

# Public Testimony Sign-Up Sheet

Agenda Item C-3(a) <sup>BSTI CRAB</sup> Emergency Relief

	NAME (PLEASE PRINT)	AFFILIATION
1	Jennifer Lincoln	NIOSH
2	Keith Colburn	F/V Wizard ACP CO-OP
3	Vern Hall	F/V Provider
4	Doug DeBoer	F/V Provider
5	M. Ke Woodley <sup>Margaret Hall</sup>	F/V Atlantic
6	Roger Thomas George Hall	Crab group of Indep. Harvesters
7	Joe Sullivan	Mundt Mac / ICE
8	JOE PLESHA	TRIDENT
9	Simon Swatof / Mateo Perez-Soldo	City of St. Paul
10	Jake Jacobson	The Perry Seafood Corp - ICED Corp
11	Heather McCarty	CBSFA
12	Pat Harding	Trickle Seafoods
13	Steve Minor	NACA
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NOTE to persons providing oral or written testimony to the Council: Section 307(1)(I) of the Magnuson-Stevens Fishery Conservation and Management Act prohibits any person "to knowingly and willfully submit to a Council, the Secretary, or the Governor of a State false information (including, but not limited to, false information regarding the capacity and extent to which a United State fish processor, on an annual basis, will process a portion of the optimum yield of a fishery that will be harvested by fishing vessels of the United States) regarding any matter that the Council, Secretary, or Governor is considering in the course of carrying out this Act.

**Emergency exemption from regional landing requirements  
Bering Sea and Aleutian Islands crab fisheries  
North Pacific Fishery Management Council  
February 8, 2009**

**Purpose and need statement**

*In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require the associated catch to be delivered and processed in the designated region. In the first three years of the program, all the crab IFQ was harvested and delivered. However, icing conditions in the Northern Region did create safety concerns, and delayed and in some cases prevented harvesters from entering harbors to deliver to shore-based and floating processors located in the regions, as required by the regional share designations. In addition, other unforeseeable events, events such as an earthquake or tsunami, or man-made disaster, could prevent deliveries or limit the available processing capacity in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements. Such an exemption should also provide a mechanism for reasonable compensation to communities and IPQ holders harmed by the granting of the exemption to ensure that the protections intended by the regional designations continue to be realized despite the exemption.*

**Alternatives**

The Council has adopted the following alternatives for analysis:

**Alternative 1 – Status quo (no exemptions from regional landing requirements)**

**Alternative 2 – Contractually Defined Exemption**

**Method of defining the exemption and compensation:**

The exemption shall be generally defined in regulation. To receive an exemption, however,

Option 1: an IFQ holder the holder of matched IPQ, and the entity holding (or formerly holding) the right of first refusal for the IPQ, or

Option 2: an IFQ holder the holder of matched IPQ, and an entity identified by the community benefiting from (or formerly benefiting from) the right of first refusal for the IPQ, or in the event that the subject IPQ was never subject to a ROFR, any entity qualified to act as the regional representative with respect to any IPQ in that region and fishery may act as the regional representative for the subject IPQ.

Option 3: an IFQ holder the holder of matched IPQ, and a regional entity agreed to by the communities benefiting from rights of first refusal (or formerly benefiting from rights of first refusal) in the designated region of the IFQ and IPQ,

shall have entered a contract defining conditions under which an exemption will be granted and the terms of any compensation.

Administration of the exemption

The exemption shall be administered through submission of an affidavit by the holder of the IFQ for which the exemption is applied. An affidavit attesting to the satisfaction of requisite conditions for the exemption (as agreed in the contract) shall constitute conclusive evidence of qualification for the exemption.

Definition of the exemption

The following provision shall be included in the civil contract among the IFQ holder, the holder of matched IPQ and the entity representing community interests:

“Qualifying circumstance: An unavoidable circumstance that unreasonably delays or prevents the delivery or processing of crab in a region as required by regionally designated IFQ and matched IPQ will qualify for the exemption from regional landing requirements. To qualify for the exemption a circumstance must: a) be unavoidable, b) be unique to the IFQ and/or IPQ holder, c) be unforeseen or reasonably unforeseeable, and d) have actually occurred.”

Additional specificity of the exemption and its term may be included in any contract between the IFQ holder, the holder of matched IPQ and the entity representing region/community interests.

A contract executed by the three parties identified above shall provide conclusive evidence that a qualifying circumstance has been adequately described in satisfaction of this requirement.

Mitigation requirements

Requirement to attempt to mitigate:

The following provision shall be included in the civil contract among the IFQ holder, the holder of matched IPQ and the entity representing community interests:

“To receive an exemption the IFQ holder and the holder of matched IPQ shall have exerted all reasonable efforts to avoid the need for the exemption, which may include attempting to arrange delivery to other processing facilities in the designated region unaffected by the unavoidable circumstance, attempting to arrange for the use of IFQ (and IPQ, if needed), and CDQ not requiring delivery in the affected region, and delaying fishing.”

Option: An IFQ holder will not be granted an exemption, if the IFQ holder holds any unused Class B IFQ, C share IFQ, or Class A IFQ that may be delivered outside of the affected region

Compensation

Compensation shall be as agreed in the contract among the IFQ holder, the holder of matched IPQ, and the entity representing regional/community interests.

Contract finalization dates

Option 1: Fishery openings

Option 2: January 1

Option 3: Open, and can be finalized at any time.

February 8, 2009

North Pacific Fishery Management Council

Motion on exemption from regional landing requirements

### **Executive Summary**

In the spring of 2007, the North Pacific Fishery Management Council (the Council) established a committee to address certain concerns with the Bering Sea and Aleutian Islands crab rationalization program (the program). In the course the committee's meetings, members expressed concern that at times of extreme icing and other uncontrollable circumstances, the regional landing requirements applicable to Class A individual fishing quota (IFQ) could pose safety risks, loss of resource (such as excessive deadloss), or extreme economic hardships to participants in the crab fisheries. At its October 2008 meeting, after receiving a staff discussion paper, an advisory panel recommendation, and public testimony, the Council directed staff to prepare an analysis of alternatives to provide an emergency exemption from regional landing requirements. To avoid potential insurmountable administrative burdens the Council identified for analysis a system of civil contracts between harvesters, processors, and a regional representatives as the means of defining the exemption from the regional landing requirements. The analysis contains a Regulatory Impact Review, an Environmental Assessment, and an Initial Regulatory Flexibility Analysis.

### **Purpose and need statement**

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

*In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require the associated catch to be delivered and processed in the designated region. In the first three years of the program, all the crab IFQ was harvested and delivered. However, icing conditions in the Northern Region did create safety concerns, and delayed and in some cases prevented harvesters from entering harbors to deliver to shore-based and floating processors located in the regions, as required by the regional share designations. In addition, other unforeseeable events, events such as an earthquake or tsunami, or man-made disaster, could prevent deliveries or limit the available processing capacity in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements. Such an exemption should also provide a mechanism for reasonable compensation to communities and IPQ holders harmed by the granting of the exemption to ensure that the protections intended by the regional designations continue to be realized despite the exemption.*

### **Alternatives**

The Council has adopted the following alternatives for analysis:

#### **Alternative 1 – Status quo**

No exemption from regional landing requirements is permitted.

#### **Alternative 2 – Contractually Defined Exemption**

Under this alternative, if an unavoidable circumstance prevents an IFQ holder from complying with a regional landing requirement, an exemption might be permitted. An option could be adopted that would require the IFQ holder to hold no IFQ that could support a landing outside of the affected region.

To qualify for an exemption, the IFQ holder must have entered an agreement with the holder of matched IPQ and a regional representative. The Council is considering three options for defining the regional representative. Under the first, the regional representative is the same entity that holds the right of first refusal on the matched IPQ. Under the second, the regional representative is selected by the community intended to benefit from the right of first refusal. Under the third option, the regional representative is chosen by agreement of all communities benefiting from the rights of first refusal in the region. The contract may more fully specify conditions that qualify for an exemption. The contract is also required to specify any compensation that could be paid among the IFQ holder, the IPQ holder, and regional entities, if the exemption were used. To qualify for the exemption, the IFQ holder and IPQ holder must exert reasonable efforts to avoid need for the exemption, including attempting to access IFQ that would allow a landing outside of the affected region. The exemption would be administered through IFQ holder affidavits. Under this approach an IFQ holder would be permitted to use the exemption without challenge, on filing an affidavit attesting to conditions qualifying for the exemption. Three options specify possible deadlines by which the contract must be completed to qualify for the exemption. These deadlines are: the applicable fishery opening, the 1<sup>st</sup> of January, and any time.

#### **Alternatives considered but not advanced for analysis**

The Council considered four types of alternatives that it elected not to advance for analysis. Generally, these alternatives were perceived by the Council as limiting the effectiveness of the alternatives in achieving their intended purpose. First, alternatives that specifically define exemption criteria in regulation were eliminated as those alternatives are believed to be overly restrictive and cannot be adapted as circumstances may require. Second, alternatives directly administered by NOAA Fisheries were not advanced, as these alternatives were viewed as overly expensive to administer and potentially preventing the exemption from fulfilling its purpose. Necessary fact finding would not only delay decision making, but could also be costly, as verification of conditions may be difficult or impracticable. Third, the Council also elected not to advance for analysis alternatives that specifically define compensation, as those alternatives were deemed too prescriptive to effectively balance the competing interests of parties, which are likely to change with the circumstances surrounding the granting of an exemption. Fourth, the Council chose not to advance alternatives that would redesignate IFQ and IPQ to compensate for landings redirected under the exemption, as those redesignations would be administratively complex and may be impossible, if TACs change substantially year-to-year.

#### ***Existing conditions***

Nine Bering Sea and Aleutian Island crab fisheries are managed under the rationalization program. Harvesting quota shares (QS) were created in each program fishery. QS are a revocable privilege that allow the holder to harvest a specific percentage of the annual TAC in a program fishery. The annual allocations, which are expressed in pounds, are referred to as individual fishing quota (IFQ). The size of each annual IFQ allocation is based on the amount of QS held in relation to the QS pool in a program fishery—a person holding one percent of the QS pool receives IFQ to harvest one percent of the annual TAC in the fishery.

QS are designated as either catcher vessel QS or catcher processor QS, depending on whether the vessel that created the privilege to the shares processed the qualifying harvests on board. Approximately 97 percent of the QS (referred to as “owner QS”) in each program fishery were initially allocated to license holders based on their catch histories in the fishery. The remaining 3 percent of the QS (referred to as “C shares” or “crew QS”) were initially allocated to captains based on their catch histories in the fishery.

Catcher vessel owner IFQ are issued in two classes, Class A IFQ and Class B IFQ. Class A IFQ are issued for 90 percent of the catcher vessel owner IFQ in a program fishery. Crab harvested using these IFQ must be delivered to a processor holding unused individual processing quota (IPQ).

Short term transfers under leases and cooperative fishing arrangements are the primary means by which QS holders in the crab fisheries have achieved fleet consolidation under the rationalization program. These leases and transfers within cooperatives have also facilitated more complete harvest of allocations and coordination of deliveries in the event of unanticipated circumstances. Liberal rules exempt vessels fishing cooperative allocations from vessel IFQ use caps. Because of these attributes, most QS holders have elected to join cooperatives. By the third year of the program, nearly all IFQ were held by cooperatives. The extent to which cooperatives manage harvest of their allocations varies across cooperatives. Some cooperatives have relatively central management of harvest activities, while others leave members to determine the harvest of their own allocations. Although some cooperatives have continued to allow individual members to arrange the harvest of their shares, over the first three years of the program, cooperative management of quota has increased. This relinquishment of individual management of the harvest of shares not only contributes to consolidation of IFQ harvests, but also has allowed for better coordination in the event of unanticipated circumstances.

In addition to harvest shares, the program also created processing quota shares (PQS), which are allocated to processors and are analogous to the QS allocated to harvesters. PQS are a revocable privilege to receive deliveries of a fixed percentage of the annual TAC from a program fishery. These annual allocations are referred to as individual processing quota (IPQ). IPQ is issued for 90 percent of the owner IFQ pool, corresponding to the 90 percent allocation of owner IFQ as Class A IFQ. As with owner QS and Class A IFQ, PQS and IPQ are designated for processing in a region. While a processing share cap prevents any person from holding or using in excess of 30 percent of the outstanding processing shares in any program fishery, an exception that would exempt custom processing in certain fisheries and regions from the plant owners share cap was adopted recently. That exemption is intended to allow consolidation beyond the caps in fisheries and regions that pose particular economic challenges to processors. The rationalization program provides communities with substantial processing history with the opportunity to designate an entity that is entitled to hold rights of first refusal on certain transfers of IPQ and PQS for use outside of the community in which processing occurred that led to the allocation of the PQS (the community of origin). Based on historical landings, the distribution of rights of first refusal varies across fisheries and regions (see Table 1).

