INITIAL REVIEW DRAFT
for an
ADDENDUM
to the

Regulatory Impact Review/
Initial Regulatory Flexibility Analysis
for a proposed Amendment
to the Fishery Management Plan for Bering Sea and Aleutian Islands King and Tanner Crabs

Modifications to Community Provisions

May 2014

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1 Executive Summary

To protect community interests, the Bering Sea/Aleutian Islands Crab Rationalization Program (Program) required holders of most processor shares to enter into agreements granting community-designated entities a right of first refusal (ROFR) on certain transfers of those shares. This document analyzes a proposed revision to ROFR provisions that is intended to improve the ability of community entities to exercise the ROFR in order to maintain historical crab processing activity in their communities. Current ROFR provisions require a community entity exercising the ROFR to accept all terms and conditions of a proposed sale of processor quota shares (PQS) to a non-ROFR buyer. This proposed revision could be incorporated into the Council's preferred alternative for additional revisions to ROFR provisions, as selected at its February 2013 meeting. The Council will consider the alternatives analyzed in this document, and any measure selected would become part of the proposed rule to be developed from the existing preferred alternative.

Purpose and Need

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

> *The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their processors, and has addressed that codependence by establishing community "right of first refusal" agreements as a significant feature of the Program.*
>
> *The purchase of all the assets of a company (if included in a proposed sale), as currently required under the right of first refusal (ROFR) contract terms in the FMP may be impractical and potentially impossible for small community entities. In addition, processing companies may have ROFR contracts with several communities in which their assets are based.*
>
> *The ROFR contract terms in the FMP should allow for flexibility so the PQS holder and community entity may determine through negotiations whether the community entity may purchase a set of assets, including only the PQS, or the PQS and associated crab assets, in the subject community.*

Alternatives

The following alternatives proposed in this analysis would modify the current ROFR contract terms for the Program fisheries.

Alternative 1: Status Quo: ROFR contract terms in the FMP require the community ROFR holder to purchase all the PQS and all the other assets of a company, if they are included in a proposed sale triggering the ROFR

Alternative 2: In ROFR contracts, the right of first refusal applies to all the assets of a company included in a proposed sale (the "underlying agreement"), or to any subset of those assets, as otherwise agreed to by the PQS holder and the community entity.

For the purpose of this follow-on action, the analyst considers the status quo to be the Council's preferred alternative from the package of ROFR actions considered at the February 2013 Council meeting. Specifically, the Council considered, as part of Action 3 of that package, whether or not to alter the current contract terms so that the ROFR would apply to only the PQS or the PQS and all assets in the community that holds the ROFR. The Council determined that both alternatives would pose significant process, timing, cost, and administrative difficulties, including determination of a process for mutually agreeable valuation of PQS in the scenario where PQS is separated from other assets in the sale, and a process for defining "*assets based in a community"*. For these reasons the Council chose to maintain the status quo, in which ROFR applies to the PQS and all assets included in the proposed sale transaction.

<u>Alternative 1 – No action</u>

Under the no action alternative, or status quo under the Council's February 2013 ROFR action, a community entity's ROFR applies to a transaction that includes the subject PQS and possibly other assets. The provision requires that a community entity exercising the ROFR 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.

Although application of the ROFR to a transaction in its entirety may limit the effectiveness of the ROFR for communities, it may also overcome difficulties that would arise were the ROFR to apply only to a subset of the assets in the transaction, such as the PQS and assets in the community. Applying the ROFR 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 the status quo allows a community entity to intervene in a transaction, the effect of that intervention is limited, since the entity is required to perform under the same contract as the non-ROFR buyer would have.

<u>Alternative 2 – Apply ROFR to all terms and conditions of proposed sale OR to any subset of those assets, as otherwise agreed to by the PQS holder and the community entity</u>

Alternative 2 would revise the ROFR contract terms to specify that, "Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement, **or to any subset of those assets, as otherwise agreed to by the PQS holder and the community entity**." The addition of the bold text would allow the PQS holder and the community that currently holds the ROFR to negotiate what, if any, other assets may be included in an exercise of ROFR. This would provide community entities and PQS holders with more flexibility compared to the no action alternative.

Alternative 2 could benefit community entities because they would not be required to purchase assets that they might not have an interest in or be able to finance in order to maintain crab processing activities in their community, if the entity can reach an agreement with the PQS holder. However, there appears to be no compelling incentive for the PQS seller to negotiate an agreement that has different terms and conditions than the underlying agreement, unless there were specific provisions included which required the PQS seller to negotiate towards the contract terms desired by the ROFR holder. Defining or quantifying the degree to which a potential PQS seller must re-negotiate would likely be a challenging policy determination. However, simply amending the FMP to allow for such a re-negotiation would provide for that possibility.

2 Introduction

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under the Crab Rationalization Program (Program). The program is unique in several ways, including the allocation of processing shares[1] corresponding to a portion of the harvest share pool. The Council allocated these processor shares based on 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 (ROFR) on certain transfers of those shares to a non-ROFR third party.

Since implementation of the Program, crab community representatives and fishery participants have suggested that some aspects of the ROFR provisions may inhibit their effectiveness in protecting communities. In February 2013, the North Pacific Fishery Management Council (Council) recommended changes to the current ROFR provisions in the Fishery Management Plan for Bering Sea and Aleutian Islands King and Tanner Crabs (FMP) and in Federal regulations. These changes were intended to improve the ability of community entities to exercise ROFR and maintain crab processing activity in their community.

In February 2013, the Council also considered revising the application of ROFR. Under current ROFR contract provisions, if the holder of processor quota shares (PQS) subject to ROFR has entered into an agreement to transfer those shares to a holder that will use the shares outside of the community, the community entity is permitted to acquire the PQS, and any other assets included in the transaction, by agreeing to perform all terms of the transaction with the non-ROFR buyer. The Council considered revising the application of ROFR to apply only to the PQS (Alternative 2), or to PQS and assets based in the community (Alternative 3). The analysis prepared for these alternatives determined that both would pose significant process, timing, cost, and administrative difficulties, including determination of a process for mutually agreeable valuation of PQS in the scenario where PQS is separated from other assets in the sale, and a process for defining "*assets based in a community"*. For these reasons the Council chose to maintain the status quo, in which ROFR applies to the PQS and all assets included in the proposed sale transaction.[2]

In June 2013, the Council received public testimony from ROFR community representatives regarding the Council's decision to maintain the status quo for the application of ROFR. These community entity representatives indicated that some PQS and ROFR holders were considering the use of private contractual agreements to address remaining community protection issues, including contractual provisions that would limit the assets to which the ROFR would apply. The community representatives asked the Council to clarify whether current ROFR provisions authorize private contractual agreements with provisions that differ from the required ROFR contract terms. In response to this testimony, the Council requested that staff prepare a discussion paper examining this question.

