implement by regulation the Program as it was approved by the Council. NMFS published a proposed rule to implement the Program on October 29, 2004 (69 FR 63200), and published a final rule on March 2, 2005 (70 FR 10174).

The fee collection provisions required by the MSA and included in the Program were implemented in the March 2005 final rule. However, NMFS did not include a loan program for QS purchase as part of the March 2005 final rule because Congress did not provide NMFS with the necessary appropriation authority to grant a specific amount of Federal loans, or provide for an appropriation to subsidize any anticipated defaults or costs for administering a loan program that may not be recovered by the interest payments on the loans. The MSA requires NMFS to administer loan programs under the credit authority of Title XI of the Merchant Marine Act, 1936. This authority is subject to the Federal Credit Reform Act

of 1990 (FCRA) (2 U.S.C. 661). The FCRA requires estimated net loan losses (FCRA subsidy costs) to be appropriated in cash at the time Congress authorizes the amount of the loans that can be provided (i.e., the annual loan ceiling). A portion of the LAPP cost recovery fees, up to 25 percent of the amount collected, and set aside for a loan program could be used to provide the FCRA subsidy costs for the loan program. Alternatively, the FCRA costs could be met through a direct appropriation, or may not be necessary if the net loan losses (i.e., the FCRA subsidy costs) are zero or negative. NMFS withheld the development of a loan program until Congress granted NMFS the necessary authority to provide for loans and the appropriate FCRA loan subsidy cost could be determined.

Beginning in June 2006, NMFS began collecting fees in accordance with the MSA and set aside 25 percent of the fees collected for purposes of a loan program as required by the Program. NMFS has presumed that a portion of the fees that have set aside for the loan program could be used to provide for any required loan subsidy as required by FCRA once NMFS received the necessary authority to grant the loans. Since the implementation of the Program, NMFS has not fully recovered all of the direct management costs for the Program because the costs of Program administration have exceeded 3 percent of the exvessel value of the fisheries.

In January 2007, Congress amended the MSA through the Magnuson Stevens Fishery Conservation and Management Reauthorization Act (MSRA). The MSRA expanded the activities for which fees may be collected to include data collection as well as management and enforcement, and modified how funds are deposited for use in supporting LAPPs. The MSRA amended the MSA so that funds that are set aside for a loan program are no longer deposited with the Department of Treasury to cover FCRA loan costs. This amendment appears to have removed the link between fees set aside for a loan program and their use to cover FCRA subsidy costs.

In June 2007, NMFS told the Council that it had explicitly requested Congress to provide NMFS loan authority in its Fiscal Year 2008 budget. NMFS noted that several of the terms that the Council used to define eligibility to participate in a loan program were not expressly defined by the Council when it adopted the Program and these terms should be clarified prior to a loan program being implemented. At its October 2007 meeting, based on public testimony and input from the Advisory Panel, the Council directed staff to analyze elements and options defining terms of the loan program that could be used by the Council to recommend terms of the loan program. Council recommendations would be forwarded to NMFS' Financial Service Division (FSD) for consideration during the rule making process.

In December 2007, Congress granted NMFS the authority to provide for \$3,000,000 in loans for QS purchase through the Consolidated Appropriations Act of 2008 (Pub. L. 110-161). In February 2008, the Council adopted terms defining "entry-level fishermen," "small boat," "active participation," "captains and crew," and some additional guidance to NMFS FSD that will be considered when crafting regulations to establish the loan program. The Council forwarded its recommended definitions to NMFS FSD. NMFS FSD is currently in the process of developing regulations for the loan program to allow \$3,000,000 in loans to be distributed to captains and crew who meet the criteria defined by the Council.

During the process of developing the definitions of the loan program terms, it became clear to NMFS FSD that because of the anticipated low default rate of loans, it is highly likely that 25 percent of the LAPP cost recovery fees collected will not need to be set aside to provide for the FCRA loan subsidy coverage. NMFS FSD bases this assessment on the fact that under the existing halibut and sablefish IFQ program, the default rate on loans has been less than the revenue received from interest on the loans, and fees collected have not been required for loan program financing. NMFS FSD has indicated that it does not anticipate using fees collected under the Program to provide for loan financing because it anticipates a

repayment history under the Program similar to that of the halibut and sablefish IFQ fishery with a zero or negative FCRA subsidy cost. If the loan program does not have a subsidy cost, fees would not need to be set aside for that purpose.