Over time several communities have benefited from landings and processing activity in the crab fisheries. The rationalization program attempts to protect communities from some of the potential redistribution of landings, in part, by the regionalization of owner QS and Class A IFQ, whereby harvests are required to be delivered within an identified region. Regional designations are based on historic landing and processing, in most instances. The protection of regionalization applies at a regional level. As a result, groups of communities (rather than individual communities) are protected. In fisheries with North/South regionalization, St. Paul and St. George, collectively, are perceived to receive significant protection from North regionalized shares. In the Western Aleutian Islands golden king crab fishery, Adak and Atka, collectively, are perceived to receive substantial protection from regionalization.

**Table 1 Distribution of rights of first refusal by community (2007-2008).**

Fishe ry	Re gion	Right of first refusal boundary	Number of PQS holders	Percentage of PQS pool
Bristol Bay red king crab	North	None	1	0.0
		St. Paul	2	2.7
		Aku tan	1	20.8
	South	False Pass	1	3.9
		King Cove	1	9.8
		Kodiak	3	4.0
		None	4	3.6
		Port Moller	3	3.7
Unalaska	11	51.5		
Bering Sea <i>C. opilio</i>	North	None	3	1.0
		St. George	2	9.7
		St. Paul	6	36.3
	South	Aku tan	1	9.7
		King Cove	1	6.3
		Kodiak	4	0.1
		None	4	1.8
		Unalaska	13	35.0
Eastern Aleutian Islands golden king crab	South	None	1	1.7
		Unalaska	7	98.3
Pribilof red and blue king crab	North	None	1	0.3
		St. Paul	5	67.3
	South	Aku tan	1	1.2
		King Cove	1	3.8
		Kodiak	4	2.9
		Unalaska	5	24.6
St Matthew Island blue king crab	North	None	5	64.6
		St. Paul	4	13.8
	South	Aku tan	1	2.7
		King Cove	1	1.3
		Kodiak	1	0.0
		Unalaska	6	17.6

Source: RAM PQS data 2007-2008.

To date, two conditions may have created impediments to deliveries in the fisheries. First, despite the limitation of the 'cooling off' provision, in the first two years of the program, no processing occurred in the City of St. George. In the first two years (when IPQ were subject to the cooling off provision), PQS holders petitioned NOAA Fisheries for an exemption from the limitation of the 'cooling off' period, claiming unavoidable circumstances prevented their processing of shares in St. George. In both years, NOAA Fisheries granted the exemption concluding that that storm damage to the breakwater at the harbor in St. George prevented safe entry of processing vessels to the St. George harbor. With no other location available to safely process in St. George, NOAA Fisheries granted the waiver of the 'cooling off' requirement. In the spring of 2008, repairs to the harbor entrance were completed in St. George. The repairs restored the harbor entrance to its pre-storm condition. Whether the harbor itself is safe and in its pre-storm condition is uncertain and may be disputed.

Ice conditions are the second obstacle to deliveries in recent years. In most years, ice in the North region makes contact with or surrounds St. Paul Island. In some years, ice has also surrounded St. George Island (see Table 2). Depending on the severity of conditions, this ice may prevent deliveries of catch into St. Paul and St. George. Prior to rationalization, harvesters with catch on board could elect to make deliveries to processors in the South, who are unaffected by the ice. Under the rationalization program, deliveries to North locations required by North region IFQ may be prevented by the ice. Whether a delivery is prevented may depending on the circumstances, including spatial distribution and type of ice, the specific vessel, the location of the vessel relative to the islands, the amount and condition of crab on board, the delivery restrictions on available IFQ, and any factors affecting the willingness of the captain to wait for conditions to change. Historical data suggest that in the first three years of the program, some deliveries may have been prevented by ice conditions. Ice abutted St. Paul in each of the first three years and

abutted St. George in two of the first three years. During all but two weeks that ice abutted the islands, North deliveries were made. No deliveries in the North region occurred in the 13<sup>th</sup> and 14<sup>th</sup> week of 2008, although deliveries in the North occurred in the weeks both before and after the 13<sup>th</sup> and 14<sup>th</sup> weeks. Whether deliveries were prevented by the ice conditions could also be disputed, since fishing appears to have almost stopped during this period. During a four week midseason period, few deliveries were made in the Bering Sea *C. opilio* fishery, with deliveries reaching a midseason low in the 25<sup>th</sup> week, when three vessels delivered fewer than 50,000 pounds total. This decline in landings was followed by a slight increase, suggesting that fishing was delayed because of ice conditions on the grounds (in addition to ice conditions that may have prevented deliveries into St. Paul).

**Table 2 St. Paul and St. George ice conditions (1997-2008) and crab landings in the North region (2005-6 through 2007-8).**

Season	Month Week	December		January				February				March				April				May			
		51	52	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20
1997*																							
1997-1998																							
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2003-2004																							
2004-2005																							
2005-2006	North landings				2	8	26	16	12	7	10	7	9	9	10	15	7						
	Ice conditions																						
2006-2007	North landings								2	4	5	4	5	7	12	18	13	16	2				
	Ice conditions																						
2007-2008	North landings				1	11	15	20	18	14	23	14	14	9	4		5	8	13	3			
	Ice conditions																						

Note: North landings includes all North region Class A IFQ landings and Class B and C share IFQ landings in St. Paul.  
 Denotes ice abutting St. Paul Island during the week.  
 Denotes ice abutting St. Paul Island and St. George Island during the week.  
 \* Includes only 1997 conditions.  
 Sources: RAM landings data (2005-6 through 2007-8) and National Ice Center Ice Charts (1997-2008).

**Analysis of alternatives**

For clarity, the analysis first examines the operation of the different alternatives and options under consideration. The analysis then goes on to examine the effects of the alternatives on different stakeholders (including harvesters, processors, and affected communities) and management and enforcement.

**Operation of the alternatives**

Under the **status quo**, holders of Class A IFQ and IPQ must comply with regional landing and processing requirements, respectively. If an event occurs that prevents compliance with these requirements, the IFQ and IPQ holders cannot obtain an exemption from the regional requirements, but must postpone use of their shares until the condition preventing delivery is removed or an alternative delivery arrangement compliant with the regional requirement is made. In some cases, this may be addressed through coordination of the deliveries with other processors in the region or the use of substitute IFQ for delivery in another region. In the worst cases, it is possible that no processor might be available to take the deliveries in the region and no substitute IFQ allowing deliveries elsewhere are available. In these instances, either deadloss could be exacerbated while the harvester waits for the circumstance to pass (or to be addressed) or crab could be returned to the water (with an indeterminate amount of associated handling mortality). Although these circumstances could occur, it may be possible to avoid either of these outcomes. The fleet could organize its deliveries so that IFQ are reserved to address a contingency preventing delivery required by a regional designation. With most IFQ held by cooperatives, it is possible that a cooperative may be able to substitute IFQ that allow deliveries outside of the region, when a regional delivery is prevented. In addition, with fewer than 20 cooperatives participating in any fishery, it is possible that a harvester without IFQ to support deliveries in another region could acquire those IFQ from another cooperative.



The **exemption alternative** would allow an IFQ holder who has reached an agreement with the associated IPQ holder and a regional representative entity to delivery a landing outside of the designated region on filing an affidavit attesting to the occurrence of an unforeseeable circumstance that prevents compliance with the regional landing requirement.

Under this qualifying circumstance definition, an exemption may be granted, if an IFQ holder is prevented from complying with the regional delivery requirement by an unforeseen, unavoidable circumstance. As such, the exemption from regional landing requirements may not be applicable, if a delivery to a particular location is prevented but other compliant delivery locations with available processing capacity are accessible. The parties are permitted the latitude to more specifically define the exemption by contract. This added specificity could benefit participants by providing more certainty concerning whether a particular event qualifies for the exemption.

Three options are under consideration for selecting the regional representative for the contract. Under the first option, the regional representative in the contract would be the entity representing the community of origin in the right of first refusal. Since this entity already represents the community of origin through the right of first refusal on IPQ, that entity could be considered as the contracting entity for purposes of defining the exemption from regionalization (including compensation provisions). In the cases of St. George, St. Paul, False Pass, and Akutan the representative organizations are the local CDQ groups. In all other cases, the groups were designated by the community to hold the rights of first refusal. Use of the right holder as the regional entity would simplify administration by using parties that are already identified by and included in the rationalization program administration. Some participants in the fisheries, however, have expressed concern that the right of first refusal holders (who are generally formed to hold shares in the fisheries) may not be appropriately positioned to represent community or regional interests in landings. It is suggested that some of these entities may not be fully engaged in all tax and economic development interests in the communities (beyond the fishing industries that they participate in). To accommodate this circumstance, the second option would allow the community benefiting from the right of first refusal on IPQ to select an entity to represent regional interests in any contract related to those IPQ. This option would allow the community to select the right holder, in the event that the community believed that the right holder would adequately represent the community's interests in the contract. The community, however, would be allowed to select some other entity, if the community believed that the right holding entity did not adequately represent the community interests. While this option has the benefit of allowing a community to select an entity that it deems most appropriate for representing its interests under the exemption, the option would add to administrative burdens by requiring communities to engage in a selection process and by requiring NOAA Fisheries to document the selection and participation of the entities.<sup>1</sup>

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<sup>1</sup> **Both of the first two options fail to fully identify parties for contracts for all shares.** In both options, the right of first refusal is used to identify the party to the contract; however, some regionally designated PQS and IPQ are not subject to rights of first refusal. In cases of the historical processing occurring outside of any community or in a community with minimal processing history, no rights of first refusal were established. **If either of these first two options is selected, an alternate method of identifying a community (or regional) party to the contract must be developed for IPQ that are not subject to a right of first refusal.** One method could be to allow any party to any exemption contracts in the region to represent community interests with respect to shares that were not subject to rights of first refusal. This method will ensure that regional interests are represented with respect to these shares in a manner similar to other shares that are subject to rights of first refusal and regionalization. This approach, however, could result in less protection for the region, if rights holders in a region compete for the contract. A rights holder may be willing to accept less favorable terms, for shares for which it does not have the exclusive negotiating right. Other methods of identifying an appropriate party to these contracts could be used, such as allowing regional

Under the third option, the communities in a region that hold (or have held) rights of first refusal would collectively designate a single entity to represent the region in all contracts. The provision would be administered on a fishery-by-fishery basis, so that interests in the regional exemption parallel community interests in the fishery.<sup>2</sup> While, on its face, this option is relatively simple, its implementation could be complex, and possibly contentious. As written the provision suggests that all communities in a region must agree on the representative entity. Requiring this consensus could be viewed as inequitable since some communities might have relatively minor interests in a fishery and others have large interests. Providing those with a small interest with an effective veto power over the designation could complicate any attempt to develop the contract. If communities are unable to come to agreement, it would seem inequitable to simply disregard the requirement for the contract (as it is the contract that provides the regional protection).

Administration of the exemption would be through the IFQ holder filing an affidavit stating that the conditions of the exemption have been met. Once this affidavit is filed, the exemption would be granted. As currently written, the affidavit would be filed with NOAA Fisheries. NOAA Fisheries has suggested that affidavits should be delivered from the IFQ holder to the IPQ holder and regional representative and that NOAA Fisheries should receive only a confirmation that the affidavit has been delivered to those parties. NOAA Fisheries would summarily grant an exemption on receipt of a complete application, including the IFQ holder's affidavit attesting to conditions satisfying exemption criteria. The use of affidavits and statements in this manner could aid in overcoming several potential complications in administration. If the Council supports this change, it could amend its motion to provide:

#### Administration of the exemption

**The exemption shall be administered through delivery submission of an affidavit by the holder of the IFQ for which the exemption is applied to the IPQ holder and regional representative. On receipt by NOAA Fisheries of notice of such delivery of an affidavit attesting to the satisfaction of requisite conditions for the exemption (as agreed in the contract) NOAA Fisheries shall grant the exemption. NOAA Fisheries granting of an exemption shall not affect any claim or obligation a party may have under the contract (including any claim concerning the sufficiency or content of the affidavit). ~~An affidavit attesting to the satisfaction of requisite conditions for the exemption (as agreed in the contract) shall constitute conclusive evidence of qualification for the exemption.~~**

The use of contracts and affidavits for administration will allow the exemption to be implemented on a case-by-case basis to accommodate individual circumstances that may vary across participants. For example, ice conditions, which to date are believed to be the most likely event that would justify an exemption, vary greatly with location. Also, the ability to navigate through ice safely varies across vessels. The captain of a vessel, with whom the IFQ holder is expected to be in regular communication, is likely in the best position to make any decision of whether that vessel can safely traverse through local ice

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communities to collectively designate the entity. These other methods likely add to administrative costs and complexity and may introduce some political complications. Neither of these solutions could be used for identifying a representative for West designate shares in the Western Aleutian Islands golden king crab fishery. While catcher vessel owner QS and PQS are subject to regional designations, that fishery does not have any rights of refusal, because the regional designations are not explicitly determined based on historic processing. As a result, rights of first refusal cannot be used to identify the regional representative for exemption contract in that region. In the years leading up to the program, Adak was the only community in the West region to host processing in the crab fisheries. Since the program was implemented, Atka has expressed an interest in developing local processing capacity, but no processing of crab is known to have occurred in Atka to date.

