

MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver *CO*
Executive Director *FOR*
DATE: January 26, 2011
SUBJECT: Crab management

ESTIMATED TIME 4 HOURS (all C-6 items)
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ACTION REQUIRED

- (a) Final action on right of first refusal (and community measures).
- (b) Initial Review of change of IFQ/IPQ Application Deadline.

BACKGROUND

- (a) Final action of right of first refusal modification (and community measures).

At its February 2011 meeting, the Council revised alternatives for three actions that would modify community rights of first refusal on processing shares and a fourth action that would require community consent to use of processing shares outside of the community from which it originated (as defined by the rights of first refusal).

The first action would extend the time to exercise the right from 60 days to 90 days and the time to perform under the contract from 120 days to 150 days.

The second action eliminate the lapse of rights of first refusal. Currently, the right lapses, if the community fails to exercise the right on a processor quota share (PQS) transfer or if the yielded individual processing quota (IPQ) are used outside the community of the right holder for three consecutive years. The action would require any holder of PQS that was subject to a right of first refusal on implementation of the program to maintain a contract providing for a right of first refusal.

The third action would limit the assets to which the right applies. Currently, the right applies to any assets included in a contract that also includes PQS to which the right applies. The proposed action would apply the right to PQS only (and no other assets). The value of the PQS would be established by an arbitration process.

The fourth action creates a requirement that a community that benefits from a right of first refusal consent to any use of the yielded IPQ outside of that community.

The executive summary to the analysis is attached hereto as Item C-6(a).

(b) Initial Review of change of IFQ/IPQ Application Deadline.

Under the crab program, annually issued individual processing quota (IPQ) have a one-to-one correspondence with a specific portion of the annually issued individual fishing quota (IFQ) pool – “Class A IFQ”. Use of either these IPQ or “Class A IFQ” requires matching with the other share type, on a pound for pound basis. To ensure applicants have adequate due process opportunity to contest any finding concerning qualification for an allocation, at the time of annual issuance of IFQ and IPQ, NOAA Fisheries sets aside quota (either IFQ or IPQ, as the case may be) in an amount needed to cover any possible claim of an applicant, should the final determination favor the applicant. As a result, any application disputes not finalized at the time of the allocation of IFQ and IPQ have the potential to strand quota of the other share type, in the event the applicant does not appeal or does not prevail on appeal (since the withheld quota cannot reasonably be issued to other qualified applicants). This action would move the application deadline from August 1st to June 15th to allow additional time to finalize some appeal filings and proceedings, thereby reducing the potential for stranded quota. At the suggestion of NOAA Fisheries, an option is also included in the analysis that would shorten the time to appeal initial administrative decisions denying a QS holder or PQS holder an allocation of IFQ or IPQ, respectively, from 60 days to 30 days. This shorter time for appeal could also result in more final administrative decisions, further reducing the potential for stranded quota.

Lastly, NOAA Fisheries would also like the Council to consider modifying the current regulations to provide that an IFQ or IPQ applicant’s failure to keep proof of filing an application would create a presumption that no filing was made. This regulation could serve a few purposes. First, applicants who keep records of filing would effectively resolve any dispute prior to an administrative finding that an application was not filed. Adopting a practice of maintaining records of filings would certainly aid applicants should NOAA Fisheries dispute the timely filing of an application. Secondly, resolution of initial administrative decisions on appeal could be streamlined. If the Office of Administrative Appeals relies on such a rule for any finding related to cases in which IFQ and IPQ applicants allegedly failed to apply for annual allocations, appellate determinations would be relatively certain. So, if (as is unlikely to happen) NOAA Fisheries were to deny an allocation despite a person’s maintaining proof of filing, that person could feel confident that the decision would be reversed on appeal. On the other hand, a person denied an allocation who could not present proof of filing might be less likely to succeed on appeal. Whether this rule would have resulted in the dismissal of cases in the recent past where claimants successfully appealed initial denials of IFQ and IPQ is not certain.

The executive summary to the analysis is attached hereto as Item C-6(b).