

# Crab Binding Arbitration RIR

June 2025



This RIR analyzes potential changes to four components of the CR Program's binding arbitration system and a clarification to regulations regarding the withdrawal of IFQ/IPQ after NMFS has accepted the application.



## Alternative 2: Potential Arbitration Changes

- **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 a 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 requirement to enforce performance disputes after a contract has been established to define crab price, delivery, or other contract terms.



## Alternative 3: Clarify IFQ and IPQ application withdrawal regulations

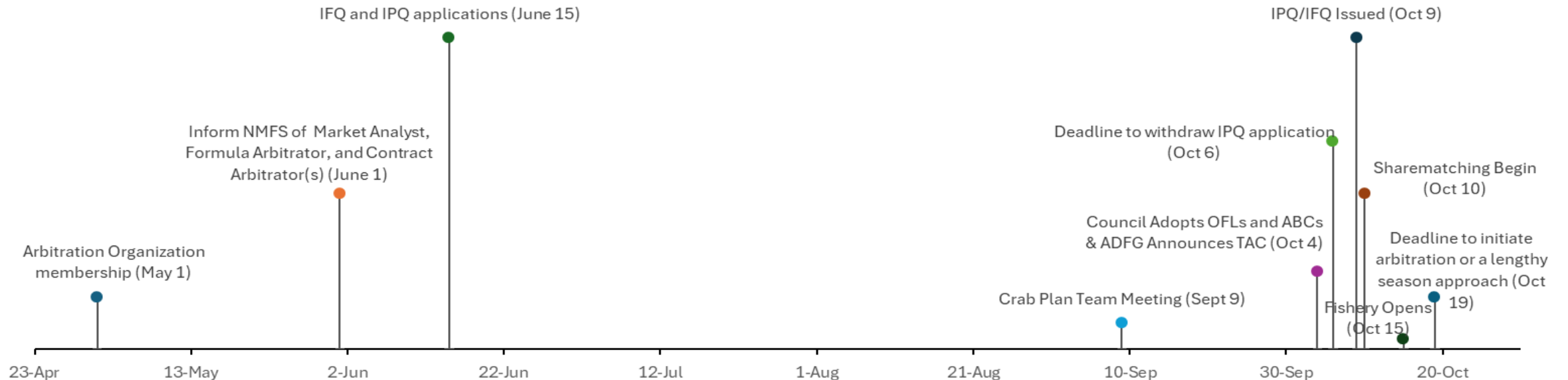
IFQ and IPQ application withdrawal: IFQ and IPQ applications can be withdrawn after being accepted by NMFS any time before BSAI crab rationalization species TACs are announced and within

- 1) Option 1: 24 hours
- 2) Option 2: 48 hours

after the BSAI CR Program species TACs are announced.



# Current Binding Arbitration Program Timing: Using 2024/25 BSS as an example



## Alt 2, Option 1: Last Best Offer

- Selecting Option 1 would remove the requirement that the Contract Arbitrator select one of the two offers submitted, eliminating regulations that require the use of the LBO arbitration structure. 50 CFR 680.20(h)(2)
- Arbitrators would be allowed use the available facts and arguments from each side to select an outcome within the range of proposed offers, independent of the proposed offers, or matching a proposed offer.
- Other arbitration requirements could remain in place or be altered:
  - cost sharing
  - timing
  - only Class A IFQ holders may initiate arbitration
  - etc.



## Alt 2, Option 1: Last Best Offer, Background

- LBO arbitration was initially selected as:
  - an efficient arbitration system that incentivizes members of the Arbitration Organizations to submit reasonable offers
  - eliminate strikes by harvesters to establish ex-vessel prices
  - help ensure predictability and fairness for the parties involved
  - have lower costs than other arbitration models or courts.
- LBO arbitration requires that the IFQ and IPQ holders submit their best proposal
- The arbitrator, selected by the parties to the arbitration, must select one of the submitted proposals. 50 CFR 680.20(h)(3)(x)



## Alt 2, Option 1: Last Best Offer, Background

### Division of First Wholesale Revenue

- Available information indicates that contract arbitrators have chosen not to diverge from the historical division of first wholesale revenue.
- Potential reasons are that doing so:
  - could create a precedent,
  - be more controversial, and/or
  - increase the complexity of weighing all factors involved in adjusting the ex-vessel price in terms of all the other (perhaps countervailing) factors that could be considered.
- Allowed an intermediate position, weighing, and perhaps justifying an outcome would be more complex.