<sup>2</sup> **The third option would identify regional representatives for all shares except for West designated shares in the Western Aleutian Islands golden king crab fishery.**

conditions to make a delivery. The use of an affidavit is intended to place discretion concerning decisions with the captain, who can communicate with the IFQ holder concerning conditions. Under the system of affidavits, parties to the contract would need to enforce those contracts.

Some stakeholders may oppose the use of a system of affidavits because it could carry some risk of abuse. Cases where the criteria for an exemption are clearly not met could arise. In addition, less clear cases where conditions may (but do not clearly) merit an exemption can occur. In both of these cases, it may be feared that an IFQ holder would be inclined to pursue an exemption any time borderline conditions are present. For example, an IFQ holder could elect to submit an affidavit supporting an exemption rather than subjecting a vessel to a minor, acceptable risk. Excessive use of affidavits in this manner could have notable effects on stakeholders, particularly communities and processors that depend on landings from the fisheries. Specificity in the definition of the criteria for an exemption may help limit the number of cases where the qualification for the exemption is uncertain. This specificity could be achieved through contractual provisions supplementing the definition, add further specificity to the exemption criteria. In addition (as discussed below), the system of compensation in the event an exemption is granted should create a noticeable disincentive for excessive use of the exemption by IFQ holders seeking only to avoid minor inconveniences.

The exemption alternative requires the IFQ holder and holder of matched IPQ to attempt to mitigate the effects of the exemption by using all reasonable efforts to avoid the need for the exemption. Including this requirement could lead to fewer exemptions. By not attempting to identify prerequisites for the granting of the exemption, the provision could avoid unintended negative consequences. In the long run, the option could lead to better coordination of share usage by harvesters and processors, avoiding the need for exemption in all but the most limiting circumstances. An option is included that would disallow the exemption when an IFQ holder also holds IFQ allowing delivery outside of the affected region. On its face, this provision appears to be a simple requirement consistent with the use of reasonable efforts to avoid the exemption. But, given the system of commitments between IFQ holders and processors under the program, it is possible that use of other IFQ could constitute a breach of contract by the IFQ holder. To avoid this potentiality, IFQ holders could include a provision for emergency use of IFQ in contracts in which those shares are committed. Such a provision could serve to limit the use of the exemption and simplify administration by limiting use of the exemption to circumstances where the IFQ holder has no shares that, on their face, could be used to support the landing. Given that the exemption is only to be available to address circumstances that cannot be otherwise controlled, it is unlikely that the exemption could ever be granted without causing delivery schedule disruptions and losses of efficiency. Administration of the exemption may also be simplified by the option that limits use of the exemption to times when the IFQ holder has no IFQ that may be substituted for the regionally limited IFQ.

To ensure the flow of benefits to those intended to benefit from the regional share designations and to limit potential abuse of the exemption, compensation may be specified in the contract in the event the exemption is used. The degree to which it is appropriate for an IFQ holder or IPQ holder to pay compensation for losses arising from exemptions is debatable, since those parties are unlikely to have caused the circumstance that prevented deliveries and effects may differ across IFQ holders and IPQ holders. Some IFQ holders may bear additional costs from rescheduling deliveries and traveling to more distant ports, while others may have no additional costs from the exemption. Likewise, an IPQ holder who has activity and production redistributed to another location will be affected differently from one who loses the benefit of the activity and production altogether. These uncertainties and differences suggest that a flexible mechanism for determining any compensation for exemptions may be appropriate. Although it may appear that the regional representative is in a weak position with respect to any negotiations concerning compensation, requiring the contract and making the regional representative a

required party to the contract effectively provides that entity with the power to prevent any exemption. IFQ and IPQ holders would therefore be forced to negotiate terms for compensation to the community entity. The community entity might be willing to concede reasonable terms to avoid being cast or perceived as extracting excessive compensation from IFQ and IPQ holders unable to comply with regional landing requirements without exposing their vessels and crews to unreasonable risks or bear excessive costs.

Compensation for costs and losses arising from the exemption could take on a few different forms. The simplest means of addressing the redistribution of benefits would be a system of cash payments. Yet, the amount of those payments may differ across stakeholders and circumstances. Providing the parties with the ability to negotiate compensation also allows for more creative arrangements to compensate for the effects of the exemption. For example, when deliveries are prevented by unforeseeable circumstances a community may suffer losses in economic activity, in addition to losses of tax revenues. Compensating the community for those losses by delivery arrangements for unrestricted shares at some future time may be a more agreeable resolution to all parties than a payment to the regional entity (or its designee). These delivery arrangements may impose less cost on IFQ and IPQ holders who may already bear unexpected costs arising from the disruption of their operating plans and more adequately compensate the community than simple payments to offset lost tax revenues. An added advantage to using a system of contracts to administer compensation is that NOAA Fisheries need not be involved in the administration of compensation. Instead, the parties can administer any compensation, with enforcement through civil actions between the parties to the compensation contract. Although settlement of claims through civil actions may increase costs to the parties if one party contests a claim, in most instances the private administration of claims will reduce costs and expedite claim processing by removing the administrative requirements that apply to agency processing of claims.

#### **Effects on OS and IFQ holders**

Under the **status quo**, no exemption to regional landing requirements on catcher vessel owner Class A IFQ is permitted. Consequently, an IFQ holder must organize the harvest of crab and use of IFQ to comply with the regional landing requirements associated with Class A IFQ. If a landing using regionally designated Class A IFQ is prevented by an unforeseeable circumstance, the IFQ holder must either delay the landing or arrange for delivery to an alternative location. As a first measure, an IFQ holder may choose to delay a delivery, possibly continuing fishing or waiting in a safe location until the circumstance passes. The ability to effectively delay a landing may be limited, if the circumstance is unlikely to pass quickly. For a lasting condition, an IFQ holder will either need to find an alternative delivery location or may suffer excessive deadloss, which would count against IFQ at the time of landing. Return of crab to the water would avoid excessive mortality, but is prohibited by regulations. Alternative delivery arrangements can be made either by coordinating the delivery with another facility within the region or by accessing IFQ that would support the landing outside of the region (i.e., either Class B IFQ or C share IFQ that can be delivered to any location or Class A IFQ designated for delivery outside the region).

In any case of a landing prevented by an unforeseen circumstance, the IFQ holder will be forced to assess the costs of these different choices. In general, an IFQ holder is likely to choose the alternative that imposes the least cost. An unanticipated circumstance that prevents a delivery will increase costs to harvesters. The distribution of these costs between vessel owners and QS holders will vary across participants. Over the first few years of the program, lease arrangements have evolved so that some agreements deduct certain costs from lease payments. These arrangements that include cost deductions are believed to be more common in cooperatives that use a single IFQ holder that oversees harvest of all IFQ. In these cases, in which revenues of the cooperative are shared across QS holders, the vessel owner's incentives are better aligned with the QS holder. The terms of these arrangements are generally

confidential and vary across participants, but agreements are believed to pass on most out-of-pocket costs associated with unanticipated circumstances to the QS holders.

Under the **exemption alternative**, if a delivery is prevented by an unforeseeable circumstance, the holder of Class A IFQ subject to a regional landing requirement that has reached an exemption agreement with the holder of matched IPQ and the representative of the region would be permitted to obtain an exemption from regional landing requirements. By providing the IFQ holder with an additional choice when confronted with an obstacle to a delivery, the exemption could in some circumstances reduce added harvester costs that accompany an unforeseeable circumstance preventing a delivery within a region. The potential for an IFQ holder to direct the use of the exemption will depend on several factors, including the cost of alternative means of addressing the obstacle to deliveries and the cost of any compensation required under the exemption agreement.

Prior to using the exemption, any IFQ held by the cooperative that allows delivery outside of the region (including Class A IFQ designated for another region, Class B IFQ, and C share IFQ) would be required to be used. A few effects could arise from this requirement. First, cooperative members are likely to ensure that share matching contracts (under which Class A IFQ deliveries are committed to specific IPQ) and delivery commitments for Class B and C share IFQ contain clauses that allow for the use of matched or committed shares to address contingencies in the event a regional delivery is prevented. Second, increased coordination of the harvest of IFQ within a cooperative is likely to occur. Currently, if a cooperative is required to use all commonly-held IFQ, the exemption may be virtually inaccessible to some members who do not have the ability to access other IFQ held by their cooperatives prior to using the exemption. These cooperative members would be effectively attempting to acquire access to IFQ through arm's length transactions with other members of their cooperative. Although these other members may be willing to assist, some will have commitments or lease arrangements that make them reluctant or unable to allow others to use the IFQ. To overcome this obstacle, cooperatives will likely include in their agreements (and in other agreements with others that affect cooperative IFQ) provisions that allow the redistribution of the IFQ within the cooperative to address unforeseeable circumstances that prevent compliance with regional delivery requirements. While returns from IFQ to members may vary within a cooperative, the more coordinated use of IFQ within cooperatives could slightly reduce any variation in pricing, as members will sacrifice some individual control of the use of the IFQ allocations arising from their QS. In addition, the need to make cooperative IFQ available to address contingencies to ensure eligibility for the exemption could lead to more coordinated use of IFQ within each cooperative over time. In addition to using all commonly held IFQ that allow deliveries outside of the affected region, the IFQ holder must also exercise reasonable efforts to avoid using the exemption (including attempting to arrange delivery to another location within the region and attempting to acquire IFQ that allow delivery outside of the region). If an operating facility is available to receive the landing, the IFQ holder would not qualify for the exemption, if that facility is able to accept delivery of the landing. If additional IFQ could reasonably be acquired by the IFQ holder to support the landing outside the region, the IFQ holder would also not qualify for the exemption. Beyond these more obvious means of overcoming the need for an exemption, the IFQ holder would be required to pursue any reasonable measures to accommodate the delivery without the exemption.

Two factors are likely to be considered when determining whether to use the exemption. First, an IFQ holder may have operational costs of travelling to and making delivery outside the region under the exemption. These various operational considerations could make the exemption more or less appealing depending on the circumstances of the vessel. Second, compensation requirements will also affect the decision of the IFQ holder to secure an exemption. Higher compensation amounts could create a disincentive for IFQ holders to use the exemption. In effect, the exemption provides an IFQ holder with

an additional choice, if confronted with a circumstance that prevents compliance with a regional delivery requirement. Although available, the exemption is only likely to be used only when it is more favorable than the other options, including waiting for the interfering circumstance to pass and possibly discarding catch. Since the alternative requires the IFQ holder to use all commonly held IFQ that could support the out-of-region delivery prior to obtaining an exemption and to pay compensation as defined by agreement, the exemption is unlikely to be used frivolously.

QS holders will be affected by the exemption, since they likely bear some (or, in some cases, all) of the costs arising when compliance with regional delivery requirements are prevented by unforeseeable circumstances. To the extent that IFQ holders are able to reduce costs associated with these circumstances through use of the exemption, QS holders are likely to benefit from the exemption. Since the exemption is available only in very limited circumstances and comes at a cost of compensation to regional interests (and possibly the IPQ holder), the exemption is unlikely to result in substantial financial savings for QS holders, in most instances. Typically, the use of the exemption will have minor changes in operational efficiency. QS holders fishing the IFQ yielded by their QS will realize all of this savings, while a portion of this savings will be passed on QS holders that have lease arrangements for the fishing of IFQ yielded by their QS.

#### **Effects on vessel operations and safety**

Under the **status quo**, vessel operators must comply with regional landing requirements when using regionally designated catcher vessel owner Class A IFQ. In most instances, the effect of these requirements is to reduce efficiency by requiring additional coordination of landings and possibly impose additional costs, if the regionally compliant landing is at a more distant location from fishing grounds. The action considered here, however, could affect vessel operations when unforeseen circumstances prevent compliance with regional landing requirements. Under the status quo, vessel operators prevented from making a landing using regionally designated IFQ have several possible choices. In some instances, the IFQ holder may have alternate IFQ allowing the landing to be made in another location. Alternatively, IFQ may be acquired to allow the landing to be made in outside of the designated region. In either of these cases, the vessel operators will need to coordinate their activity with the IFQ holder (if the IFQ holder is not the vessel operator) and both the processor (and IPQ holder) who was initially scheduled to receive the landing and the processor (and IPQ holder, if needed) who will ultimately receive the landing. If the condition preventing the landing is likely to pass, the vessel operator could choose to wait to make the delivery. In general, the effects of the status quo on vessel operations are that harvesters must make additional efforts to coordinate harvest activity with the regional landing requirements on Class A IFQ. When a landing is prevented by an unanticipated circumstance, vessel operations must be adapted to comply with regional landing requirements without exception.

Of greatest concern, the need to full comply with all regional landing requirements increases the incentive for vessel operators (in conjunction with IFQ holders) to force deliveries when circumstances may prevent the vessel from safely making the delivery. In all cases, the captain of a vessel is responsible for the safety of the vessel and may choose not to attempt to make a delivery to ensure the safety of the vessel. The captain, however, will have to balance the safety risk of attempting to make a delivery against the financial cost of redirecting or delaying the delivery. The potential to accept the risk is likely greatest at the end of season when little or no unused IFQ would support a delivery outside of the designated region. In that case, a captain may be unable to substitute IFQ for the regionally designated IFQ. In addition, captains and crews are likely to have less patience for waiting out ice conditions and may be more inclined to accept greater risks to complete their seasons. In these circumstances, the threat to safety will likely be the greatest.