However, the FMP requires that 25 percent of the fees collected must be set aside to provide for the loan subsidy costs, and 133 percent of the actual direct costs must be collected with 25 percent of the fees collected set aside for loan subsidization. Given recent trends of increasing crab total allowable catches (TACs) and exvessel values, it is possible that direct management costs could represent less than 3 percent of the exvessel value of the rationalized crab fisheries. In that case, NMFS would collect more than 100 percent of the management costs to fund the 25 percent set-aside for the loan program subsidization, up to 133 percent of the actual management costs, as long as the total fee is under 3 percent of the exvessel value in the rationalized crab fisheries. In April 2008, NMFS recommended that the Council amend its FMP to avoid collecting LAPP cost recovery fees beyond the amount required to reimburse agency costs and provide for a loan program. The Council indicated that it wished to amend its FMP in June 2008, and requested NMFS staff provide any necessary analysis to initially review its FMP and take final action at this meeting.

1.2 Problem Statement and Proposed Action

The following problem statement summarizes the need for action.

The current provisions in the FMP that define fee collection for loan obligation financing provide no flexibility for NMFS to modify its LAPP fee collection in response to needed loan obligation financing. In addition, amendments to the MSA under the MSRA appear to have removed the link between fees set aside for a loan program and their use to cover FCRA subsidy costs, suggesting that setting aside fees for a loan program could not be used to cover the FCRA subsidy cost. In order to ensure that NMFS collects and sets aside only the amount of fees necessary for a loan program without excess, the Council would need to amend its FMP.

This document is NMFS' response to the Council's requested analysis. Section 2 provides a background description of portions of the crab rationalization program relevant to the definition of terms of the loan program. Section 3 contains a description of two alternative modifications to the FMP to be considered by the Council. Briefly, the alternatives described in Section 3 are:

- Alternative 1: Status quo
- Alternative 2: Removing FMP text requiring an assignment of fees for a loan program set aside.
- Alternative 3: Modifying FMP text to provide NMFS discretion to determine the amount of fees set aside for loan financing.

NMFS notes that this action would only amend the FMP. Regulations at 50 CFR 680.42 that establish fee collection for the Program would not need modification. Because this action would not result in implementing regulations, this action does not require an Initial Regulatory Flexibility Analysis (IRFA) or Regulatory Impact Review (RIR). In addition, this action would not require the preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). Pending Council adoption of this FMP amendment, NMFS would prepare a categorical exclusion (CE) under NEPA. Because this action affects only the amount of fees that may be assigned to a loan program but does not otherwise affect the total amount of fees that are collected, or the mechanism of fee collection, this action would not have any effect on the human

environment in ways that have not already been considered in the EIS that was prepared for the Program (Council/NMFS, 2004). The EIS prepared for the Program is incorporated by reference and is available on the NMFS website at <http://www.fakr.noaa.gov>.

2 Existing Conditions

This section describes the relevant existing conditions in the crab fisheries. The section provides a brief description of the management of the fisheries under the Program and the relevant sections of the MSA, FMP, and regulations applicable to the loan program.

2.1 Management of the fisheries

The following nine crab fisheries are managed under the 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.

The Program assigns quota share (QS) to persons based on their historic participation in the BSAI crab fisheries during a specific time period. Under the Program, NMFS issued four types of QS: (1) catcher vessel owner (CVO) QS is assigned to holders of License Limitation Program (LLP) licenses who delivered their catch onshore or to stationary floating crab processors; (2) catcher/processor vessel owner (CPO) QS is assigned to LLP holders that landed and processed their catch at sea; (3) captains and crew credited with landings onboard catcher/processor vessels on a State of Alaska fish ticket were issued catcher/processor crew (CPC) QS; and (4) captains and crew credited with landings onboard catcher vessels on a State of Alaska fish ticket were issued catcher vessel crew (CVC) QS. In each crab fishery, 97 percent of the QS is assigned to CVO and CPO QS holders, and three percent is assigned to CVC and CPC QS holders. Each year, QS yields an exclusive harvest privilege for a portion of the annual total allowable catch (TAC), called individual fishing quota (IFQ), in each of the nine BSAI crab fisheries. 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.