In December 2013, the Council reviewed the discussion paper, which concluded that the current ROFR contract provisions do not provide for a re-negotiation of the terms and conditions of the proposed sale transaction. The paper noted that the ROFR contract provisions could be revised in the FMP to allow for such flexibility. After reviewing the discussion paper and receiving public testimony in support of modifying ROFR contract provisions, the Council initiated this analysis to allow for negotiated contracts that apply ROFR to (1) all the assets included in a proposed sale transaction to a non-ROFR holder (the

[1] Processor shares include both Processor Quota Shares (PQS), which are long term privileges to receive annual allocations of Individual Processor Quota (IPQ), and IPQ. Annual IPQ is a privilege to receive specific poundage of crab landings in that year (which represent a share of the TAC).
[2] For further discussion of the alternatives considered refer to the Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Modifications to Community Provisions (North Pacific Fishery Management Council, January 2013).

status quo) or (2) to any subset of assets agreed to by the PQS holder and the ROFR holder. The Council will consider the alternatives analyzed in this document and any measure selected would become part of the proposed rule to be developed for the ROFR modifications recommended by the Council in February 2013.

This document contains a Regulatory Impact Review (Section 3) and an Initial Regulatory Flexibility Analysis (Section 4) of the alternatives to modify the ROFR contract term in the FMP specifying that ROFR applies to the PQS and all assets included in the underlying sale transaction. Section 5 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.[3]

This document relies on information contained in the Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Modifications to Community Provisions (NPFMC 2013) reviewed by the Council in February 2013 and the Bering Sea/Aleutian Islands Crab Fisheries Final Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis/ Social Impact Assessment (NMFS/NPFMC, 2004).[4]

3 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 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 statue 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;

[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, and as a consequence, distribution of landings of crab under the program. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

[4] In addition, further information concerning the fisheries and regulatory structure at issue in this action are contained in North Pacific Fishery Management Council/AECOM (November 2010).

- 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.

3.1 Purpose and Need

The purpose of this action is to improve the ability of community entities to exercise ROFR in order to maintain historical crab processing activity in their communities. Since implementation of the Program, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests.

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

> *The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their processors, and has addressed that codependence by establishing community "right of first refusal" agreements as a significant feature of the program.*
>
> *The purchase of all the assets of a company (if included in a proposed sale), as currently required under the right of first refusal (ROFR) contract terms in the FMP, may be impractical and potentially impossible for small community entities. In addition, processing companies may have ROFR contracts with several communities in which their assets are based.*
>
> *The ROFR contract terms in the FMP should allow for flexibility, so the PQS holder and community entity may determine through negotiations whether the community entity may purchase a subset of assets, including only the PQS, or the PQS and associated crab assets, in the subject community.*

3.2 Description of Action

The Council approved the alternatives analyzed in this document in December 2013. They are listed below, and described in detail in the sections that follow. These alternatives propose management measures that would apply to both PQS holders and community entities that hold a ROFR.

Alternative 1: No action. ROFR contract terms in the FMP require the community ROFR holder to purchase all the processing quota share (PQS) and all other assets of a company, if they are included in a proposed sale triggering the ROFR.

Alternative 2: In ROFR contracts, the ROFR applies to all the assets of a company included in a proposed sale (the "underlying agreement"), or to any subset of those assets, as otherwise agreed to by the PQS holder and the community entity.

For the purpose of this follow-on action, the analyst considers the status quo to be the Council's preferred alternative from its action in February 2013to recommend modifications to a number of ROFR provisions. The Council's preferred alternative maintained the status quo requirement that "*Any right of* *first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement*".

In selecting its preferred alternative in February 2013, as part of Action 3 of the ROFR amendment package, the Council considered two alternatives for modifying the status quo FMP requirement that ROFR applies only to the conditions of the underlying agreement. The alternatives developed by the Council and analyzed in February 2013 included (1) applying the ROFR to the processor shares only or (2) applying the ROFR to the processor shares and assets based in the community. Based on the analysis, both of these alternatives posed significant process, timing, cost, and administrative difficulties, including determination of a process for defining "*assets based in a community*", and a process for mutually agreeable valuation of PQS in the scenario where PQS is separated from other assets in the sale.[5] For these reasons the Council chose to maintain the status quo for Action 3 in February 2013.

3.2.1 Alternatives Considered, but not advanced for analysis

The Council has not considered any alternatives in addition to those analyzed in the Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Modifications to Community Provisions (NPFMC 2013) and in this addendum to that analysis.

3.3 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 program, followed by descriptions of the harvesting and processing sectors in the fisheries. A brief description of communities dependent on the crab fisheries is also included as background, concerning community effects of this action.

3.3.1 Management of the fisheries

The following nine crab fisheries are managed under the Program:

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

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

[5] Regulatory Impact Review/Initial Regulatory Flexibility Analysis for Modifications to Community Provisions (NPFMC 2013)

vessel QS based on their LLPs' histories as a catcher vessel. These owner QS are approximately 97 percent of the QS pool. The remaining three percent of the initial allocation of QS was issued to eligible captains as crew QS or "C shares", based on the individual's harvest histories as a permit holder on a crab vessel. QS annually yields individual fishing quota (IFQ), which represent a privilege to harvest a particular amount of crab (in pounds) in a given season (based on the TAC). The size of each annual IFQ allocation is based on the amount of QS held in relation to the QS pool in the fishery. So, a person holding 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 an equal amount of unused individual processor quota (IPQ).[6] The remaining 10 percent of the annual IFQs are issued as "B shares", or "Class B IFQ," which may be delivered to any processor.[7] 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.[8]