The **exemption alternative** provides an additional option to vessel operators that encounter unforeseeable impediments to complying with regional delivery requirements. Since these unforeseeable events arise infrequently and the exemption is narrowly tailored, it is unlikely to have widespread implications on vessel operations. The alternative, however, could provide some vessel operators with an additional choice in some circumstances that could benefit operators and reduce some safety risks. Specifically, the ability of vessel operators to gain an exemption could relieve some of the financial pressure to accept the risks incumbent in making a delivery under questionable circumstances (such as when ice is present, but is arguably navigable) by providing a limited exemption from the regional landing requirement. Clearly, a vessel operator could still perceive a benefit to complying with the regional landing requirement, thereby avoiding any compensation that might be required in the event of an exemption. Yet, the outlet created by the exemption could be particularly important nearer the end of season when little or no unused IFQ would support a delivery outside of the designated region. In that case, a captain may be unable to use the regionally designated IFQ except by receiving the exemption to the regional designation or accepting risks associated with the delivery. Late in the season, captains and crews are likely to have less patience for waiting out ice conditions and may be more inclined to accept greater risks to complete their seasons. The exemption may provide a reasonable alternative that could lead vessel operators to avoid risks associated with attempting lands despite obstacles.

#### **Effects on POS and IPQ holders and processors**

Under the **status quo**, no exemption to regional landing requirements is permitted. So, both regional landing requirements and IPQ commitments must be complied with. Processors will likely be idled in the event compliance with regional delivery requirements is prevented by an unforeseeable circumstance. If additional capacity is available within a region, IPQ holders may be able to make use of their IPQ by redirecting landings to another plant using custom processing arrangements. In some circumstances, compliance with regional landing requirements may require that an IPQ holder arrange for additional processing capacity in a region to receive deliveries under Class A IFQ/IPQ contractual agreements. Processors may incur additional costs through these arrangements. Clearly, a circumstance preventing compliance with regional landing requirements will increase costs to processors with those costs being dependent on the specific circumstances, the responses of both the harvesting and processing sectors, and any change in pricing that might be negotiated between the parties or driven by the arbitration system.

The **exemption alternative** allows a Class A IFQ holder to obtain an exemption from regional landing requirements, in the event that compliance with that requirement is prevented by an unanticipated circumstance. IPQ holders are likely to require some level of notice prior to exercising the exemption (except in case of emergency). This type of notice requirement should ensure that processors are not expending substantial efforts to overcome the circumstance, only to have an IFQ holder redirect the landing under the exemption. Likewise, a compensation requirement in the contract could be carefully drafted to protect an IPQ holder should an IFQ holder exercise the exemption in a manner that unreasonably imposes excessive cost on the IPQ holder. These two provisions together should limit the extent to which any circumstance imposes an undue burden on an IPQ holder in the event a IFQ holder elects to use the exemption.

#### **Effects on regions and communities**

Under the **status quo**, holders of Class A IFQ and IPQ holders must abide by regional landing requirements without exception. Consequently, the only circumstance under which a region will not benefit from a landing from a regionally designated IFQ is if the IFQ is not used. Without an exemption, IFQ could be left unharvested should an unanticipated circumstance prevent the harvest altogether or make the harvest cost prohibitive. In considering the effects of regional landing requirements, it should be noted that those requirements provide no community specific benefit. As a result, regional landing

requirements will only ensure that additional offloads and processing take place in the region. That activity may not benefit a community or even the regional economy, if the processing occurs outside the boundaries of a community.

The potential for landings to be redirected outside of communities differs across fisheries and regions. In the North region of the Bering Sea *C. opilio* fishery, where unanticipated circumstances might be most likely to arise, the potential to redirect landings away from communities is relatively limited. Areas in the region that are outside of communities are relatively exposed, and likely cannot safely support offloads and processing activities during the winter months when most processing occurs. In the St. Matthew Island blue king crab fishery, locations near St. Matthew Island (and not within any community) provide some protection from weather for processors. Much of the processing historically relied on these locations. In the Pribilof Island red and blue king crab fishery, most processing occurred historically in the Pribilof Island communities. Since the fisheries are relatively small, it is possible that the North processing in the St. Matthew Island blue king crab fishery could be consolidated with processing in the Pribilof Island red and blue king crab fishery in the Pribilofs. The effect of any unanticipated circumstances on the redistribution of processing within the North region in these fisheries cannot be predicted, but would depend on available resources. An unanticipated circumstance might redistribute landings to a different location, but the Pribilofs are the most likely location for processing. In the Western Aleutian Islands golden king crab fishery, the only shore plant to receive deliveries under the program to date is in Adak. Some participants have suggested that processing could take place in Atka in the future. If deliveries are prevented to Adak or Atka by an unanticipated circumstance, it is likely that landings would move to a different location, if a plant is made available. This movement of landings could be simply between these communities, but also could result in a loss of benefits to communities in the region, if those landings move to a location outside of any community. If a delivery into a South region processor is prevented by an unforeseeable circumstance, it is likely that the processing would move to a different facility. In Dutch Harbor/Unalaska and Kodiak, it is possible that the processing would simply move to another local facility, unless the entire community is inaccessible. Any other processing location in the South is likely to have processing moved to a different community (or outside of any community) in the event that a delivery is prevented by an unforeseeable circumstance.

Under the **exemption alternative**, if an unanticipated circumstance prevents deliveries within a designated region that delivery may be redirected outside of the region. Since the exemption is relatively limited, requiring an IFQ holder to take all reasonable steps to avoid the need for exemption, it is unlikely to be used liberally or frequently. In cases when the exemption is applied, the community that would have hosted the landing and processing will lose tax revenues and could lose economic activity associated with the landing. In a few circumstances, the community's economic activity may be unaffected. For example, if the landing would have taken place at a floating processor within community boundaries, but with no interaction within the community, it is possible that only tax revenues would be affected.

The effects of any exemption will depend on the circumstances surrounding the redirected deliveries and the terms of the agreement between the IFQ holder, the holder of matched IPQ, and the regional representative. In cases of a few redirected deliveries in the course of a relatively long processing period, it is possible that the community could suffer little loss of economic activity. If the compensation agreement makes up for lost tax revenues, it is possible that the community may be unaffected by the exemption. On the other hand, if the exemption is granted for a large share of a community's processing activity, it could have a very different effect on the community's economy. It should be noted that in some instances, a community that would have received a landing but for an unforeseeable circumstance could be better off under the exemption than with a strict requirement to comply with regional landing requirements. For example, under the status quo, IFQ may be either left unharvested by an IFQ holder



that is unable to make a delivery to a community. If the IFQ holder is able to use an exemption to redirect the landing to another region and is required to pay compensation to the community under the agreement, the community would be better off under the exemption.

Notwithstanding the case of movement of small numbers of landings, it is also important to consider circumstances that affect a large portion of a community's processing being redirected under an exemption. In these instances, it is likely that processing in the community will have been prevented for an extended period. Obligations to exert reasonable efforts to avoid the exemption and compensation provisions in the exemption agreement should prevent IFQ and IPQ holders from redirecting landings for simple convenience. The provisions should also prevent abuse of the exemption, in the event a single location within a region is unavailable for deliveries, while processors may be accessible in other locations (or a processor can be brought to a location to support deliveries). Assuming deliveries are prevented in a region, without the exemption, these landings would not occur. If they occur under the exemption, the community would receive any compensation prescribed by the agreement (or alternatively the regional interest protected by the compensation provision would receive that compensation).

#### **Effects on management, monitoring, and enforcement**

Under the **status quo**, managers monitor use of regionally designated IFQ and IPQ through the elandings system. Since compliance with designations is required without exception, oversight is simplified. Any violation could be tracked and verified through the elandings monitoring system, which creates a record of landings including IFQ and IPQ usage by facility.

Under the **exemption alternative**, NOAA Fisheries managers will be required to oversee a few additional aspects of share holdings and usage. NOAA Fisheries will be required to identify the proper party to contract on behalf of regions with respect to the exemption contract. Since exemptions will only be granted for IFQ and IPQ that are subject to a contract, NOAA Fisheries must also collect exemption contracts for the different parties. Since most IFQ holders will deliver to multiple IPQ holders, it is likely that each IFQ and IPQ holder that wishes to have the exemption available will need to enter several contracts. The number of contracts could differ depending on the option selected for identifying the regional representative. If regions have multiple representatives (such as each right of first refusal holder) more contracts will be required. Once contracts are filed, the exemption is available upon the IFQ holder attesting to unanticipated circumstances preventing compliance with the requirements as specified by the terms of the contract. Any time an exemption is sought, NOAA Fisheries will need to process the affidavit of the IFQ holder attesting to the conditions allowing the exemption and identify both the IFQ and IPQ for which the exemption is requested. These shares will then be permitted to be landed outside of the designated region. To adequately implement the exemption, the affidavit must identify not only the IFQ and IPQ subject to the exemption, but also the specific contract authorizing the exemption and the regional party to the exemption contract. Beyond documentation of usage and eligibility for the exemption, other aspects of exemption oversight and enforcement would be shifted to participants (including the regional entity). By shifting contract performance oversight to the parties, NOAA Fisheries burden for overseeing performance (particularly performance of compensation requirements) is limited. Although the shifting of management burdens to participants should reduce agency administration costs, the costs to participants may increase. The extent of costs to parties will depend greatly on the choices of the parties in the exemption agreements and the complexities and costs of enforcing those arrangements.

#### **Effects on the physical and biological environment**

Under the **status quo**, an IFQ holder must comply with regional landing requirements without exception. As a result, it is possible that in some rare circumstances, IFQ holders will be prevented from fully harvesting their allocations because they would be prevented from delivering their catch by an

unanticipated circumstance. The effect on crab stocks arising from such a circumstance would be expected to be negligible.

Under the **exemption alternative**, holders of IFQ subject to regional landing requirements who are able to come to terms with the holders of matched IPQ and regional representative and who are unable to comply with regional landing requirements because of unanticipated circumstances could obtain an exemption from those regional landing requirements. The exemption could aid IFQ holders in the full harvest of their allocations by ensuring that they are able to deliver their catch, in the event deliveries in a region are prevented by an unanticipated circumstance. No affect on the environment is anticipated to arise under this alternative.



# Testimony

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*Statement of Jennifer Lincoln, Ph.D.  
National Institute for  
Occupational Safety and Health  
Centers for Disease Control and Prevention  
U.S. Department of Health and Human Services*

To the North Pacific Fishery Management Council (NPFMC),  
Anchorage, Alaska

June 2009

Mr. Chairman and members of the Council, my name is Jennifer Lincoln, and I am an injury epidemiologist at the National Institute for Occupational Safety and Health (NIOSH). NIOSH is the federal agency responsible for conducting research and making recommendations to identify and prevent work-related illness and injury. I work in the NIOSH Alaska Pacific Regional Office, where I lead the Commercial Fishing Safety Research and Design program.

In the early 1990s, NIOSH initiated an injury and fatality prevention effort focused on high risk industries in Alaska, which included the commercial fishing industry. Since that time, safety among the Alaskan fishing fleet has improved, with a decline in the number of fatalities and a 47% decline in rate of fatalities from 1990 to 2007 [NIOSH 2009]. The declining rate indicates that the decrease in fatalities is not simply a function of fewer fishermen in the workforce, but rather a result of improvements in safety and reductions of risk due to U.S. Coast Guard (USCG) policies, fisheries management policies, marine safety training and industry action. These safety improvements have been most pronounced in the Bering Sea Aleutian Island (BSAI) crab fleet. However, continued monitoring of the change in risks caused by crab rationalization is warranted.

I am pleased to appear before you today to testify about the reductions in risks seen by BSAI crab fleet and the need for the council to address policies that continue to put these crews at risk. NIOSH recommends the development of a fishery management policy that allows for Regional Delivery Relief when safety is at stake. Such a policy would not force the vessel operator to traverse dangerous ice in order to deliver the catch.

