

ADVISORY PANEL
Motions and Rationale
December 3-6, 2024 - Anchorage, AK

D2 BSAI Crab Arbitration

Motion 1

The AP recommends that the Council initiate an expanded discussion paper with the following alternatives:

Alternative 1. No action

Alternative 2. Changes to the regulations governing the arbitration process.

Option 1. Remove the requirement that the arbitrator can only select a remedy proposed by one side. Allow the arbitrator to select an independent or compromise remedy based on the facts provided in the arbitration.

Option 2. Allow parties to receive the arbitrator's written report and rationale, as well as a publicly available report providing key rationale (without including confidential information).

Option 3. Remove the requirement for a market report.

Option 4. Remove the arbitration option for non-performance.

'Option 5: Bond requirement to protect harvesters against failure to pay for processed crab

Alternative 3. Specify conditions for IFQ and IPQ holders to withdraw their applications for quota after being accepted by NMFS.

Option 1. IFQ and IPQ holders can withdraw their applications for quota within 48 hours of BSAI crab rationalization species TACs being announced.

Amendment 1 (add option 5): passed unanimously
Main motion passed: 13/4 (2 abstaining)

Rationale in Favor of Motion

- *Very few active processors remain in the fishery – this year there are only 1-2 processors actively processing crab, which makes it appropriate to request the Council initiate a regulatory amendment at this meeting to evaluate potential changes primarily associated with the arbitration system, to reduce cost, burden, and uncertainty in the program.*

- *The processor risk associated with these fisheries is very high, especially given closures and low TAC levels and it is likely even fewer crab processors will apply for their processing quota moving forward because they cannot continue to sharematch, be subject to arbitration, and commit to operating well prior to the TACs being announced and risk losing money in these fisheries.*
- *The options detailed in the motion and retained the overall structure and policy objectives of the original program. Actions the Council can take to increase transparency and flexibility and lower costs are worthwhile and necessary.*
- *The motion does not seek to eliminate the arbitration program or even make significant changes to it as there needs to be some means of arbitrating price disputes, since some harvesters may be matched with a processor not of their choosing. There is also a complicating dynamic: the program allows for non-active processors to own processing quota - they then match with harvesters and find custom processing arrangements with active processors, circumventing the system.*
- *Specific to Alternative 2:*
 - *This change would allow the arbitrator to select an independent or compromise remedy based on the facts provided in the arbitration. While the thought is that the current 'baseball style' arbitration results in both sides bringing more moderate proposals to the table, it also serves to stifle the arbitrator's latitude to support a compromise solution.*
 - *Currently participants receive the arbitrator's decision but have no rationale provided or understanding of the thought process or key information relied upon to come to a decision. As the paper states, currently the arbitrator's decision is final and issued without explanation (p. 4). Nobody is learning anything from each arbitration except whether they won or lost.*
 - *The market report is just one of the four data reports or agreements that must be paid for by participants and submitted annually, well prior to the fishery opening. It is intended to provide baseline information concerning the current market and help establish a reasonable price, although it has no binding effect and must be released at least 50 days before the season opening, which lessens its relevance.*
 - *The concern here is that non-active IPQ holders who are matched with IFQ holders will be liable for paying for crab, even if they cannot find a processor to process their crab. The analysis would detail any additional risk for harvesters that may arise.*
- *Specific to Alternative 3*
 - *Allow a specified time period after crab TACs are announced, in which IFQ or IPQ holders can withdraw their applications for quota.*
 - *This would provide increased regulatory certainty for an option that is already being used by processors due to low TACs and increased risk under the arbitration program.*
 - *The certainty is needed so that IPQ holders can make decisions before share matching begins.*
 - *Currently this is the only tool available for processors to avoid share matching but the timing of the TAC announcement and share matching process provides very little time to make a decision to withdraw.*

Rationale in Opposition to Motion

- *The arbitration program is not broken. There have been exactly 2 arbitrations in the past 10 years. Both of those arbitrations were triggered by processors paying well below the price paid by other processors. Because of "Baseball style arbitration", harvesters only asked the arbitrator for a price paid by the lowest payers. Accessing the arbitration system is very difficult for harvesters. Because of their FCMA status, ICE is the only cooperative that can arbitrate.*
- *As long as harvesters must sharematch with IPQ holders the arbitration system must remain in place as it is the only viable means by which harvesters can ensure that they are paid a fair price for their catch.*
- *Responsive to public testimony and Reference to BSAO written comment letter.*
- *Arbitration is a safeguard for harvesters against bad actors. Without it, bad behavior is encouraged with no viable recourse by harvesters.*
- *Specific to Option 1*
 - *Baseball" arbitration keeps a lid on the arbitration system. The risk of losing is a powerful disincentive to arbitrate that would effectively be removed if the arbitrator can choose a compromise price. It is reasonable to assume that without "baseball" arbitration, there will be a significant increase in arbitration events and therefore increased costs.*
- *Specific to Option 2*
 - *The arbitration issues are not that complicated. If a processor offers a price that is well below what others pay, they may end up in arbitration.*
- *Specific to Option 3*
 - *Market Report adds unnecessary expense to the program and is not used.*
- *Specific to Option 4*
 - *Despite the fact that there has never been a performance arbitration, its presence acts as a deterrent to anyone who would otherwise fail to comply with the arbitrator's decision or the terms of a contract. This is an important protection for both parties that should remain in place. Without it, a very expensive civil suit is the only recourse.*
- *If an IPQ holder cannot perform on par with others, harvesters wouldn't want to deliver to them. For that reason, harvesters are not opposed to this option as long as the quota is distributed to other IPQ holders and not stranded.*

Rationale in Favor of Amendment

- *Prior to the recent closure and receivership of Peter Pan Seafoods, harvesters incurred the full cost of preparing for and prosecuting the season (insurance, fuel, bait, groceries, transport, crew, etc.) Crab was harvested, delivered, processed and sold yet due to the closure, harvesters were not paid, with no recourse due to arbitration and litigation being stayed by the receivership.*

Motion 2

The AP recommends that the Council initiate an expanded discussion paper to review the cooperative program structures for the Gulf of Alaska rockfish program and the BSAI Pacific cod trawl catcher vessel program and evaluate how the existing BSAI Crab Rationalization Program could be modified to a cooperative program while maintaining community, harvester, and processor protections.

Motion failed 12/6

Rationale in Opposition to Motion

- *The program was working well until very low TACs became an issue. For the first time since it was developed, the emergency exemption from regionalization looks like it will be implemented this year. This will address the largest issue for IPQ holders, the custom processing fee.*
- *Since high processing costs and high custom processing fees are such a concern, perhaps the Council may want to look at a solution to “mailbox” processors.*