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

- Bristol Bay red king crab – North/South division at 56°20'N latitude
- Bering Sea *C. opilio* – North/South division at 56°20'N latitude
- Eastern Bering Sea *C. bairdi* – none (or undesignated)
- Western Bering Sea *C. bairdi* – none (or undesignated)
- Pribilof red and blue king crab – North/South division at 56°20' N latitude
- St. Matthew Island blue king crab – North/South division at 56°20'N latitude
- Western Aleutian Islands red king crab – South of 56°20'N latitude
- Eastern Aleutian Islands golden king crab – South of 56°20'N latitude
- Western Aleutian Islands golden king crab – undesignated and West of 174ºW 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 ROFR on the PQS (and derivative IPQ) arising from processing in that community.[9] In addition, entities representing qualified communities in the Gulf of Alaska north of 56°20' N latitude received a ROFR on any PQS issued, based on processing in a community not qualifying for a ROFR in that same area of the Gulf. Only the community of Kodiak qualified for this Gulf provision. Four fisheries – the Eastern and Western Bering Sea *C. bairdi* and the Western Aleutian Islands red and golden king crab fisheries – are exempt from the ROFR provisions, as allocations of PQS in those fisheries were based on historic processing in other fisheries.

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[6] C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ and regional landing requirements.
[7] The terms "A share" and "Class A IFQ" are used interchangeably in this paper, as are the terms "B share" and "Class B IFQ".
[8] 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 for these offsetting shares. To maintain 10 percent of the catcher vessel owner IFQ pool as B shares requires that unaffiliated QS holders receive more than 10 percent of their allocation as B shares (and less than 90 percent A shares).
[9] 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.

In the case of CDQ communities, the representative entity holding the ROFR is the local CDQ group. In all other communities, the ROFR is held by an entity designated by the community. The ROFR is established by a contract between the community entity and the PQS holder. Under the contract, the ROFR 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 currently formulated, to exercise the ROFR, the community entity must accept all terms and conditions of the underlying agreement.

Any intra-company transfers, within a region, are exempt from the ROFR. To qualify for this exemption, the IPQ must be used by the same company.[10] In addition, transfers of PQS for use in their home community are exempt from the ROFR. 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 ROFR on the received PQS to the community's representative. The ROFR provisions implemented in 2005 identified two circumstances under which the ROFR will lapse. First, if a company uses its IPQ outside of the home community for three consecutive years, the ROFR on the underlying PQS (and derivative IPQ) lapses. Second, if a community entity chooses not to exercise the ROFR on the transfer of PQS, the ROFR also lapses. In February 2013, the Council took action to modify the lapse provisions from the ROFR program. The Council recommended removing the requirement that ROFR lapses if a company uses IPQ outside of the home community for three consecutive years. The Council also recommended that if a community entity chooses not to exercise ROFR on the transfer of PQS, the new PQS holder may identify the ROFR holder for that PQS. The PQS can either name the original ROFR holder or the new eligible ROFR holder for the community in which the PQS will be used.

To exercise the ROFR, a community entity must provide the seller of PQS with notice of its intent to exercise the ROFR 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.

3.3.2 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.

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

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

pqs

Fishery	Region	Share holdings by region				Across regions			
		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 *C. opilio*	North	8	5.87	5.51	15.46	19	5.26	3.42	25.18
	South	17	3.12	0.38	9.72				
Eastern Aleutian Island golden king crab	South	10	10.00	5.24	45.36	10	10.00	5.24	45.36
St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	10	10.00	6.87	32.67
	South	7	3.09	2.08	7.96				
Pribilof red and blue king crab	North	6	11.26	12.01	23.28	13	7.69	3.87	24.49
	South	10	3.25	1.09	13.85				

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

Historically, holders of PQS have operated in multiple communities (in some cases onshore and in some cases on floating processors). While any specific PQS is subject only to a single community ROFR, 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 ROFR, if the PQS holder attempts to include all of its share holdings in a single transaction. In this circumstance, two communities would hold a ROFR, 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 (2011-2012).

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

Source: RAM permit database (2011-2012)

Under the 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 Program was implemented, the number of processing plants participating in the Bristol Bay red king crab fisheries has remained relatively constant at approximately 12. The average processing by the top 3 plants in the fishery increased to approximately 20 percent, with the concentration of the different share types slightly higher (suggesting that the largest processors of the different share types differ). In the first six years of the Program, on average, 9 plants have participated in the Bering Sea *C. opilio* fishery, fewer than prior to the Program (Table 4). Concentration of processing declined slightly in the 2010-2011 season. This decline likely resulted from the increase in the TAC, which resulted in substantial increases in the mean and median pounds processed, as well as the average pounds processed by the largest three plants. Ten or fewer plants participated in processing in the Bering Sea *C. bairdi* fisheries in the first three years of the Program. Since these fisheries are directly prosecuted by few vessels and have relatively small TACs, the processing is slightly more concentrated than in the two largest fisheries. Five or fewer plants participated in the Eastern Aleutian Island golden king crab and Western Aleutian Island golden king crab fisheries in the first three years of the Program, limiting the information that may be released concerning processing in those fisheries.

In the first two years of the Program, a large portion of the IPQ pool was subject to the "cooling off" provision, which required most processing to occur in the community of the processing history that led to the allocation of the underlying PQS. Consequently, few changes in the distribution of processing of Class A IFQ/IPQ landings occurred in the first two years of the Program. Also, for most shares, entities representing the community of origin hold a ROFR on the transfer of the PQS and IPQ for use outside the community. This right was relatively weak, because intra-company transfers made within a region are exempt from the ROFR, and, under the provisions in place during the first two years of the Program, the ROFR lapses if the IPQ is 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 ROFR may be avoided, in the third year of the Program, most processing of IPQ landings occurred in the community of origin. Discerning the degree of redistribution, however, is not possible, as landings on floating processors are often categorized as "at-sea". In many cases, these floaters operated within community boundaries, at times docked in the community harbor. In the 2010-2011 season, four years from the lapse of the 'cooling off' provision requirements, some redistribution of processing of Class A IFQ landings is suggested (Table 3). Dutch Harbor and Akutan, collectively, have attracted slightly more Class A IFQ landings in the Bristol Bay red king crab fishery than under the cooling off period. These redirected landings reduced landings in King Cove and Kodiak, collectively. In the cooling off period, King Cove and Kodiak received substantially larger percentages of Class A IFQ landings than their rights of first refusal suggest. These likely occurred as landings from within borough boundaries were consolidated in King Cove, and as King Cove and Kodiak attracted landings that were unconstrained by the cooling off requirements. Processing of A share IFQ in Akutan and Dutch Harbor in the Bering Sea *C. opilio* fishery dropped substantially (by almost 20 percent) in the fifth and sixth years of the Program. Redistribution of these landings to other locations cannot be revealed, because of confidentiality restrictions. The movements of landings suggest that, with the cooling off provision expiring, it is possible to see a significant redistribution of landings among communities.