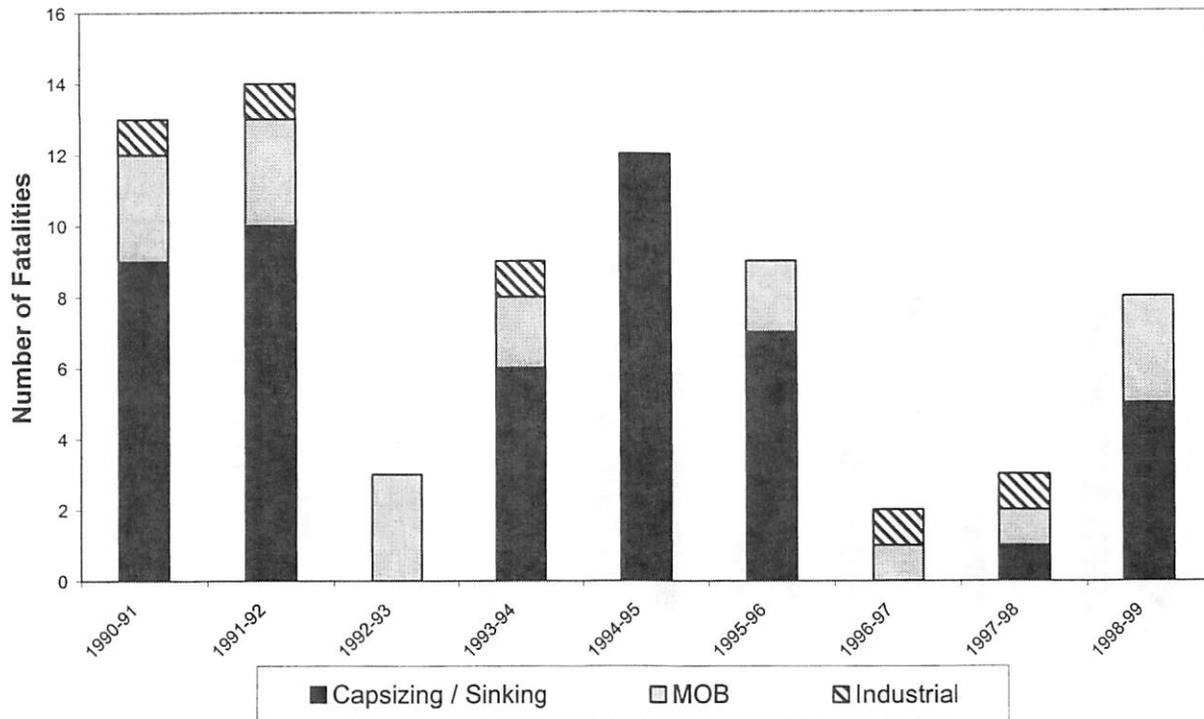
This testimony discusses the following topics:

1. The **safety improvements** experienced by the BSAI crab fleet since 1990;
2. How the **Crab Rationalization Program** has affected risk factors; and
3. **Current NIOSH safety concerns** regarding fisheries management policies for the BSAI crab fisheries.

### **Safety Improvements**

From October 1990 through March 1999, 73 people died in the BSAI crab fisheries as a result of capsizing, sinking, falls overboard (MOB), and industrial accidents, such as being struck or crushed by crab pots [Woodley et al. 2009]. Fifty of these 73 were on 12 vessels that capsized or sank (Figure 1). At least eight of the 12 vessels were fully loaded with crab pots en route to or from the crab grounds. A primary cause for many of these fatal capsizing/sinking events was overloaded or fully loaded vessels in icing conditions. According to USCG investigations, at least three of the 12 vessels were determined to be overloaded. When taking into account changes in workforce size, variations in season length, and number of vessels participating in the fishery, workers participating in crab fisheries in the Bering Sea were experiencing a yearly fatality rate of 768 fatalities per 100,000 full time fishermen [CDC 2008].

## Bering Sea / Aleutian Island Crab Fishery Fatalities (1990-1999)



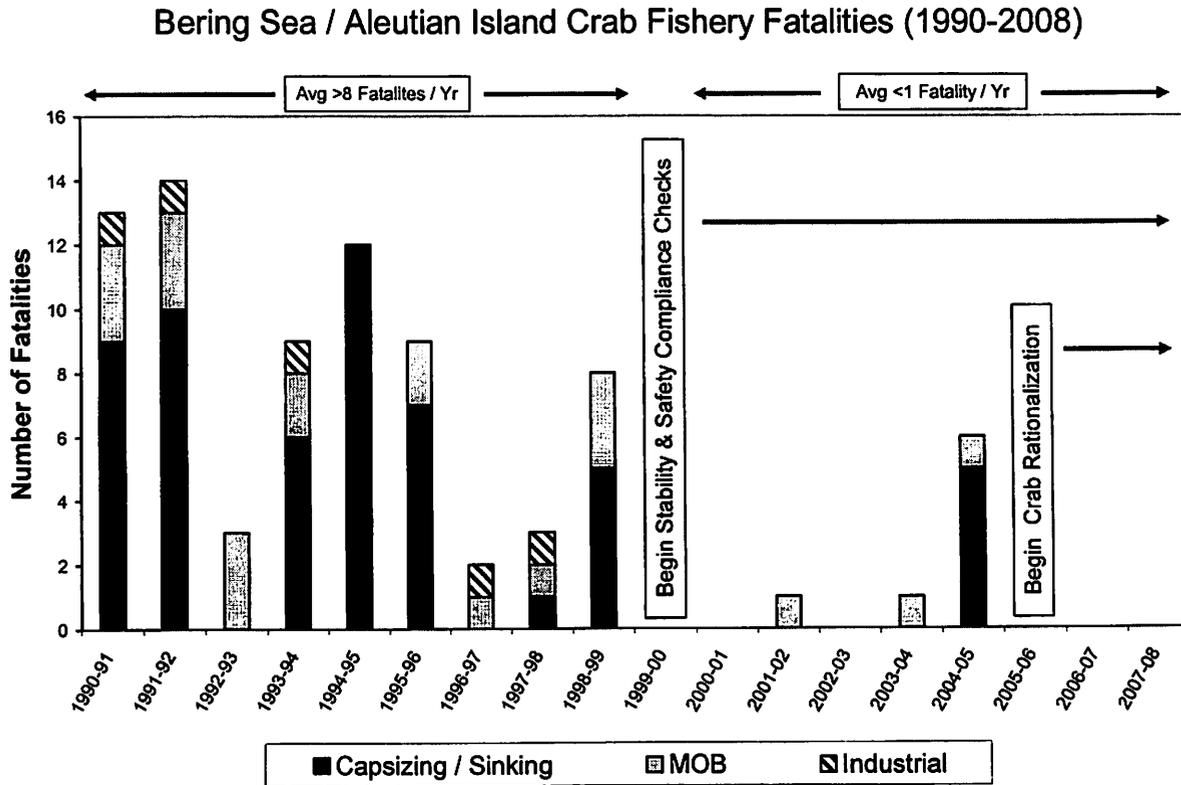
**Figure 1. BSAI Crab Fishery Fatalities 1990–1999**  
 MOB=falls overboard

In 1999, many stakeholders saw the need to develop a tailored program to address the specific hazards faced by these vessels, including prevention of capsizing events and the practice of vessel overloading. The safety program developed for the BSAI crab fleet, known as the “At the Dock Stability and Safety Compliance Check (SSCC),” was cooperatively established through a partnership of the 13<sup>th</sup> and 17<sup>th</sup> Coast Guard Districts, the Alaska Crab Coalition, the North Pacific Fishing Vessel Owner’s Association (NPFVOA), NIOSH, and the Alaska Department of Fish and Game (ADF&G).

To execute the program, the USCG joined ADF&G to board the vessels in multiple ports. While ADF&G personnel conducted tank checks, the USCG reviewed vessel loading and stability issues with the master and checked for overloading. Vessels found to be without stability reports, overloaded, or having missing, outdated, or inoperable primary life saving equipment (i.e. immersion suits, life rafts, Emergency Position Indicating Radio Beacons) were issued Captain of the Port orders and not allowed to get underway until the safety discrepancy was corrected.

The results of this program can be measured in the reduction of fatalities since implementation of the SSCC (Figure 2). From October 1999 through January 2005, the USCG conducted 12 SSCC examinations at the dock in October and January of each year prior to the crab seasons. This program has resulted in a decline in the number of fatalities and a 60% reduction in the fatality rate in the BSAI crab fleet [CDC 2008]. The reduction in the fatality rate controls for the

reduction in the size of the fleet. There has been one vessel lost since implementation of the program, resulting in the loss of 5 fishermen.



**Figure 2. BSAI Crab Fishery Fatalities 1990–2008 seasons**

### Crab Rationalization Program

This much improved safety record has continued through implementation of the Crab Rationalization Program in 2005.

One of the primary goals of the Crab Rationalization Program was to *improve safety* in the crab fleet by:

1. Ending the “race to fish.” Fishermen can now choose the weather they fish in, take a longer period of time to catch their share, and have longer periods of rest to decrease fatigue.
2. Improving economic stability within the fleet. This allows operators to hire, train and retain more experienced and professional crews. More profitable fisheries allow owners to afford investments in vessel maintenance, safety equipment and safety training.
3. Consolidating the fleet. This potentially results in more efficient and safer vessels in the fleet.

The following are measures of safety improvements:

**Casualty Rates/Search and Rescue Cases:** From the beginning of the Crab Rationalization Program in August 2005 through December 2008, there were no vessel losses, fatalities, and search and rescue cases on vessels participating in the rationalized crab fisheries. However, in January 2009, one man was lost when he was pulled overboard while hauling pots. This was the first fatality in these fisheries since January 2005.

**Reduction in Vessels:** A major impact on the fleet following crab rationalization was the immediate and significant consolidation of the fleet due to sidelining of less efficient vessels and the extensive use of vessel cooperatives. The number of vessels participating in the Bristol Bay Red King Crab Fishery decreased by 67% and in the Bering Sea Snow Crab Fishery by 59% [Knapp and Lowe 2007].

**Increases in Fishing Season Length and Change in Fishing Pace:** The Crab Rationalization Program has allowed a significant increase in the number of fishing days for the fleet. Table 1 shows that in the final years of the pre-rationalization Bristol Bay Red King Crab Fishery, the season length had been reduced to 3–5 days. Under the Crab Rationalization Program, the average days fished per vessel was 26 days for the 2005/06 season and 21 days for the 2006/07 season. Substantial season length increases have been noted for the Bering Sea Snow Crab Fishery as well from 5–8 days in 2004 and 2005 to 42 days in the 2005/06 season and 36 days in the 2006/07 season. Table 1 also shows the average number of pots pulled per vessel and the average number of pots pulled per day. There has been a reduction in the number of pot lifts per vessel per day, indicating a slower fishery pace under the Crab Rationalization Program.

**Table 1: Comparison of pre-rationalization vs. rationalization effects on the average days fished, pots pulled, and pots pulled per day [Knapp and Lowe 2007]**

	Before Rationalization		After Rationalization	
	2003	2004	2005/06	2006/07
<b>Bristol Bay Red King Crab Fishery Summary Data</b>				
Average days fished per vessel	5	3	26	21
Average pots pulled per vessel	512	362	1119	794
Average pots pulled per fishing day	102	121	43	38
<b>Bering Sea Snow Crab Fishery Summary Data</b>				
Average days fished per vessel	8	5	42	36
Average pots pulled per vessel	582	424	1390	1192
Average pots pulled per fishing day	73	85	33	33

### Current NIOSH Safety Concerns

Since the initiation of crab rationalization, the fatality rate among fishermen participating in these two fisheries remains low, vessels have consolidated, the season has become longer and the fishing pace slower. However, based on interviews with individual owners and operators, several changes brought about by the Crab Rationalization Program have resulted in new hazards or risks. Individual masters have stated that because the Crab Rationalization Program dictates a percentage of the catch be delivered to pre-designated processors, there are times when vessels

are forced to deliver to ports through icy, hazardous waterways. As a result, uninspected commercial fishing vessels that were not built to break through the ice, are forced to navigate the ice to meet their delivery requirements. In addition, ice can move buoys off station creating further navigational hazards.

## **Summary**

Commercial fishing takes place in a dynamic environment where adverse events are caused by a variety of risk factors, such as poor vessel design, construction, or stability; or human factors such as lack of crew training, error-prone work methods, demanding hours of work, or lack of personal protection. Ensuring that fishery management does not adversely affect safety under these conditions is a challenge but one that can be met with good policy and use of established partnerships.

Substantial progress has been made in Alaska's most hazardous industry. Hazard recognition and practical safety interventions in concert with industry commitment have led to a decline in fatalities in this fleet. The harsh operational environment for these vessels does not allow a large margin of error. Policy makers can help by developing practical guidelines for mariners that do not put them at risk.

NIOSH recommends that the Council allow the professional mariner to make a decision for safety versus the bottom line by providing an exemption from regional landing requirements in the event that risky icing conditions exist.

NIOSH will continue to support the safety of the commercial fishing industry by assisting with research and evaluation of interventions to prevent vessel losses, fatalities, and severe injuries. NIOSH research will focus on mitigating the worst problems and identifying emerging hazards to improve worker safety.

Thank you for the opportunity to testify today. I am happy to respond to any questions that you might have.



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# Improving Commercial Fishing Vessel Safety Through Collaboration

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**C**ommercial fishing in Alaska's Bering Sea/Aleutian Island (BSAI) crab fleet has long been one of the most dangerous occupations in the United States, and was popularized in the Discovery Channel's series "The Deadliest Catch." Stemming in part from the devastating losses of the Seattle-based crab vessels F/V *Americus* and F/V *Altair* in February 1983 (a combined total of 14 fatalities), Congress passed the Commercial Fishing Industry Vessel Safety Act in 1988.