## Alt 2, Option 1: Last Best Offer, Potential Impacts

### Change in the Number of Arbitrations

- The current system has been successful in limiting the number of arbitrations. There have been 3 reported arbitrations since the 2012/13 fishing year. (Section 3.2.3).
- Allowing the Contract Arbitrator to select from a broader range of outcomes could result in IFQ holders seeking more favorable outcomes than in the past.
- The cost of arbitration is expected to limit its use.
- Depends on whether IPQ holders would be allowed to initiate arbitration under a new structure.





## Alt 2, Option 1: Last Best Offer, Potential Impacts

### Change in Arbitration Cost

- The cost of arbitration would increase if more arbitrations were initiated.
- More information could be submitted and considered by the arbitrator.
  - Submission and verification costs would increase
- The duration of arbitrations could increase to review and consider the additional information presented.
- Attorney's fees associated with the formation and administration of each arbitration organization and representing parties at arbitrations may increase as more time is required to compile information and prepare for an arbitration.



# Alt 2, Option 1: Last Best Offer, Potential Impacts

## Impacts on Distribution of First Wholesale Revenue

- This is highly dependent on whether the Contract Arbitrators would be more willing to consider additional information to reach a decision based on the facts presented
- Factors that may be considered (50 CFR 680.20(g)(2)(ii)(B))
  - Current ex-vessel, consumer, and wholesale product prices
  - Innovations and developments of the harvesting and processing sectors
  - Efficiency and productivity
  - Quality
  - Financially healthy and stable harvesting and processing sectors
  - Safety and expenditures for ensuring adequate safety
  - Timing and location of deliveries
  - Cost to avoid penalties for overharvesting and accounting for deadloss



## Alt 2, Option 1: Last Best Offer, Potential Impacts

### Impact on Harvest Crew

- The impact on crew are related to how the program will impact ex-vessel prices.
- Crew are typically paid on shares of the ex-vessel value after certain deductions (lease fees, food, etc.)
- Increases in ex-vessel value would increase crew compensation (all else being equal – decreasing ex-vessel prices would decrease crew compensation)



# Alt 2, Option 1: Last Best Offer, Potential Impacts

## Impact on Communities

- Section 3.5 Shorebased processing of CR Program crab has been centered in Dutch Harbor/Unalaska and Akutan.
- Some CR Program crab was delivered to Kodiak.
- Other communities that had shorebased processor do not currently have active processors of CR Program
- Like the harvesters, changes in ex-vessel price would directly impact community tax revenue. How those revenues would change and the distribution of those taxes would depend on several factors
  - Agreements to address regional delivery requirements
  - Changes in landings patterns among active communities
  - Etc.



## Alt 2, Option 2: Binding Arbitration Report

### Written Report (non-public)

The Contract Arbitrator may provide a written report if it does not release confidential information and the information provided is allowed within antitrust rules. The Contract Arbitrator currently is required to submit information to NMFS regarding any arbitrations by 30 days before the end of the crab fishing year (50 CFR 680.20(h)(6)). The information includes:

1. minutes from any meeting attended by that Contract Arbitrator between or among any PQS or IPQ holders;
2. the last-best offers made during the Binding Arbitration process with all contract details;
3. the names of other participants in the arbitration, and whether the Contract Arbitrator accepted the bid; and
4. any information, data, or documents the Contract Arbitrator gave to any person who was not a party to that arbitration, and the person provided the data or documents.



## Alt 2, Option 2: Binding Arbitration Report

### Written Report (public)

The Arnold and Porter legal opinion (Appendix I) advised that several provisions could be publicly announced consistent with antitrust laws if they were conducted within limited parameters. These included

- publicly announcing a pricing formula,
- circulating a Market Report,
- and providing arbitrators with access to information from prior arbitration sessions.