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

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

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

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

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

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

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

Source: RAM IFQ data and RCR permit file.

* Processed under the exemption from regional delivery requirements.

3.3.3 ROFR 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 ROFR 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 ROFR, but that does not trigger the ROFR, must enter a ROFR contract for that PQS prior to the transfer being processed. Once contracts are entered, the holder of the ROFR and the PQS holder oversee the ROFR through civil actions. This approach is intended to ensure that the ROFR is established as required, while limiting the extent of agency involvement in any private dispute between the parties to the contract.

The ROFR contract provisions are also specified in the crab FMP, pursuant to Section 313(j) of the MSA, and include the following (A through I):

Contract Terms for Right of First Refusal based on Public Law 108-199

A. The right of first refusal will apply to sales of the following processing shares:

1. PQS and
2. IPQs, if more than 20 percent of a PQS holder's community based IPQs (on a fishery by fishery basis) has been processed outside the community of origin by another company in 3 of the preceding 5 years.

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

C. Intra-company transfers within a region are exempt from this provision. To be exempt from the first right of refusal, IPQs must be used by the same company. In the event that a company uses IPQs outside of the community of origin for a period of (two options):

1. 3 consecutive years
2. 5 consecutive years

The right of first refusal on those processing shares (the IPQ and the underlying PQS) shall lapse. With respect to those processing shares, the right of first refusal will not exist in any community thereafter.

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

1. use at least 80 percent of the annual IPQ allocation in the community for 2 of the following 5 years (on a fishery by fishery basis), and
2. grant the community a right of first refusal on the PQS subject to the same terms and conditions required of the processor receiving the initial allocation of the PQS.

E. All terms of any right of first refusal and contract entered into related to the right of first refusal will be enforced through civil contract law.

F. A community group or CDQ group can waive any right of first refusal.

G. The right of first refusal will be exercised by the CDQ group or community group by providing the seller within 60 days of receipt of a copy of the contract for sale of the processing shares:

1. notice of the intent to exercise and
2. earnest money in the amount of 10 percent of the contract amount or (two options)
    a. $250,000 or
    b. $500,000

    whichever is less

The CDQ group or community group must perform all of the terms of the contract of sale within the longer of:

1. 120 days of receipt of the contract or
2. in the time specified in the contract.

H. The right of first refusal applies only to the community within which the processing history was earned. If the community of origin chooses not to exercise the right of first refusal on the sale of PQS that is not exempt under paragraph D, that PQS will no longer be subject to a right of first refusal.

I. Any due diligence review conducted related to the exercise of a right of first refusal will be undertaken by a third party bound by a confidentiality agreement that protects any proprietary information from being released or made public.

3.3.4 ROFR

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

[11] Rights established on implementation are included.

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

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

Source: RAM PQS data 2011-2012

In six instances, community entities holding the ROFR have acquired PQS subject to the ROFR (Table 6). A variety of arrangements led to these transactions, but in no case was the ROFR exercised directly. In one fishery, a portion of the PQS subject to the ROFR was transferred to the community entity holding the ROFR, while the ROFR with respect to another portion of the PQS was allowed to lapse. In another instance, a PQS holder with a considerable harvest share-holding transferred its PQS to the ROFR 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 ROFR has affected community interests. In two cases, a ROFR holder has voluntarily agreed to relinquish the ROFR. The terms of those agreements (and whether any compensation was made for the relinquishment) are not known.

Circumstances in the various communities and of the ROFR holders and the processors have affected the manner in which PQS have either been transferred to ROFR holders or have been relinquished. The limitations of the 'cooling off' provision prevented much of the IPQ subject to the ROFR from being used outside the community of origin in the first two years of the Program. Only in the third year of the Program (once the cooling off limitation lapsed) was any sizeable portion of the IPQ permitted to be moved. As a result, rights of first refusal on PQS are believed to have lapsed (as a result of use outside the community) in only a few instances in the first three years of the Program. Most notably, the ROFR has lapsed with respect to PQS arising from historical processing in St. George. The St. George harbor and its entrance were damaged by a storm in 2004. In the first two years of the Program, NOAA Fisheries found that damage prevented processing in St. George, and on request of both the community of St. George and APICDA, approved use of a regulatory exemption to the cooling off landing requirements. In the third year, the PQS holders used the IPQ outside the community. As a consequence, by its terms, the ROFR lapsed on shares for which the Aleutian Pribilof Island Community Development Association (APICDA) held rights of first refusal on behalf of St. George. Despite these circumstances, APICDA reached agreements with both PQS holders with respect to these shares. Under the agreement with one of the PQS holders, APICDA acquired the PQS formerly subject to the ROFR. The terms of the other agreement are not known, but APICDA relinquished its right as a part of that agreement.

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

Table 6. PQS no longer subject to ROFR by fishery.

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

Source: RAM PQS data (2011-2012)

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

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

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

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

3.3.5 Communities

Eight communities have historically received substantial landings from the Bering Sea and Aleutian Islands crab fisheries in which the ROFR apply: Unalaska, Akutan, King Cove, St. Paul, St. George, Kodiak, Port Moller, and False Pass. Of these eight communities, three are CDQ communities (False Pass, St. George, and St. Paul), which means the ROFR holding ECC entity in those communities is the CDQ group to which the ECC is a member. In the remaining 4 communities (Dutch Harbor, Kodiak, King Cove, and Port Moller[12]), an ECC entity was designated by the governing body of the ECC (Table 7).

Table 7. Communities with a history of crab processing and the associated ECC entity.

Community with historical ties to crab processing	ECC entity
Adak	* No ROFR because they received a special allocation of 10% of the Western Aleutian gold king crab TAC
False Pass (CDQ)	APICDA
St. George (CDQ)	APICDA
St. Paul (CDQ)	CVSFA
Kodiak (non-CDQ)	Kodiak Fisheries Development Association
King Cove (non-CDQ)	City of King Cove and Aleutians East Borough
Dutch Harbor (non-CDQ)	Unalaska Crab, Inc.
Port Moller (non-CDQ)	Aleutians East Borough

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,

[12] As mentioned previously, Adak, which is a non-CDQ community, 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.

processing, and support sector activity or ownership. Each of these factors influences the direction and magnitude of potential social impacts associated with the proposed action (NPFMC, 2008).