The Commercial Fishing Industry Vessel Safety Act of 1988 provided the first Coast Guard authority for development of safety regulations for commercial fishing vessels. The act focused on improving the survivability of commercial fishermen after a casualty. Despite the improvement in safety from the regulations under the act, there is no authority to require regularly scheduled safety compliance examinations, and commercial fishing vessels remain classified as "uninspected." This legal framework has prompted extensive collaboration to improve safety. The regulations developed under the act require survival equipment, including life rafts, immersion suits, emergency position indicating radio beacons (EPIRBs), and also some training in emergency drills and the use of this emergency equipment.<sup>1</sup> These

safety regulations had their intended effect in Alaska commercial fisheries, which experienced a 67 percent decline in total commercial fishing deaths and a 38 percent decline in the commercial fishing fatality rate from 1990 to 1999.<sup>2</sup> However, the shellfish fisheries in Alaska had the highest fatality rate of all fisheries in the state.<sup>3</sup>

The Bering Sea/Aleutian Island crab fleet, which figured so prominently in the development of the safety legislation and regulations, continued experiencing staggering losses. During the 1990-1999 crab seasons, an average of eight lives were lost annually as a result of vessels capsizing or sinking, man overboard incidents, and industrial accidents.<sup>4</sup> In October 1999, an innovative regional safety program focusing on the prevention of vessel loss was developed to address the hazards of this dangerous fishery.

## Crab Fishery Information and Operations— The Olympic Years

Catcher vessels (which catch and deliver live crabs to shore-based or floating processing vessels) engaged in

**BSAI Crab Harvest Volume Comparison 1990-2006<sup>5</sup>**

Year	1990-1994	1995-1999	2000-2004
Harvest Volume	288 million pounds	158 million pounds	43 million pounds

**Table 1**

BSAI crab fisheries are highly specialized for crab fishing service. The average vessel gross tonnage is less than 200, vessel length is between 90 and 120 feet, and each vessel has a crew of five to six people. These vessels utilize pot gear to harvest the crabs, with pot dimensions approximately seven feet by seven feet by three feet and each pot weighing 750-850 pounds.<sup>6</sup>

Prior to the start of the season, vessels typically arrive in the ports of Dutch Harbor, Akutan, King Cove, St. Paul, and Kodiak to purchase bait, fuel, and groceries for the season. During this time, vessels also load pot gear, stacking the gear on deck in tiers. The first tier is stacked on end, and subsequent tiers are stacked flat. Combined, these tiers measure approximately 15-20 feet high from the deck. Once vessels had loaded all gear and completed a tank check and registration, they would depart from these multiple ports simultaneously en route to the crab fishing grounds. Once on the fishing grounds, the season would begin at a time predetermined by the Alaska Department of Fish and Game (ADF&G), and vessels would begin fishing.

The Bering Sea / Aleutian Island crab fisheries are managed jointly by the National Marine Fisheries Service and the ADF&G. Fleetwide harvest levels, known as the guideline harvest level, are determined by the Alaska Department of Fish and Game for each fishery on an annual basis. In an "Olympic" fishery, there is no quota assigned to individual vessels. Vessels compete directly with each other to maximize catch and revenues within the limitations of the guideline harvest level. From 1990 through 2005, there were approximately six major geographically and species-specific commercial crab fisheries conducted annually in the BSAI management area. The major seasons typically began in August for eastern and western Aleutian Island golden king crab, followed by blue and red king crab seasons in the Pribilof and St. Matthew Islands in September, Bristol Bay red king crab in October, eastern and western Bering Sea bairdi crab in November, and Bering Sea opilio crab in January.<sup>7</sup>

The BSAI crab resource underwent a significant decline during this time period, resulting in major reductions in catch for some fisheries and outright closures of three of

the six major crab fisheries. Table 1 shows this decline in five-year increments.

**Economic Pressure**

While the crab amounts declined substantially, the total number of vessels participating in the fisheries did not. The biggest fisheries management problem with the Bering Sea crab fleet was that despite efforts to limit overcapacity and fishery participants through a license limitation plan, the catching power within the fleet far exceeded the available amount of crabs. As a result, the average vessel in the crab fleet was making less money. The annual ex-vessel value (average value of crab harvest per vessel) of the Bering Sea Crab harvest from the major crab fisheries was well below the decade average, falling from \$1.75 million per vessel in 1990 to \$0.7 million per vessel from 1995-1998.<sup>8</sup>

In such in a highly competitive fishing environment, a vessel with greater catching power has a better chance to catch more fish and obtain a greater economic reward. This was one of the major factors that transformed this economic problem into a safety problem.<sup>9</sup> In the Bering Sea crab fleet, the catching power or capability of a vessel is directly related to a critical vessel safety feature: the number of pots a vessel is able to carry.<sup>10</sup> As more vessels have entered the fisheries and crab stocks have declined, there has been a proportional reduction in per vessel harvest and income. In an attempt to recapture this lost share, some vessel owners have increased their harvesting capability by investing in the ability to carry additional pots.<sup>11</sup> The safe carriage

**Pursuing Enhanced Authority**

In 2006, as part of its FY08 legislative proposal, the Coast Guard recommended a provision that sought to authorize a pilot program for dockside crew survivability exams to conduct mandatory dockside crew survivability examinations on uninspected U.S. commercial fishing vessels in two geographic areas for a period of five years.

In the 110<sup>th</sup> Congress, the Coast Guard and Maritime Transportation Subcommittee of the House Committee on Transportation and Infrastructure introduced a more robust fishing vessel safety provision for FY09 as part of H.R. 2830, the Coast Guard Authorization Act of 2008, which passed the House of Representatives. Section 307 of H.R. 2830 would have mandated dockside fishing vessel examinations and crew training.

The Coast Guard continues to pursue expanded authority for mandatory dockside examinations of commercial fishing vessels in order to improve vessel safety in this vital industry.



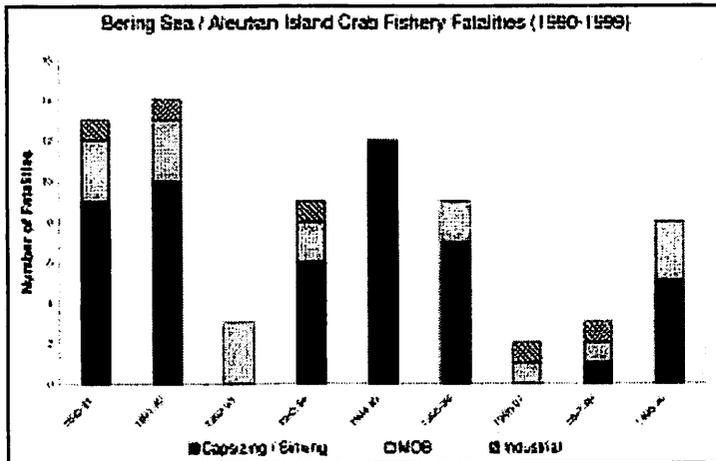


Figure 1: BSAI Crab Fishery Fatalities 1990-1999 (USCG/NIOSH, unpublished data, 2008).

of additional pots often necessitates expanding the vessel dimensions through increasing the length or beam of the vessel.<sup>12</sup> Because such investments are extremely expensive (e.g., a million dollars or more), not all owners can afford or are willing to take such measures, especially with the poor fishery outlook.

A much simpler and less expensive way to increase catching power is to carry additional pots without any vessel modification. For example, a vessel that normally carries 120 pots can increase its catching/earning power by 20 percent by adding 24 additional pots. Under the existing regulatory regime, the number of pots that a vessel can carry is limited by the vessel's stability booklet/letter, or ADF&G pot limits for certain fisheries. Adding pots beyond the vessel's stability requirements raises the center of gravity, decreases the freeboard of the vessel, and lessens the vessel's righting arm. In less technical terms, adding more pots to the vessel puts weight up higher, pushes the vessel lower in the water, and decreases the vessel's ability to right itself from external heeling forces such as wave action, wind action, or internal forces such as free surface effect, improper loading, or tank management.<sup>13</sup> Crab vessels are particularly susceptible to certain kinds of catastrophic casualty events. When fully loaded with pot gear, they are susceptible to capsizing, especially during icing conditions, as is common in the Bering Sea's winter months.

**Vessel Loss History and Fatality Rates 1990-1999**

From October 1990 through March 1999, 73 people died in the BSAI crab

fisheries (Figure 1) as a result of capsizing, sinking, man overboard (MOB), and industrial accidents, such as being struck or crushed by crab pots.<sup>14</sup>

During this period, 50 people on 12 vessels died as the result of capsizing/sinking events.<sup>15</sup> At least eight of the 12 vessel losses occurred when the vessels were en route to or coming from the crab grounds in a loaded condition. A primary cause for many of these fatal capsizing/sinking events was vessel overloading or being fully loaded in icing conditions. According to USCG investigations, at least three of the 12 vessels lost were determined to be overloaded. When taking into account changes in workforce size, variations in season length, and number of vessels participating in the fishery, workers participating in crab fisheries in the Bering Sea were experiencing an astronomical fatality rate of 768 fatalities per 100,000 full-time fishermen.<sup>16</sup>

**Partnerships and Program Development**

Many stakeholders saw the need to develop a tailored program to address the specific hazards these vessels faced. The BSAI crab fleet historically had a high level of participation with the voluntary dockside exam (VDE) program. A voluntary dockside exam is conducted when USCG fishing vessel safety personnel are invited aboard the vessel at the master's request to examine required safety equipment. If the vessel is in full compliance, a VDE decal is issued. Although there was a high level of participation with the program (58 percent of the fleet had a current VDE decal in October 1999), there was a general recognition that the program was not addressing the safety problems within the fleet.

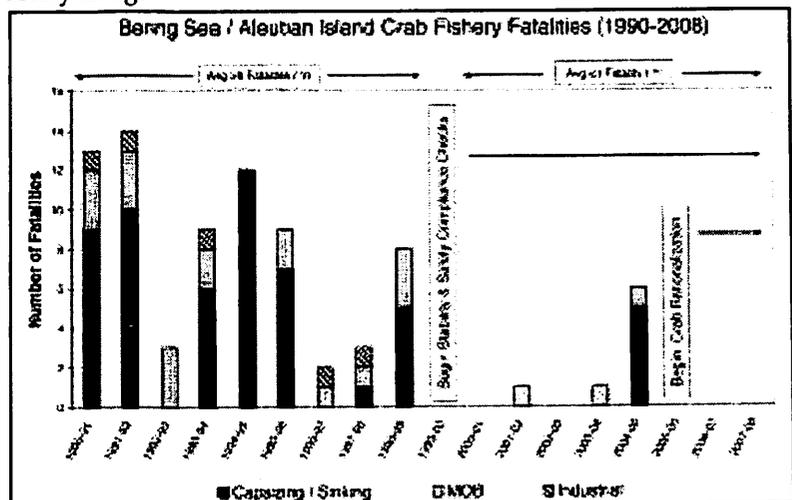


Figure 2: BSAI Crab Fishery Fatalities 1990-2008 (USCG/NIOSH, unpublished data, 2008).

To have the largest impact on reducing vessel losses and fatalities, the desired safety program would need to prevent capsizing events and specifically target the practice of vessel overloading. Because this kind of targeted safety intervention program had never been attempted before, it was critical to establish a strong agency/industry partnership to achieve maximum effectiveness.

The "At the Dock Stability and Safety Compliance Check" (SSCC) program that developed from this effort yielded impressive results. From October 1999 to January of 2005, the only fatalities associated with the fleet were three man overboard fatalities. Capsizing events had ceased. One exception happened on January 15, 2005, when the F/V *Big Valley* capsized, resulting in five fatalities. A subsequent investigation revealed that the vessel departed Dutch Harbor in a grossly overloaded condition and had not been the subject of an SSCC examination. It was also noted during the investigation that the vessel had been found to be overloaded in two previous SSCC exams, and had been directed to remove pots.

The loss of the vessel revealed the shortcomings in the USCG's ability to contact 100 percent of the fleet prior to the start of the season, and also revealed that the weight of crab pots had increased significantly since the issuance of most of the fleet's stability letters. Specifically, the F/V *Big Valley* was carrying approximately 55 crab pots (weighing 780 pounds each) instead of 31 pots (weighing 600 pounds each) as allowed by the vessel's stability report.

But even with this accident, in the seven years since this enforcement program was established, only eight lives have been lost, or slightly more than one life annually. This is a significant improvement over the 1990-1999 time period, where the fleet lost an average of eight fishermen annually.

#### Overall Results

The results of this program can be measured in the reduction of fatalities. Figure 2 depicts this decline in fatalities since implementation of the SSCC. Since its implementation in October 1999, and since the conclu-

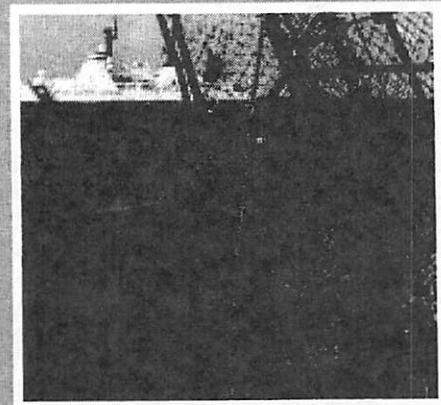
## STABILITY CHECK

The safety program developed for the BSAI crab fleet, known as the "At the Dock Stability and Safety Compliance Check," was cooperatively established through a partnership of the 13<sup>th</sup> and 17<sup>th</sup> Coast Guard Districts, the Alaska Crab Coalition (a crab industry group), the North Pacific Fishing Vessel Owners' Association, the National Institute for Occupational Safety and Health (NIOSH) Alaska Field Office, and ADF&G. By working closely with NIOSH to develop robust casualty analysis that could withstand industry and scientific scrutiny, the USCG was in a strong position to approach the Alaska Crab Coalition and the North Pacific Fishing Vessel Owners' Association to propose an intervention strategy that would:

- Increase USCG interaction with the crab fishing industry.
- Provide a mechanism to review stability and safety issues with vessel masters.
- Allow for mandatory dockside compliance examinations of required vessel safety equipment.
- Deter overloading of the crab vessels.