NMFS also issued processor quota share (PQS) under the Program. Each year PQS yields an exclusive right to process a portion of the IFQ in each of the nine BSAI crab fisheries. This annual exclusive processing privilege is called individual processor quota (IPQ). Only a portion of the QS issued yields IFQ that is required to be delivered to processor with IPQ. IFQ that must be matched and delivered to a processor with IPQ is Class A IFQ. QS derived from deliveries made by catcher vessel owners (i.e., CVO QS) is subject to designation as Class A IFQ.¹ Ninety percent of the IFQ derived from CVO QS is

¹ Currently, CPC, CPO, and CVC IFQ shares are exempt from the Class A/B IFQ designation. Effective for the 2008/2009 crab fishing year, CVC IFQ may be subject to Class A/B IFQ designation. However, the Council

designated as Class A IFQ, the remaining 10 percent of the IFQ is designated as Class B IFQ and is not required to be delivered to a specific processor with IPQ.² Each year there is a one-to-one match of the total pounds of TAC issued as Class A IFQ and pounds of IPQ issued in each crab fishery.

The Class A IFQ and IPQ requirements help to ensure that catch historically delivered to onshore processors continues to be delivered to processors with historic investment in the fisheries and is intended primarily to add stability to the processing sector and provide a means for compensated removal of processing capacity from the fisheries. To ensure that Class A IFQ holders receive an equitable share of the historic revenue from the fishery when they are required to deliver their Class A IFQ to specific processors with IPQ, the Program established a requirement that all Class A IFQ holders participate in an arbitration system that can be used to resolve any price or delivery disputes among Class A IFQ and IPQ holders. Because PQS and the resulting IPQ can be transferred among processors, there is not a guarantee that crab will continue to be delivered at the same processing facility or community indefinitely. The PQS/IPQ transfer provisions provide processors with the ability to consolidate processing operations, or sell their processing operations to new participants, for economic efficiency. Limits on the total amount of PQS that a person can hold and limits on the total amount of IPQ that a person can use ensure that no person can receive an excessive share of the processing capacity. These limits constrain the ability of processors to maximize the consolidation of processing and efficiencies that may arise.

In addition to Class A IFQ/IPQ matching requirements, Class A IFQ (along with IPQ) are subject to regional landing requirements. Class A IFQ designated for a specific geographic region must be landed in specified regions, and IPQ designated for a specific region must be received within that region. There is a one-to-one match of Class A IFQ and IPQ designated for a specific region. The following regional designations are defined for the crab fisheries in the Program:

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

As noted in the introduction, the Program also includes specific provisions for fee collection and a loan program to aid in the purchase of QS that is described in section 2.4.

recommended and NMFS is developing regulations to permanently exempt CVC IFQ from the Class A/B IFQ designation. Pending approval by the Secretary of Commerce, NMFS anticipates that these regulations would be effective prior to the 2008/2009 crab fishing year.

² Although in aggregate 90 percent of CVO IFQ issued each year is Class A IFQ, the proportion of Class A/B IFQ issued to each CVO QS holder can vary from the aggregate 90:10 ratio. CVO QS holders who also hold PQS/IPQ (and any affiliates of that PQS/IPQ holder) receive their CVO IFQ allocations as Class A IFQ in proportion to their IPQ holdings, and are allocated CVO IFQ with a ratio of Class A/B IFQ only for their CVO IFQ holdings that are greater than the amount of IPQ they hold. To ensure 10 percent of the aggregate CVO IFQ pool is issued as Class B IFQ, CVO QS holders unaffiliated with PQS/IPQ holders receive more than 10 percent of their CVO IFQ as Class B IFQ, and less than 90 percent of their CVO IFQ as Class A IFQ.

2.2 BSAI Crab Fishery Value

The value of the BSAI crab fisheries, and therefore the limit on the amount of fees that may be recovered from the BSAI crab fisheries will vary with the exvessel price and the TAC. If fishery value increases relative to management costs, the maximum limit on fee collection of 3 percent of exvessel value is less constraining, and it becomes increasingly likely that NMFS could charge fees up to 133 percent of actual Program costs and assign 25 percent of that amount for loan financing.