Commercial fishing and seafood processing play a significant role in the economic success of Unalaska/Dutch Harbor. This community is home to the greatest concentration of processing and catcher vessel activity of any Alaska community. In recent years, pollock has accounted for the majority of the total wholesale value processed in Dutch Harbor. The second largest contributor to total wholesale value processed in Dutch Harbor has been crab, with red king crab providing the largest value contribution of a crab species, followed by *C. opilio*. Dutch Harbor based processors received a substantial share of the PQS allocations in most crab fisheries under the 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 ROFR, 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 (NPFMC/AECOM, 2010; NPFMC/EDAW, 2008).

Once heavily dependent upon salmon, the community of King Cove is now more diversified, processing groundfish and crab from the GOA and BSAI. The community is home to several large crab vessels, and is also home to Peter Pan Seafoods,[13] the only shore based processor located in King Cove. The plant processes salmon, crab, halibut, and groundfish. A large majority of King Cove's work force is employed full time in the commercial fishing industry, with additional employment in the community to support businesses dependent on commercial fishing. For several years now, the amount and total value of crab processed in King Cove have been declining, while groundfish processing has increased. The decline in crab production was due primarily to a decline in quotas, related to reduced stocks. In addition, AFA sideboard limits on BSAI crab have also limited the amount of crab that could be processed in King Cove. Under the Program, crab processing has remained an important component of the diversified processing undertaken at the shore plant in King Cove. Yet, the potential for the community to attract additional processing is limited by excessive share caps, which constrain the local plant since its parent merged with the owner of two other plants active in the crab fisheries. In addition, rapid fleet contraction under the Program, particularly in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, has affected King Cove. Approximately 20 crew jobs were estimated to have been lost (see Lowe, et al., 2006). Although difficult to quantify because of the yearly variation in crew employment, the estimate is consistent with information gathered in other studies (see NPFMC/AECOM, 2010). 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/EDAW, 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.

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

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

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 (in both value and volume) (EDAW, 2010). As with plants in Dutch Harbor and King Cove, crab has remained an important part of a diverse operation at the shore plant in Akutan, since implementation of the 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. In 2011, the seafood industry, which includes harvesting (active permit holders 789) and seafood processing, was the second largest employer, after the U.S. Coast Guard and other government entities (Kodiak Chamber of Commerce, 2012). Kodiak's processing sector has also relied on a diverse group of fisheries to support its operations through ebbs and flows in resource availability. Although Kodiak has a long history of crab processing, in the years leading up to the implementation of the Program (including the qualifying years used for processor share allocation), its dependence on the Bering Sea and Aleutian Island crab fisheries was small relative to Unalaska, King Cove, Akutan, and St. Paul. A study of the effects of the 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 shore plant 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 Program. This limitation on landings should ensure that a substantial portion of the processing in the Bering Sea *C. opilio* fishery is undertaken in St. Paul. In the long run, it is possible that St. George could obtain a greater share of North landings, but most participants currently prefer St. Paul's harbor facilities to those available in St. George. Central Bering Sea Fishermen's Association, the St. Paul CDQ group, is the community entity holding rights of first refusal on behalf of St. Paul.

As with St. Paul, St. George has depended primarily on processing of crab from the Bering Sea *C. opilio* fishery. Processing of crab in St. George has been conducted exclusively by floating processors. Since 2000, little crab processing has taken place in St. George. Prior to the Program, the loss of processing activity was primarily attributable to the decline in crab stocks. Under the Program, some processing is reported to take place within St. George's community boundary on a floating processor, but no processing has returned to St. George harbor. Processing shares were subject to the 'cooling off' provision requiring the processing of landings with those shares to be undertaken in St. George. Yet, harbor breakwater damage caused by a storm prevented deliveries to the community during the first two years of the Program and only limited activity has returned. Whether the community can attract crab landings in the future depends, in large part, on its ability to provide processing capacity and a harbor that is perceived to be safe and suitable for the large vessels currently used in the fisheries. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of St. George.

Limited processing of catch from the Bristol Bay red king crab fishery on floating processors occurred in the communities of False Pass and Port Moller in the processor qualifying years. This processing qualified both communities for rights of first refusal under the Program. No processing is believed to have occurred in either community since implementation of the Program. And, neither community currently has a shore-based processing plant that supports crab processing. Port Moller has a salmon plant that is operated seasonally. Aleutian Pribilof Island Community Development Association, the local CDQ group in False Pass, is in the process of opening a processing plant in that community. At this stage, the plant does not support crab processing. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of False Pass. Aleutia holds the ROFR for Port Moller.[14]

3.3.6 Deliveries in the fisheries

Under the Program, season limits are imposed for biological reasons. With this new latitude to schedule harvest activity, participants have the ability to spread deliveries out across the seasons (see **Error! eference source not found.**).[15] For example, deliveries made during the 2005-2006 Bristol Bay red king crab season were dispersed over the 3-month period following the October 15, 2005 season opening date; the first delivery was made on October 20, 2005 and the last delivery was made on the day after the regulatory closure date of January 15, 2006. In all of the fisheries, deliveries have been distributed over a period of several months; however, deliveries remain most concentrated in the Bristol Bay red king crab fishery. That season is only three months in duration, substantially shorter than the season in other fisheries, and markets tend to be strongest at the year's end, leading up to the holidays. These extended seasons provide flexibility to schedule deliveries to accommodate market and operational preferences, as well as address unforeseen contingencies.

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

[15] Table includes only catcher vessel activity.

Table 8. Post-rationalization pattern of catcher vessel deliveries by fishery.