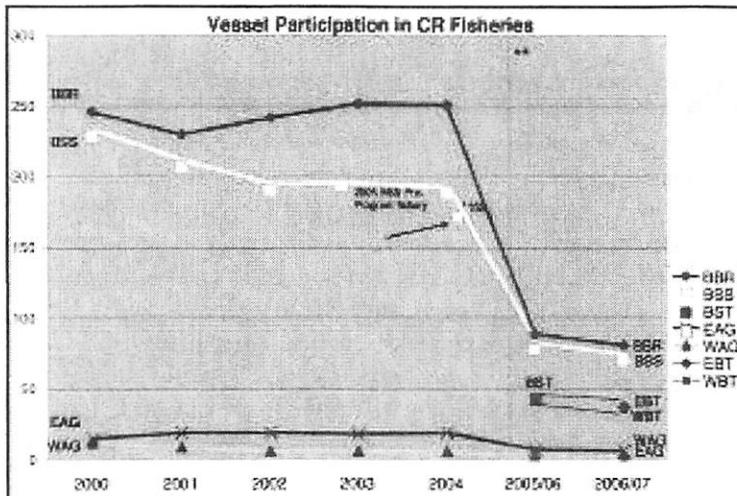
The Bering Sea/Aleutian Island crab industry leadership was very receptive to this kind of program because it placed a high value on safety and responsible vessel operations. The program was viewed in large part by the crab industry as a leveling of the playing field. The crab industry endorsed the program, offering strong support to senior USCG leadership through numerous public forums. Bringing together these various partners proved invaluable in implementing a viable and workable approach that would address key areas of concern without imposing an unnecessary burden on the crab fleet.

To execute the program, the USCG at Marine Safety Detachment Unalaska, accompanied by personnel from Marine Safety Office Anchorage, 17<sup>th</sup> USCG District, and the 13<sup>th</sup> USCG District, joined with ADF&G to conduct tank checks in multiple ports.<sup>17</sup> While ADF&G personnel conducted tank checks, the USCG reviewed vessel loading and stability issues with the master and checked for overloading. Operating in this manner, the ADF&G/USCG team would be on each vessel for a total of 10-15 minutes. Vessels found to be without stability reports, overloaded, or having missing, outdated, or inoperable primary lifesaving equipment (i.e. immersion suits, life rafts, EPIRBs) would be issued captain of the port orders and not be allowed to get underway until the safety discrepancy was corrected.



sion of the Olympic fisheries in January 2005, the USCG conducted at-the-dock stability checks and compliance examinations 12 times in October and January of each year prior to the crab seasons. The decline in the number of fatalities is real. According to NIOSH, this program has resulted in a 60 percent reduction in the fatality rate in the BSAI crab fleet.<sup>18</sup> The reduction in the





**Figure 3: Vessel Participation in CR Fisheries.**<sup>19</sup> BBR = Bristol Bay red king crab, BSS = Bering Sea opilio crab, BST = Bering Sea Tanner crab, EAG = eastern Aleutian Island golden king crab, WAG = western Aleutian Island golden king crab, EBT = eastern Bering Sea bairdi crab, and WBT = western Bering Sea bairdi crab.

fatality rate takes into account the reduction in the size of the fleet.

### Bering Sea Crab Rationalization

In 2005, the BSAI crab fishery management regime underwent comprehensive and dramatic change with the implementation of the BSAI crab rationalization (CR) program. This quota-based system provides allocations of crab resources to vessels, processing companies, and vessel masters.<sup>20</sup> The CR program includes several measures to protect revenues and employment in fishery-dependent coastal communities with a history of participation in the Bering Sea/Aleutian Island crab fisheries.<sup>21</sup> As a consequence, there are requirements for vessels to land catch in various communities.

Under this new system, the "Olympic" fishery is over. Vessels no longer maximize catch and income through a "race" to fish. Instead, vessel owners are issued a quota based upon their percentage of annual average catch, as recorded during certain qualifying years within the fishery. Vessel owners may fish that quota without competition from other vessel operators or concern that someone else will harvest their catch. Additionally, vessel owners may form cooperatives and lease or sell their quota to be harvested by another vessel. Cooperatives must use a hired master to harvest cooperative quota share, and vessels must be owned in part by a cooperative member.<sup>22</sup>

A primary goal of the crab rationalization program was to improve safety in the crab fleet by ending this race to fish, improving economic stability within the fleet, and allowing

more efficient (and hopefully safer) vessels to harvest the quota. At the time of this publication, the CR program was in the midst of completing its 36-month review, as required by the North Pacific Fishery Management Council, and empirical safety data is incomplete at this time.

Based upon interviews with individual owners and operators, there are several changes brought about by the CR program that indicate safety is improving.

**Casualty Rates/SAR Cases.** Since the beginning of the CR program in August 2005, there continue to be no vessel losses for vessels participating in the rationalized crab fisheries.<sup>23</sup> However, USCG cutter time has increased from 10 days to 135 days annually due to the fleet taking advantage of the opportunities provided by the CR program to spread out their fishing effort over time.

**Increases in Fishing Season Length/Lack of a Derby Start.** There has been a significant increase in the number of fishing days for the fleet. In the final years of the Olympic-style Bristol Bay red king crab fishery, the season length had been reduced to three to four days. Under the new crab rationalization program, the average days fished per vessel was 26 days for the 2005/06 season and 21 days for the 2006/07 season.<sup>24</sup> Substantial season length increases have been noted for the Bering Sea opilio fishery as well. Ending the derby start has also provided masters the opportunity to ensure that the vessel and crew are fully ready before getting underway.

**Reduction in Vessels.** A major impact to the fleet following crab rationalization was the immediate and significant consolidation of fleet due to the sidelining of less efficient vessels and the extensive use of vessel cooperatives.<sup>25</sup>

**Crab Gear Carried and Fishery Pace.** Under the Olympic-style fisheries, vessels would maximize catching power to improve their ability to quickly locate and

	Harvest Volume	Average Pot Lifts Per Vessel Day	Average Pots Carried Per Vessel
1992 Bristol Bay Red King Crab (Olympic Style)	16.9 Million	107	294
2005 Bristol Bay Red King Crab (Crab Rationalization)	16.5 Million	37	177

**Table 2**

## AT THE DOCK STABILITY AND SAFETY COMPLIANCE CHECK (SSCC) PROGRAM RESULTS

**Increased USCG interaction with the crab fishing industry.** USCG personnel have conducted At the Dock Stability and Safety Compliance Check (SSCC) examinations simultaneously in multiple western Alaska ports for every major crab fishery in western Alaska since October 1999. The goal for each crab season was to conduct mandatory compliance examinations of 60 to 70 percent of the crab fleet (160–175 vessels) at the dock prior to the start of the season. In determining which vessels were boarded, no distinction was made between vessels with current fishing vessel safety decals (approximately 58 percent of the fleet) and vessels with no decals (42 percent of the fleet) because the primary focus was on vessel loading practices.

In addition to these dockside operations, USCG personnel began attending nightly price negotiation meetings as well as annual crab industry meetings to review program results and familiarize themselves with crab fishery issues. These direct visits to vessels and industry meeting attendance greatly increased USCG/crab industry/fishery manager interactions, allowing development of a sustained and mutually beneficial relationship.

**Provided a mechanism to review stability-related issues with vessel masters.** During the course of the SSCC examinations, USCG personnel reviewed vessel stability letters with vessel masters. The stability information lists the number of pots that can be carried by the vessel safely in non-icing conditions, and have specific tank and hold loading instructions or reduced pot loadings for icing conditions. Reviewing stability information at the dock provided an ideal opportunity to emphasize the importance of vessel stability and to correct any vessel loading problems.

**Allowed examination of vessel safety equipment.** Another program focus was to examine primary lifesaving equipment. This included spot checks of immersion suits, life rafts, and EPIRBs to ensure all required equipment was properly serviced and installed correctly. During the first season, approximately 50 percent of the vessels had major safety deficiencies associated with primary lifesaving equipment. Because compliance checks were conducted at the dock and prior to the start of the season, corrections of deficiencies related to primary lifesaving equipment could be addressed immediately with minimal disruption to vessel operations. Five years into the program, primary lifesaving deficiencies were noted on less than five percent of the boats examined—a 90 percent decline in this type of discrepancy. Additionally, the number of vessels participating in the fishing vessel safety decal program increased from approximately 58 percent in 1999 to 95 percent in 2005.

**Deterred overloading.** The main goal of the program was to provide a deterrent to overloading. By flooding individual ports with USCG marine safety personnel and having those personnel conduct mandatory compliance examinations at the dock for a large number of crab boats prior to the start of the season, the opportunity for detection of overloading was greatly increased. One to two vessels were detected in an overloaded or improperly loaded condition, and were directed to remove pots. Because compliance checks were conducted at the dock and prior to the start of the season, the removal of pots could be done safely and with minimal disruption to vessel operations.

catch crab in the intensely competitive derby fishery. Since the implementation of the CR program, the number of pots carried has been decreased significantly, reducing the emphasis on catching power and potentially providing a greater margin of safety. Table 2 provides a comparison between the 1992 Bristol Bay red king crab season and the 2005 Bristol Bay red king crab season.

Of further interest is the reduction in the number of pot lifts per vessel per day. This is an indicator of fishery pace, and demonstrates that the fishery has slowed down considerably under the CR program, providing more opportunity for crew rest and reducing crew fatigue.

### A Look Ahead

Despite these notable changes in operational behavior, which can improve safety, the crab rationalization program alone is not enough to make all safety problems disappear. With implementation of the program, other

influences have developed that could negatively impact safety.

Interviews with individual masters have indicated that since the program dictates a percentage of the catch be delivered to pre-designated processors, there are times when vessels are forced to deliver to ports where waterway conditions are poor due to winter icing.<sup>27</sup> In addition, vessel masters have also expressed concern about rigid delivery dates established by processors and the implications of having to “race” to meet pre-established delivery schedules.

Given the exceptionally challenging operating conditions of the Bering Sea, it is still necessary for the USCG and agency/industry partners to continue emphasizing the safety of these vessels through fleet-wide dockside prevention efforts. The SSCC examination process relied on the “race to fish” to maximize USCG exposure to the fleet in a short time frame.



To maintain the USCG's ability to have extensive interactions with the crab fleet, the ADF&G and NMFS have changed their regulations to require that vessels participating in the CR fisheries have a current fishing vessel safety decal. This adjustment provides the USCG with regular opportunity to visit the vessels to ensure compliance with safety requirements. It also provides suitable leverage to hold a vessel in port if there are serious safety concerns detected that need to be addressed before the vessel is permitted to get underway.

**About the authors:**

CDR Woodley, CDR Lincoln, and Mr. Medicott have collaborated for 15 years on researching, developing, and implementing safety initiatives for commercial fishing vessels operating in Alaskan fisheries.