# Alt 2, Option 2: Binding Arbitration Report

## AntiTrust Concerns

- The main concerns focus on provisions regarding the exchange of information that would not be permitted in an unregulated and competitive environment.
  - Giving both harvesters and processors access to all information provided to their arbitrators
  - Permitting processors to engage in discussions regarding pricing
  - The unlimited publication of the arbitration results.
- The legal opinion recommended that the harvesters' and processors' access to information during an arbitration be limited to materials submitted directly by the parties.
- The opinion also concluded that access to the results of other arbitration sessions should be limited to arbitrators and non-affiliated harvesters that have not committed shares to a processor. Limiting the information provided was an important consideration in the program's development to avoid antitrust issues.



## Alt 2, Option 2: Binding Arbitration Report

### Could be included in the Contract

- The contract with the Contract Arbitrator could include a clause that requires the Contract Arbitrator to provide a written report to the parties to the arbitration so long as the contents of the report do not raise antitrust concerns.
- Requirements for a written report are common and examples include when the report must be released, a summary of the proceedings, findings of fact, legal conclusions, a detailed justification for the award, and the final award.





## Alt 2, Option 2: Binding Arbitration Report

### Additional Information

- Greater specificity on what would be included in the report may allow analysts to provide more information on whether specific information would be allowed under antitrust rules.



## Alt 2, Option 3: Market Report

### Remove Market Report Requirement

- Other sources of information are available and have been used by the parties to collect the information.
- Would not create data gaps in the arbitration process
- Both harvesters and processors supported removal in December 2024
- Cost for Market Report and Non-Binding Price Formula was reported to be \$49,000 in 2023/2024.



## Alt 2, Option 4: Non-performance

Remove the arbitration requirement for non-performance

- The use of civil courts is expected to be considerably more costly
- NMFS/Council does not have the authority to establish the division of costs for civil trials
- Judges making the decision may be less knowledgeable of the CR Program and the fishery than the arbitrators who have been selected by the two parties.
- While quality issues could also be considered a performance dispute, the analysts assume that Option 4 would not apply to those disputes and the regulations for quality disputes would be unchanged.



## Alt 2, Option 4: Non-performance

Remove the arbitration requirement for non-performance

- 50 CFR 680.20(h)(10) states that if an IPQ holder and an Arbitration IFQ holder are unable to resolve disputes regarding the obligations to perform specific contract provisions after substantial negotiations or when time is of the essence, the issues of that dispute **shall** be submitted for Binding Arbitration before a Contract Arbitrator for that fishery.
- The proposed action would allow performance disputes to be settled through binding arbitration agreed to by the parties or a civil court.
- Use of civil courts is expected to be more costly.
- Arbitration has never been used to settle performance disputes, but has been used in negotiations



## Alt 3: Withdrawing IPQ/IFQ Applications

- Regulations require a complete IPQ or IFQ application to be postmarked or received by NMFS by June 15 for the upcoming crab fishing year.
- NMFS has allowed IPQ application withdrawals before issuing IFQ/IPQ, but regulations do not clearly define the conditions for approval. IPQ withdrawal requests are evaluated on a case-by-case basis
- Previous application withdrawals were submitted well in advance of annual IPQ issuance.
- Tight timeline, but either option of up to 24 or 48 hours after TAC is announced would provide RAM adequate time to issue quota and open the fishery, given the other regulatory requirements for share matching, etc.



## Sections to be Completed

The following sections will be completed should the Council wish to move forward and select a preliminary preferred alternative.

- Initial Regulatory Flexibility Act
- Net Benefits to the Nation
- National Standards



# Thank you!

## Next Steps:

- This is Initial Review. Consider next stage of analysis if moving forward (Initial or Final Review)
- Potentially identify a Preliminary Preferred Alternative

**For Further Questions  
Contact:**

sarah.marrinan@noaa.gov



Source: NPFMC