Determining the potential future value of the fishery is not predictable with any degree of accuracy. Exvessel prices are subject to changing market conditions that will vary based on a host of factors such as consumer preferences and worldwide availability of other crab products and any potential substitutes. Crab TACs are also variable, although stock assessment models do provide some expectations about the range of potential TACs for the various crab fisheries. The annual BSAI crab Stock Assessment and Fishery Evaluation provides detailed descriptions of TAC projections for the various fisheries. Given these factors, this analysis does not provide what would be, at best, a highly speculative assessment of future fishery value and the 3 percent limit.

2.3 MSA requirements, FMP provisions, and regulations relating to fee collection and the loan program.

This section provides an overview of MSA statutory provisions, the FMP adopted by the Council, regulations promulgated by NMFS, and how those provisions affect the loan program. Under the existing conditions imposed by the MSA, FMP, and regulations: (1) NMFS currently lacks the flexibility to determine the portion of fees to be set aside for a loan program; (2) at this time, it does not appear that fees must be set aside to provide for loan financing; (3) given recent amendments to the MSA, it is not clear if a mechanism exists to assign fees set aside for loan subsidization; (4) the Council has the authority and ability to amend its FMP to provide NMFS flexibility in setting aside fees; and (5) if the FMP is not amended NMFS will need to assess fees greater than the actual costs for management.

More specifically, the existing FMP requires that NMFS collect 133 percent of its actual direct management costs and assign 25 percent of that amount for a loan program regardless of whether those funds are actually required. If the total amount collected by NMFS were not limited by the cap of 3 percent of the exvessel value, then under the existing FMP, NMFS could collect up to 33 percent more than actual costs. Table 1 illustrates the amount of fees that could have been assessed for the 2005/2006 and 2006/2007 crab fishing years if the 3 percent cap were not constraining.

Table 1: Program costs and potential additional fee liability without FMP amendment

Crab Fishing Year	Program Costs	133 percent of Program costs	Addition fee due if 3 percent exvessel limit were not constraining.
2005/2006	\$ 4,270,881	\$ 5,680,272	\$ 1,513,607
2006/2007	\$ 3,939,841	\$ 5,239,988	\$ 1,300,183

2.3.1 MSA requirements

The MSA contains several provisions that circumscribe fee collection. In order of description and relevance to this action, the relevant sections of the MSA are section 304(d), section 303(d)(4)(A) of the

MSA that was in effect at the time that the Program was implemented, section 303A(i), section 305(h)(5)(B), and section 313(j).

Section 304(d)(2) establishes the requirement that NMFS collect fees for LAPPs, limits those fees to 3 percent of the exvessel value of the fishery, the timing of fee collection, and how fees are deposited.

SECTION 304. ACTION BY THE SECRETARY

(d) ESTABLISHMENT OF FEES.—

(1) The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1). The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

(2)(A) Notwithstanding paragraph (1), the Secretary is authorized and shall collect a fee to recover the actual costs directly related to the management, data collection, and enforcement of any—

(i) limited access privilege program; and

(ii) community development quota program that allocates a percentage of the total allowable catch of a fishery to such program.

(B) Such fee shall not exceed 3 percent of the ex-vessel value of fish harvested under any such program, and shall be collected at either the time of the landing, filing of a landing report, or sale of such fish during a fishing season or in the last quarter of the calendar year in which the fish is harvested.

(C)(i) Fees collected under this paragraph shall be in addition to any other fees charged under this Act and shall be deposited in the Limited Access System Administration Fund established under section 305(h)(5)(B).

(ii) Upon application by a State, the Secretary shall transfer to such State up to 33 percent of any fee collected pursuant to subparagraph (A) under a community development quota program and deposited in the Limited Access System Administration Fund in order to reimburse such State for actual costs directly incurred in the management and enforcement of such program.

The key provision in this section is the requirement that NMFS collect fees for LAPPs “to recover the actual costs” of administration. Congress did not provide NMFS the discretion not to collect fees for the costs described.

The MSRA amended section 304(d)(2)(A) to allow NMFS to collect fees for “data collection” in addition to “management and enforcement.” At this time, NMFS has not adopted regulations to define “data collection” and existing regulations do not authorize fee collection for that purpose. Presumably, the Council and NMFS will address this amendment to the MSA at a later date.