Fishery	Season	Season opening	Date of first delivery	Week of most deliveries (in pounds): Weekending date	Week of most deliveries (in pounds): Percent of quota delivered	Date of last delivery	Season closing
Bristol Bay red king crab	2005-2006	October 15	October 20	November 5	28.6	January 16	January 15
	2006-2007		October 19	November 5	44.0	November 28	
	2007-2008		October 18	November 5	31.1	January 15	
	2008-2009		October 18	November 5	28.7	January 17	
	2009-2010		October 17	November 5	41.0	January 16	
	2010-2011		October 16	October 29	31.5	December 10	
Bering Sea C. opilio	2005-2006	October 15	October 27	February 4	11.0	May 27	May 15 (east) May 31 (west)*
	2006-2007		November 7	February 25	11.1	May 5	
	2007-2008		November 18	February 25	13.0	May 10	
	2008-2009		November 30	February 11	10.7	May 16	
	2009-2010		October 25	March 4	15.5	May 6	
	2010-2011		November 18	February 11	15.3	April 9	
Eastern Aleutian Islands golden king crab	2005-2006	August 15	August 30	September 19	14.1	March 28	May 15
	2006-2007		August 31	**	**	January 13	
	2007-2008		August 30	**	**	February 9	
	2008-2009		September 7	October 3	14.8	December 22	
	2009-2010		August 31	September 12	17.1	January 10	
	2010-2011		August 22	October 17	18.6	December 16	
Eastern Bering Sea C. bairdi	2006-2007	October 15	October 23	March 11	18.1	March 27	March 31
	2007-2008		October 20	March 24	7.0	April 2	
	2008-2009		October 19	**	**	March 11	
	2009-2010		October 17	November 19	22.7	March 1	
Western Aleutian Islands golden king crab	2005-2006	August 15	September 6	October 24	11.4	March 25	May 15
	2006-2007		September 10	**	**	May 6	
	2007-2008		September 14	**	**	May 21	
	2008-2009		September 13	**	**	May 12	
	2009-2010		September 5	**	**	May 18	
	2009-2010		September 11	**	**	March 18	
Western Bering Sea C. bairdi	2005-2006	October 15	October 27	March 25	7.9	May 3	March 31
	2006-2007		November 4	March 11	16.3	April 5	
	2007-2008		November 16	March 3	5.5	March 31	
	2008-2009		January 11	March 11	4.0	April 6	
St. Matthew Island blue king crab	2009-2010	October 15	October 23	November 19	14.4	December 7	February 1
	2009-2010		October 23	December 3	18.4	December 11	

Source: RAM IFQ landings data
* The boundary between the Eastern and Western Subdistricts is 173° W longitude.
** withheld for confidentiality.

To date, two conditions may have created impediments to deliveries in specific communities (or locations), ice conditions and a fire aboard a floating processor.[16] Ice conditions have been an obstacle to deliveries from the Bering Sea *C. opilio* fishery in to the Pribilof communities every year since implementation of the Program. When ice is an obstacle to deliveries, it also often limits access to fishing grounds, further complicating harvests and deliveries in the fishery. In each of the first seven years of the Program, ice has abutted St. Paul, the only community in the North region to receive landings under the Program. In addition, St. George, whose representative holds rights of first refusal on PQS, has also had harsh ice conditions with ice abutting the area in more than half of the past seven years. Depending on the severity of conditions, this ice may prevent deliveries of catch into those communities. Harvesters with catch on board prevented from making a delivery in a particular location by ice could elect to make the delivery to a processor in a location unaffected by the ice (provided it remains in the designated region). Whether ice prevents a delivery to a specific location may depend on the circumstances, including the spatial distribution and type of ice, the specific vessel, the location of the vessel relative to the delivery location, the amount and condition of crab on board, and any factors affecting the willingness of the captain to wait for conditions to change. While the fleet has coordinated harvests of the North region IFQ,

[16] Although the dearth of processing in St. George caused deliveries to be redirected to St. Paul, that redistribution is permitted without exemption to the regional landing requirements. In addition, the circumstances that prevented deliveries into Adak prompting emergency rulemaking and provision for exemption from regional landing requirements in that fishery are beyond the scope of this action.

fishing that allocation early in the season, before ice conditions reached their extreme, is not likely to adequately address all circumstances.

The most severe delivery problems in the fishery occurred in 2012, when ice surrounded St. Paul Island and covered much of the fishing grounds for several weeks. Alaska Department of Fish and Game extended the season in the fishery for an additional 15 days to allow for full harvest of IFQ.[17] Landings in the fishery extended through the end of the season.

In the spring of 2007, icing problems in the North region were compounded by a disabling fire on one of the two floating processors scheduled to operate in the North region. With limited processing capacity scheduled for the North region, deliveries were delayed, and, at one point, three crab vessels were trapped in the ice temporarily outside St. Paul harbor. Travelling through ice no doubt poses threats to fishing vessels and crews. Vessels are not only at greater risk of loss, but also may suffer hull, propeller, and rudder damage. In some instances, this damage may not be easily detectable. Through the first five years of the Program, several vessel owners have said that they believe their vessels suffered extraordinary wear and tear from traversing through ice to make North region deliveries. The extent to which the North region landing requirement has contributed to these safety risks is uncertain. Prior to implementation of the Program, vessels periodically became trapped in the ice during the Bering Sea *C. opilio* season, particularly when attempting deliveries to St. Paul. In addition, most harvesters prefer to deliver catch in the Bering Sea *C. opilio* fishery to the Pribilofs to avoid the travel costs associated with deliveries to the South. Lastly, ice conditions that cause problems for deliveries to the Pribilofs are frequently accompanied by icing problems on the grounds. To the extent that harvesters are unable to make deliveries to St. Paul for an extended period, they may be unable to continue fishing. Harvesters unable to fish, however, may need to offload any crab onboard to avoid excessive deadloss.

Whether deliveries to a community are prevented in the future by conditions other than ice will depend on several factors, including the availability (or replaceability) of processing capacity in the community. In communities with several shore-based platforms (such as Kodiak and Unalaska), a PQS holder is likely to have several delivery alternatives, should a facility be disabled. In such a case, communities with a single platform (such as Akutan or King Cove) may provide little opportunity to have crab processed in the community, should a plant be disabled.

In December 2010, to address potential circumstances that could prevent deliveries in a region, the Council adopted an amendment that would create an exemption to the regional landing requirements. Generally, the exemption would only be permitted on agreement of the IFQ holder, IPQ holder, and community entity holding the ROFR. These parties are intended to specify both mitigating actions and possible compensation, in the event the exemption is granted. The exemption is intended to be administered by the parties through two agreements. A framework agreement (required to be entered by October 15th of each season) would be used to outline the terms of the exemption. An exemption agreement would be intended to define the terms of the specific exemption. The amendment was implemented for the 2013-2014 crab fishing season.