The MSRA also modified section 304(d)(2)(C) of the MSA to remove a provision that required “any such fees reserved under section 304(d)(4)(A) [loan program set aside fees] shall be deposited with the Treasury, and available, subject to annual appropriations, to cover the costs of new direct loan obligations and new direct loan obligations and new loan guarantee commitments as required by section 504(b)(1) of the Federal Credit Reform Act (2 U.S.C. 661c(b)(1)).” As amended, the MSA only requires that fees be set aside in the Limited Access System Administration Fund (LASAF) which is described later in this section. By removing this provision, it appears that if Congress wishes to authorize a loan program, and

if a FCRA subsidy cost is required, it would require a separate appropriation and loan subsidization could not be "funded" from fees collected because the MSA no longer provides that funds can be deposited with Treasury for that specific purpose.

Section 303(d)(4)(A) of the MSA in effect at the time the Program was implemented governed the application of fees collected under section 304(d)(2) for use in loan programs:

SECTION 303. CONTENTS OF FISHERY MANAGEMENT PLANS

(d) INDIVIDUAL FISHING QUOTAS.--

(4)(A) A Council may submit, and the Secretary may approve and implement, a program which reserves up to 25 percent of any fees collected from a fishery under section 304(d)(2) [fee collection] to be used, pursuant to section 1104A(a)(7) of the Merchant Marine Act, 1936 (46 U.S.C. App. 1274(a)(7)), to issue obligations that aid in financing the--

(i) purchase of individual fishing quotas in that fishery by fishermen who fish from small vessels; and

(ii) first-time purchase of individual fishing quotas in that fishery by entry-level fishermen.

In section 303A(i) of the MSA as amended by the MSRA, Congress included a specific provision applying section 303(d) in effect prior to amendment by the MSRA to all existing quota programs, including the Program.

SECTION 303A. LIMITED ACCESS PRIVILEGE PROGRAMS

(i) TRANSITION RULES.—

(1) IN GENERAL.--The requirements of this section [Section 303A] shall not apply to any quota program, including any individual fishing quota program, cooperative program, or sector allocation for which a Council has taken final action or which has been submitted by a Council to the Secretary, or approved by the Secretary, within 6 months after the date of enactment of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, except that--

(A) the requirements of section 303(d) of this Act [MSA] in effect on the day before the date of enactment of that Act [MSRA] shall apply to any such program.

Section 303(d)(4)(A) provides the Council and the Secretary the discretion to reserve "up to 25 percent of any fees collected" for a loan program. The Council recommended that the maximum amount permitted be set aside. The Council defined the terms in section 303(d)(4)(A)(i) and (ii) for the crab loan program in February 2008 and provided those recommended definitions to NMFS FSD.

Section 305(h)(5)(B) describes how NMFS may use the fees that are collected under section 304(d).

SECTION 305. OTHER REQUIREMENTS AND AUTHORITY

(h) CENTRAL REGISTRY SYSTEM FOR LIMITED ACCESS SYSTEM PERMITS.--

(5) (B) There is established in the Treasury a Limited Access System Administration Fund. The Fund shall be available, without appropriation or fiscal year limitation, only to the Secretary for the purposes of--

(i) administering the central registry system; and

(ii) administering and implementing this Act [MSA] in the fishery in which the fees were collected. Sums in the Fund that are not currently needed for these purposes shall be kept on deposit or invested in obligations of, or guaranteed by, the United States.

It is not clear if under the authority of this section NMFS could redirect fees collected to provide for a FCRA loan subsidy cost. At this time, NOAA General Counsel has not reviewed that issue. Even if NMFS could direct fees collected for a FCRA loan subsidy, NMFS would not want to direct more than the amounts required.

Finally, section 313(j) specifically directs NMFS to implement the Program as adopted by the Council, including a loan program, subject to further amendment. The relevant portions of section 313(j) for this action are cited below.

SECTION 313. NORTH PACIFIC FISHERIES CONSERVATION

(j) BERING SEA AND ALEUTIAN ISLANDS CRAB RATIONALIZATION.--

(1) By not later than January 1, 2005, the Secretary shall approve and hereafter implement by regulation the Voluntary Three-Pie Cooperative Program for crab fisheries of the Bering Sea and Aleutian Islands approved by the North Pacific Fishery Management Council between June 2002 and April 2003, and all trailing amendments including those reported to Congress on May 6, 2003. This section shall not preclude the Secretary from approving by January 1, 2005, and implementing any subsequent program amendments approved by the Council.

(2) Notwithstanding any other provision of this Act, in carrying out paragraph (1) the Secretary shall approve all parts of the Program referred to in such paragraph. Further, no part of such Program may be implemented if, as approved by the North Pacific Fishery Management Council, individual fishing quotas, processing quotas, community development quota allocation, voluntary cooperatives, binding arbitration, regional landing and processing requirements, community protections, economic data collection, or the loan program for crab fishing vessel captains and crew members, is invalidated subject to a judicial determination not subject to judicial appeal. If the Secretary determines that a processor has leveraged its Individual Processor Quota shares to acquire a harvesters open-delivery "B shares", the processor's Individual Processor Quota shares shall be forfeited.

(3) Subsequent to implementation pursuant to paragraph (1), the Council may submit and the Secretary may implement changes to or repeal of conservation and management measures, including measures authorized in this section, for crab fisheries of the Bering Sea and Aleutian Islands in accordance with applicable law, including this Act as amended by this subsection, to achieve on a continuing basis the purposes identified by the Council.

(4) The loan program referred to in paragraph (2) shall be carried out pursuant to the authority of sections 1111 and 1112 of title XI of the Merchant Marine Act, 1936 (46 U.S.C.

2.3.2 FMP Provisions

The Council specifically addressed fee collection and the loan program section 1.8.1.8 and in the Clarifications section of the FMP. The relevant sections of the FMP follow:

1.8.1.8 Loan program for crab QS

A low-interest rate loan program consistent with MSA provisions, for skipper and crew purchases of QS, shall be established for QS purchases by captains and crew members using 25% of the Crab IFQ fee program funds collected....

11. Cost recovery definition - ...

Cost recovery definition - The Council clarified that cost recovery funds would be collected in accordance with the current cost recovery program, which allows for the collection of actual costs up to 3 percent of ex vessel gross revenues. The Council provided that costs would be paid in equal shares by the harvesting and processing sectors (on all landings including landings of crab harvested with Class B IFQs). Catcher/processors would pay the entire 3 percent since catcher/processors participate in both sectors. A loan program for share purchases would be established with 25 percent of the fees collected. The motion authorized the collection of 133 percent of actual costs of management under the new program, which would provide for 100 percent of management costs after allocation of 25 percent of the cost recovery to the loan program.

The FMP text clearly directs NMFS to set aside the maximum amount of the fees collected (i.e., 25 percent) for a loan program, collect 133 percent of the actual costs, and did not provide the agency discretion to collect less than that amount. Because Congress directed NMFS to implement the Program as adopted by the Council under section 313(j)(1) of the MSA, NMFS is required to collect 133 percent of the actual costs, unless this provision is subsequently modified by the Council through an FMP amendment.

2.3.3 Regulations

As noted in the introduction, NMFS does not have regulations in place for the loan program. Regulations governing the fee collection program are found at 50 CFR 680.44. Those regulations describe the process for assessing actual costs and exvessel values, the process of notifying participants of the fee percentage and amount due, and billing procedures. Consistent with the FMP text and the MSA the regulations assess Program fees on all IFQ crab landed, as well as community Development Quota (CDQ) and the Adak Community Allocation crab.

The existing regulations contain no reference to the dispensation of fees once they are received by NMFS. Currently, NMFS apportions fees collected to reimburse the various agencies that have submitted costs for Program management through a series of memoranda of understanding.

3 Proposed modifications to the FMP

Modifying the FMP would ensure that in future years, NMFS has the necessary flexibility to collect fees commensurate with the actual subsidy costs of a loan program, and that only the minimum amount of subsidy cost is collected for loan financing. These changes would not affect the amount of loans currently authorized by Congress, or the subsidy costs anticipated by NMFS FSD for that loan program, and would not delay the implementation of loan program regulations currently under development by NMFS FSD.

The Council could choose three alternative approaches to address the concerns addressed. Alternative 1, the status quo alternative would not address the concern of potentially billing industry participants more than is necessary. Alternative 2 would remove the requirement that any funds be set aside for a loan program. Alternative 3 would provide NMFS the discretion to determine the amount of fees set aside for a loan program, but would clarify that no fees should be set aside unless NMFS determined that the set

aside is required. The following sections briefly note the proposed changes in the FMP text under Alternative 2 and 3 and describe the potential effects of both. Alternative 1 is described in the previous sections of this document and in the EIS prepared for the Program and is not addressed further here.