3.4 Analysis of Alternatives

The following section analyzes the potential effects of the no action and action alternatives, with the no action alternative being the Council's preferred alternative for Action 3 in its February 2013 motion.[18]

[17] ADFG, Emergency Order 4-S-24-12, Bering Sea Snow Crab Fishery Partial Extension of Eastern Subdistrict (May 8, 2012) and ADFG, Emergency Order No. 4-S-25-12, Bering Sea Snow Crab Season Extended (May 14, 2012).
[18] The motion is located on the Council web site at http://www.npfmc.org/wp-content/PDFdocuments/catch_shares/Crab/Crabmotion213.pdf

3.4.1 Alternative 1 – No action (Status quo under Council's February 2013 ROFR action)

Under the no action alternative, also the status quo under the Council's preferred alternative for its action in February 2013, a community entity exercising the ROFR must accept all terms and conditions of the proposed transaction (underlying agreement) between the PQS holder and the non-ROFR buyer. Paragraph B of the ROFR contract terms (see section 3.3.3) specifies that "Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement." The Council originally intended for ROFR contract terms to provide a community entity with the right to purchase PQS from a seller for the same price and subject to the same terms and conditions as offered by the seller in an open market. The analysis to implement the Program in 2004 noted that

> "…paragraph B provides that the ROFR would apply to the transaction involving processor shares as a whole and would require the community group exercising that right to agree to all the terms of the agreement. This provision would be intended both to make the ROFR workable and to limit the disruption to a processor's transaction that might be caused by the exercise of the ROFR….exercise of the right would require the community group to perform the contract in its entirety. The requirements of the contract should be clear to the community. The provision is thought to protect the selling processor's interests by requiring that the transaction that is acceptable to the processor be adopted."

Since implementation of the ROFR provisions, community representatives and fishery participants have suggested that some aspects of the ROFR program may inhibit their effectiveness in protecting community interests. Some community representatives have identified specific concerns with the ROFR provision that requires the community to 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 ROFR for several reasons. Financing may be more difficult to obtain as the cost of these additional assets increases the transaction price, likely reducing the feasibility for an entity to exercise their ROFR. The entity may have no justifiable interest in assets unrelated to the community it represents. Acquiring these unrelated assets under the ROFR may effectively require the entity to act as a broker for the assets to avoid maintaining 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 ROFR on large transactions that include valuable assets from outside the community.

Although application of the ROFR to a transaction in its entirety may limit the effectiveness of the ROFR for communities, it may also overcome difficulties that would arise were the ROFR to apply only to a subset of the assets in the transaction, such as the PQS and assets in the community. If the ROFR applies to a subset of the assets in the transaction and this subset of assets is specified in the ROFR contract terms, a valuation method must be adopted for determining the contract amount that must be paid on exercise of the ROFR. The process for valuing the assets would be needed and the time allowed for the exercise of the ROFR would likely need to be extended to accommodate that valuation. In its February 2013 action to revise ROFR provisions, the Council elected not to revise the ROFR contract terms in a manner that would require establishing a valuation method for PQS and assets in the community. The Council determined that establishing such a process posed significant timing, cost, and administrative difficulties. Applying the ROFR 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 the status quo allows a community entity to intervene in a transaction, the effect of that intervention is limited, since the entity is required to perform under the same contract as the non-ROFR buyer would have.

Under the status quo, the PQS holder has the option to limit the underlying agreement to the PQS subject to ROFR. If the underlying agreement does not refer to 'other goods' (as stipulated in paragraph B), then the ROFR holder would have the ROFR option on the PQS, and 'other goods' would be the subject of a separate contractual agreement between the PQS holder and the non-ROFR buyer.

3.4.2 Alternative 2 – In ROFR contracts, the right of first refusal applies to all the assets of a company included in a proposed sale (the "underlying agreement"), or to any subset of those assets, as otherwise agreed to by the PQS holder and the community entity.

Alternative 2 would revise paragraph B of the ROFR contract terms (see section 3.3.3) to specify that, "Any right of first refusal must be on the same terms and conditions of the underlying agreement and will include all processing shares and other goods included in that agreement, **or to any subset of those assets, as otherwise agreed to by the PQS holder and the community entity**." The addition of the bold text would allow the PQS holder and the community that currently holds the ROFR to negotiate what, if any, other assets may be included in an exercise of ROFR. This would provide community entities and PQS holders with more flexibility compared to the no action alternative. For example, assume a PQS holder has assets in communities A, B, and C, along with PQS currently used in community A. Community A holds a ROFR that is triggered if the PQS holder decides to transfer the PQS for use outside of the community A. No processing currently takes place in communities B and C, but the PQS holder owns processing assets in those communities. If the PQS holder decides to sell the PQS that is used in community A and the assets it owns in in communities A, B, and C, to a buyer who would use the PQS outside of community A, the proposed sale would trigger the ROFR. Under the current ROFR contract terms (status quo), the community entity would be required to purchase the PQS and the PQS holder's assets in all three communities (A, B, and C), even though, the community entity likely would only be interested in purchasing the PQS and the assets in community A.

Under Alternative 2, community A, which holds the ROFR, would have more flexibility compared to the no action alternative because it has the option to reach agreement with the PQS holder that, for example, the ROFR would only apply to the PQS and the assets in community A. The PQS holder would maintain the option to sell the assets in communities B and C without triggering community A's ROFR. Alternative 2 could benefit community entities because they would not be required to purchase assets that they might not have an interest in or be able to finance in order to maintain crab processing activities in their community, if the entity can reach an agreement with the PQS holder.

However, there appears to be no compelling incentive for the PQS seller to negotiate an agreement that has different terms and conditions than the underlying agreement, unless there were specific provisions included which required the PQS seller to negotiate towards the contract terms desired by the ROFR holder. Defining or quantifying the degree to which a potential PQS seller must re-negotiate would likely be a challenging policy determination. However, simply amending the FMP to allow for such a re-negotiation would provide for that possibility.

Under Alternative 2, the PQS holder would not be obligated to negotiate or reach an agreement with the community entity to apply the ROFR to something other than the underlying agreement. Although a current ROFR contract is required in order for the PQS holder to receive their annual IPQ[19], the community, which is reliant on the processing activity, is not likely to hinder the PQS holder from receiving their IPQ. Because the benefits of Alternative 2 to the PQS holder are likely limited, it is

[19] Although ROFR contracts do not have a set timeframe, the communities and PQS holder are free to place a term on the contracts.

difficult to determine whether it would improve the ability of community entities to exercise ROFR and maintain historical processing activity in their community.