3.1 Alternative 2: Removing FMP text requiring an assignment of fees for a loan program set aside.

Under this alternative, the Council would remove all references in the FMP requiring that a portion of the fees collected be dedicated to a loan program set aside. If no fees are set aside to meet potential FCRA subsidy costs, NMFS FSD would have to meet any FCRA subsidy cost requirements either by receiving a direct appropriation from Congress, or the FCRA subsidy cost would need to be zero or negative, and therefore no appropriation would be required. The portions of the FMP text that would be amended under this alternative follows:

Alternative 2: Proposed FMP text modifications.

1.8.1.8 Loan program for crab QS

A low-interest rate loan program consistent with MSA provisions, for skipper and crew purchases of QS, shall be established for QS purchases by captains and crew members ~~using up to 25% of the Crab IFQ fee program funds collected.~~

11. Cost recovery definition - ...

A loan program for share purchases would be established. ~~with 25 percent of the fees collected. The motion authorized the collection of 133 percent of actual costs of management under the new program, which would provide for 100 percent of management costs after allocation of 25 percent of the cost recovery to the loan program.~~

Although this alternative would address concerns about assessing fees in excess of the amount required for a loan program, it would remove any potential discretion for NMFS to assign fees to cover loan subsidization costs if required in the future. However, as noted in section 2.3.1, it not clear that currently section 304(d) of the MSA provides a mechanism for NMFS to assign a portion of the fees it currently sets aside to Treasury for the explicit purpose of meeting any potential FCRA loan subsidy requirements. Therefore, NMFS may currently lack the ability to assign fees to cover FCRA subsidy costs under the MSA and deleting references to the set aside provisions in the FMP may not have any additional effect. Conversely, as described under section 2.3.1, section 305(h)(5)(B) of the MSA could be interpreted to provide NMFS with the ability to assign a portion of the fees collected for use in providing loan subsidization, then this alternative would effectively preclude NMFS from using fees collected to provide any necessary FCRA subsidy cost if it were subsequently determined that section 305(h)(5)(B) of the MSA does provide NMFS the authority to set aside fees, and a FCRA subsidy cost is required.

3.2 Alternative 3: Modifying FMP text to provide NMFS discretion to determine the amount of fees set aside for loan financing.

Under this alternative, the Council would remove the mandate that the maximum of 25 percent of fees collected be assigned to the loan program and provide NMFS the discretion to determine if any fees should be set aside based on a review of potential FCRA subsidy costs. If fees are not required to meet FCRA subsidy costs because they are not required due to a zero or negative subsidy cost, Congress has

provided separate appropriations to meet loan subsidization requirements, or recent amendments to the MSA precludes NMFS from using fees collected to meet FCRA subsidy costs, then no fees would be set aside.

This alternative would address the concern of collecting more fees than are absolutely necessary. This alternative would also allow NMFS to use any fees collected to cover a necessary FCRA subsidy cost if it were determined that section 304(d) of the MSA does not restrict NMFS from using fees collected to cover these costs, or if section 305(h)(5)(B) of the MSA could be interpreted to provide NMFS with the ability to assign a portion of the fees collected for use in providing loan subsidization. This alternative could provide slightly more flexibility to NMFS to meet FCRA subsidy cost requirements than alternative 2. This alternative is identical to the proposed modifications provided by NMFS at the April 2008 Council meeting. The portions of the FMP text that would be amended under this alternative follows:

Alternative 3: Proposed FMP text modifications.

1.8.1.8 Loan program for crab QS

A low-interest rate loan program consistent with MSA provisions, for skipper and crew purchases of QS, shall be established for QS purchases by captains and crew members using up to 25% of the Crab IFQ fee program funds collected....

11. Cost recovery definition - ...

A loan program for share purchases would be established with up to 25 percent of the fees collected. The motion authorized the collection of up to 133 percent of actual costs of management under the new program, which would provide for 100 percent of management costs after allocation of up to 25 percent of the cost recovery to the loan program. NMFS will assign no more than the minimum amount of fees required to aid in loan financing. No fees would be assigned for loan financing unless required.

4 References

North Pacific Fishery Management Council/National Marine Fisheries Service. (2004). Final Environmental Impact Statement/Regulatory Impact Review/Final Regulatory Flexibility Analysis for Bering Sea and Aleutian Islands Crab Fisheries.

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