Community representatives have suggested that the Council may wish to consider requiring the revised ROFR contract terms under Alternative 2 to specify that if the PQS holder and the community entity agree to apply ROFR to any subset of assets included in the proposed transaction, those assets must be appraised and the value stipulated in the ROFR contract terms. The community entity may benefit from an asset appraisal in advance of signing the ROFR contract rather than relying on an appraisal at the time it must determine whether to exercise the ROFR. A community entity has limited time to exercise the ROFR after it is triggered, and having the appraisal information for the assets included in the ROFR contract terms may facilitate the community's decision whether to exercise the ROFR. If the Council elects to require an appraisal of the assets to which the ROFR applies, the PQS holder and the ROFR holding community may want to consider specifying the ROFR contract duration to ensure the appraisal information is relatively current.

Under Alternative 2 and the status quo, the PQS holder has the option to limit the underlying agreement to the PQS subject to ROFR. If the underlying agreement does not refer to 'other goods' (as stipulated in paragraph B), then the ROFR holder would have the ROFR option on the PQS, and 'other goods' would be the subject of a separate contractual agreement between the PQS holder and the non-ROFR buyer.

3.4.3 Net benefits to the Nation

The alternatives considered in this amendment package are largely intended to assist communities in maintaining historical processing interests in, and revenues from, the crab fisheries. These actions create community benefits that are perceived to outweigh efficiency losses that could arise from the changes.

4 REGULATORY FLEXIBILITY ANALYSIS

4.1 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 ROFR 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.

4.2 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 ventures 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.

4.3 Reason for considering the proposed action, action objectives, and legal basis

The Council developed the following purpose and need statement defining its rationale for considering these actions:

> *The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their processors, and has addressed that codependence by establishing community "right of first refusal" agreements as a significant feature of the Program.*
>
> *The purchase of all the assets of a company (if included in a proposed sale), as currently required under the right of first refusal (ROFR) contract terms in the FMP may be impractical and potentially impossible for small community entities. In addition, processing companies may have ROFR contracts with several communities in which their assets are based.*
>
> *The ROFR contract terms in the FMP should allow for flexibility so the PQS holder and community entity may determine through negotiations whether the community entity may purchase a set of assets, including only the PQS, or the PQS and associated crab assets, in the subject community.*

The purpose and need for the particular considered action analyzed here is described in Section 3.1 of this document.

Under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), the Secretary of Commerce (NMFS Alaska Regional Office) and the North Pacific Fishery Management Council have the responsibility to prepare fishery management plans and associated regulations for the marine resources found to require conservation and management. NMFS is charged with carrying out the federal mandates of the Department of Commerce with regard to marine fish, including the publication of federal regulations. The Alaska Regional Office of NMFS and the Alaska Fisheries Science Center research, draft, and support the management actions recommended by the Council. The Bering Sea/Aleutian Islands crab resources are managed by NMFS and the State of Alaska under the FMP. The objective of this action is to clarify and strengthen the position of entities holding ROFR on transfers of PQS outside of their community.

4.4 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 ROFR, under the BSAI Crab Rationalization Program.

Estimates of small entities holding PQS are based on the number of employees of PQS holding entities. Currently, 21 entities hold PQS subject (now or previously) 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. The community entities are directly regulated by the proposed action.

4.5 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 not be increased under the proposed action.

4.6 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.

4.7 Description of significant alternatives to the proposed actions

No alternatives beyond those described in this analysis were considered.

5 NATIONAL STANDARDS & FISHERY IMPACT STATEMENT

5.1 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.

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

National Standard 2
Conservation and management measures shall be based upon the best scientific information available.

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

National Standard 3
To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

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

National Standard 4

Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various U.S. fishermen, such allocation shall be (A) fair and equitable to all such fishermen, (B) reasonably calculated to promote conservation, and (C) carried out in such a manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

The proposed action would 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. The actions will not contribute to an entity acquiring an excessive share of privileges.

National Standard 5

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

The proposed action considers efficiency in utilization of the resource, balancing that efficiency against community interests, in establishing the rights of first refusal or expanded community protection under the five actions. The actions are intended to ensure that community social and cultural interests are adequately protected.

National Standard 6

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

The proposed action does not affect the annual allocation process. To the extent that the availability of resources is affected, the reduction is necessitated by the protections to communities arising from this action.

National Standard 7

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

The proposed action does not duplicate any other measure and would not add costs to beyond those necessary to implement the protections intended by the actions.

National Standard 8

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

The proposed 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 measures included in the rationalization program.

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.

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

5.2 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. These actions will have no effect on participants in other fisheries.

6 REFERENCES

ADFG (May 8, 2012) Emergency Order 4-S-24-12, Bering Sea Snow Crab Fishery Partial Extension of Eastern Subdistrict.

ADFG (May 14, 2012) Emergency Order No. 4-S-25-12, Bering Sea Snow Crab Season Extended.

EDAW (2004) Social Impact Assessment of the Environmental Impact Statement for Bering Sea and Aleutian Islands Crab Fisheries – Overview and Community Profiles, EDAW, San Diego, California.

EDAW (2005) Comprehensive Baseline Commercial Fishing Community Profiles: Unalaska, Akutan, King Cove, and Kodiak, Alaska, EDAW, San Diego, California. Kodiak Chamber of Commerce (2012) Kodiak Community Profile and Economic Indicators, 4th Quarter 2012. (available at http://www.kodiak.org/images/stories/4th_qtr_community_profile__economic_indicators_2012.pdf)

National Marine Fisheries Service (October 24, 2006) Application for transfer of QS/IFQ, PQS/IPQ, OMB No. 0648-0154 (available at http://www.fakr.noaa.gov/ram/default.htm).

North Pacific Fishery Management Council/AECOM (November 2010) Five-Year Review of the Crab Rationalization Management Program for Bering Sea and Aleutian Islands Crab Fisheries.

North Pacific Fishery Management Council (June 2004) Motion of the Council for BSAI Crab Rationalization, June 10, 2002, updated through June 9, 2004.

North Pacific Fishery Management Council (January 2013) Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Modifications to Community Provisions.

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.

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