**Endnotes:**

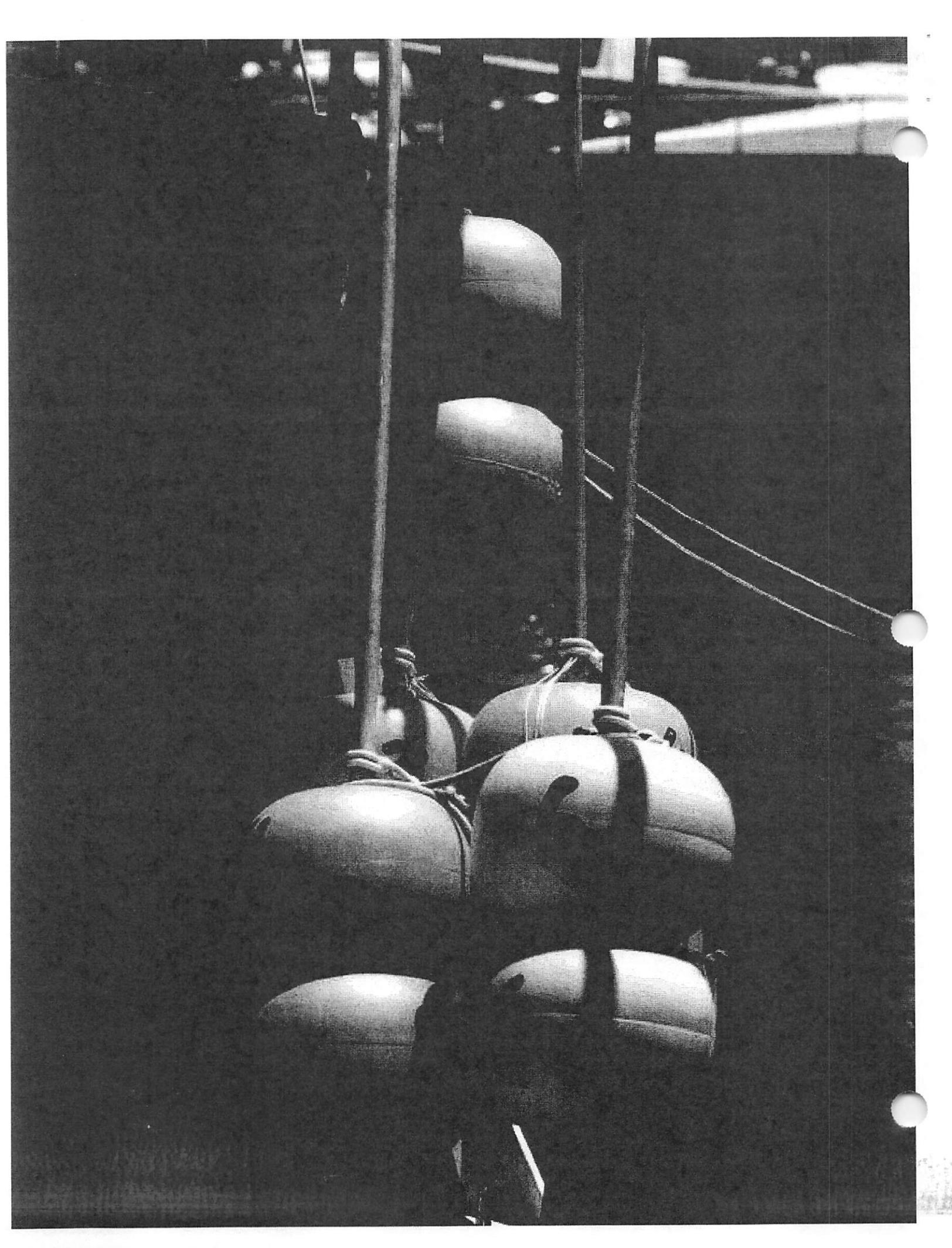
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<sup>14</sup> USCG/NIOSH unpublished data.  
<sup>15</sup> Ibid.  
<sup>16</sup> CDC, 2008. J. Lincoln and D. Lucas, "Commercial Fishing Fatalities—California, Oregon, and Washington, 2000-2006." *MMWR* 2008; 57 (16): 426-429.  
<sup>17</sup> Woodley and Medicott, 2001. (see endnote 6)  
<sup>18</sup> CDC, 2008. (see endnote 16)  
<sup>19</sup> NOAA, 2008. "Bering Sea and Aleutian Islands Crab Rationalization Program Report Fishing Year 2007/08." NOAA Fisheries Service (NMFS) Alaska Region Restricted Access Management.  
<sup>20</sup> Steven Hughes and Chris Woodley, 2007. "Impacts on Alaska fishing fleets and their crews due to transition from open access to quota based fishery management regimes." *International Maritime Health*, 2007, 58 - No. 1-4.  
<sup>21</sup> NOAA, 2008. (see endnote 19)  
<sup>22</sup> Ibid.  
<sup>23</sup> On January 6, 2009, after preparation of this article, the first fatality in the BSAI crab fishery occurred on the F/V *Seabrooke* due to a fall overboard. This was the first fatality in this fishery since January 2005.  
<sup>24</sup> Gunnar Knapp, 2006. "Economic Impacts of BSAI Crab Rationalization on Kodiak Fishing Employment and Earnings and Kodiak Businesses Anchorage." University of Alaska Institute of Social and Economic Research.  
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<sup>27</sup> Personal communications, January 2007.

1. The At the Dock Stability and Safety Compliance Check examination program developed among the USCG, partner agencies, and the BSAI crab industry has had a significant positive impact in reducing vessel loss and subsequent fatalities in the BSAI crab industry by 75 percent.
2. The high level of coordination and communication among all stakeholders, particularly between the USCG and the crab industry, should be used as a model for other fishing vessel safety intervention programs.
3. A critical component of the program was conducting mandatory compliance examinations at the dock, where serious safety concerns could be identified and remedied without placing the vessel or the crew in danger.
4. The At the Dock Stability and Safety Compliance Check examination increased visibility and participation in the USCG fishing vessel safety decal program.
5. Major safety improvements such as reducing vessel losses and subsequent casualties in the Bering Sea crab fleet occurred with the implementation of the At the Dock Stability and Safety Compliance Checks, before the start of the BSAI crab rationalization program.
6. The crab rationalization program has significantly reduced, if not completely eliminated, the "race to fish."
7. An increased number of fishing days, increased flexibility for masters to choose when to fish, and reduced emphasis on catching power and large pot loads potentially have safety benefits and contribute to eliminating vessel losses.
8. Under its current construct, there are incentives in the BSAI crab rationalization program to "race" to meet pre-arranged landing dates or locations. This "race" and its potential inflexibility may create safety hazards for the fleet.
9. Despite safety improvements, it is still imperative that owners provide well-maintained vessels and professionally trained crews to operate in this fishery, and it is also necessary that the USCG and agency/industry partners continue dockside compliance and casualty prevention efforts.
10. A significant and continued commitment on the part of the vessel owners and fishery managers is necessary to ensure that other economic factors or fishery management decisions do not negatively impact safety.







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**RECEIVED**  
 MAY 27 2009

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**N.P.F.M.C.**

Respond to Fishermen's Terminal Office

May 27, 2009

Chairman Eric A. Olson  
 North Pacific Fishery Management Council  
 605 West 4<sup>th</sup> Avenue, Suite 306  
 Anchorage, Alaska 99501-2252

Re: June 2009 Council Meeting - Agenda Item C-3(a) - BSAI Crab Program -  
 Initial Review of Emergency Relief Analysis

Dear Chairman Olson,

We are submitting the following comments and attached motion in connection with the agenda item referenced above on behalf of Inter-Cooperative Exchange ("ICE"). ICE is a Fishermen's Collective Marketing Act ("FCMA") cooperative whose members are 11 crab harvesting cooperatives formed under the Bering Sea/Aleutian Islands crab rationalization program. ICE's members hold approximately 70% of the "unaffiliated" catcher vessel individual fishing quota issued under the crab rationalization program.

Existing Conditions. While the emergency relief provision being considered by the Council is intended to be generic in nature, and thus to address the potential need for emergency relief from the full suite of regional landing requirements imposed under the crab rationalization program, the members of ICE see the most significant need for relief need in connection with the North region Opilio crab delivery requirement. Therefore, the ICE emergency relief proposal is primarily focused on addressing that requirement.

As an initial matter, we want to make it clear that crab fishermen value the opportunity to deliver Opilio crab in the North Region. It is often more convenient and less expensive to deliver Opilio in the North Region than in the South Region, and the processing history accrued in the North in the years prior to rationalization reflects that

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fact.

However, it is important to note that delivering crab in the North Region under rationalization has become a very different proposition than it was during the pre-rationalization fishery. Prior to rationalization, floating processors took deliveries of crab in St. George and in waters outside of the St. Paul harbor, which provided harvesters with North region delivery alternatives when ice conditions made it unsafe or impossible to deliver in the St. Paul harbor.

Since rationalization, there have been no opportunities to deliver crab in the St. George harbor, and limited opportunities to deliver outside of St. Paul harbor. Further, in January of 2007, Congress passed Section 122(e) of the Magnuson-Stevens Act, which directs NMFS to modify how IPQ caps apply to a person who is custom processing Opilio crab in the North Region. Section 122(e) stipulates that custom processing arrangements do not count against any use cap for processing Opilio crab in the North Region, as long as such crab is processed by a "shore-based crab processor". For purposes of Section 122(e), a "shore-based crab processor" means "a person or vessel that receives, purchases or arranges to purchase unprocessed crab, that is located on shore or moored within the harbor". [sic] See 73 Federal Register 183, Friday, September 19, 2008, page 54349 (emphasis added). Given the importance to IPQ holders of consolidating their processing activity in the North Region, it appears reasonable to expect that North region Opilio IPQ holders will take advantage of the Section 122(e) use cap exemption, and as a result, there will be few, if any, opportunities to deliver North region Opilio outside of the St. Paul and St. George harbors. It is not clear when crab processing in the St. George harbor may resume. In the mean time, the St. Paul harbor is likely to be the only location where a North Region Opilio delivery may be made.

ICE has not challenged implementation of the Section 122(e) use cap exemption. However, ICE believes that if North region crab processing activity is concentrated in

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St. Paul harbor, there will be times when it is either unsafe or impossible to deliver Opilio crab in the St. Paul harbor within a commercially reasonable time after they are harvested.

**To assist the Council in evaluating how North region landing patterns have changed since rationalization, we request that the Council analysis concerning this issue be expanded to include information regarding the amounts and GHL percentages of North region crab delivered to floating processor located outside of St. Paul harbor during the quota share ("QS") and processor quota share ("PQS") allocation base years, versus the amounts and TAC percentages delivered to floating processors outside of St. Paul harbor in the years since crab rationalization took effect.**

Harvesters recognize that the most efficient method for addressing the occasional frustrated North Region delivery is to deliver in the South region instead, through arrangements with individual processing quota ("IPQ") holders under which South Region Class A individual fishing quota ("IFQ") and the matched IPQ are used to cover the delivery, and harvesters expect that method will be used in the vast majority of those circumstances. Indeed, one of the primary reasons ICE is being reorganized as an IFQ holding cooperative is to facilitate these arrangements. However, re-arranging Class A IFQ deliveries is a complicated matter that requires cooperation not only among IFQ holders, but also among the processors with whom their IFQ is matched. To date, the level of coordination among fishermen and processors has not reached the point that deliveries intended for the North which must be taken South because of circumstances outside of a harvester's or processor's control can predictably be covered with South region Class A IFQ and IPQ. Further, for reasons more fully explained below, harvesters do not believe it is appropriate to require that Class B or Class C IFQ be used to cover such deliveries. Therefore, harvesters believe that some form of emergency relief from the North region delivery requirement is essential.

Further, given the consolidation of processing operations in the North Region, and the limited availability of alternative processing platforms on short notice, there may be times when a catastrophic event makes it impossible to deliver and process all of the crab designated for delivery in the North Region during the relevant crab fishing

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season, and unless there is a means for re-designating crab for delivery outside of the region, the opportunity to harvest the resource may be lost.

The ICE emergency relief proposal is intended to address these limited circumstances, and comparable circumstances in other regions. It is NOT intended to undercut regional delivery requirements, or to deny communities the economic stability regional landing requirements provide.

2. The ICE Proposal. We have attached a marked version of the current Council motion showing the changes ICE proposes. The following explanatory comments track the sections of the existing Council motion, and explain the reasons for the proposed changes.

A. Problem Statement. The current problem statement makes no reference to the Section 122(e) custom processing use cap exemption. Because Congress's adoption of this exemption has promoted concentration of crab deliveries within the St. Paul harbor, and because ice conditions in and around the harbor are a significant factor giving rise to the need for emergency relief, ICE proposes that the problem statement directly reference the effects of Section 122(e).

For reasons more fully explained below, ICE does not believe that regional landing relief should include a compensation component.

B. Alternatives. ICE considers the current alternatives appropriate for analysis.

C. Method of Defining the Exemption. ICE agrees that the exemption should be generally defined in regulation and specifically defined in a contract among IFQ holders, IPQ holders and one or more community representatives. That being said, ICE considers the decision regarding how the community representative(s) are selected and the extent to which emergency relief contract terms are subject to negotiation on an annual basis to be critical factors in connection with this proposed action. ICE is withholding further comments on this section of the motion at this time, pending discussions with community representatives regarding these issues.

As referenced above, and more fully explained below, ICE does not believe that regional landing relief agreement should include a compensation component.

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D. Administration of the Exemption. ICE agrees that the regional delivery relief exemption should be administered through an affidavit submitted by an IFQ holder. ICE also agrees that, for purposes of NMFS's decision whether to grant the relief requested, the affidavit should constitute conclusive evidence that conditions warranting relief exist, i.e., NMFS should not be required to conduct an independent investigation or to exercise independent judgment regarding whether the conditions warranting relief exist.

However, ICE also believes that an important element of the contract and affidavit approach to regional delivery relief is the ability of a party to the contract to seek damages for breach of contract if that party believes an affidavit contains inaccurate information or is improperly filed. To clarify that recourse is intended to be available, the motion has been amended to clarify that the affidavit constitutes conclusive evidence of qualification for the exemption for NMFS purposes.

E. Definition of the Exemption. ICE proposes that the definition of the conditions under which regional landing relief would be available be revised for two reasons.

First, the definition in the existing motion was explicitly borrowed from the "unavoidable circumstances" provisions that the Council has incorporated into License Limitation Program landing requirements. That definition has been applied by the NMFS Office of Administrative Appeals ("OAA") in a number of cases, and OAA's decisions in those cases could be considered precedent for purposes of interpreting this definition. Applying the element requiring that circumstances be "unique to the [IFQ holder and/or IPQ holder]" OAA has determined that general conditions such as ocean temperatures or the lack of a processing facility in a community do not qualify a harvester for relief, because they affect a class of harvesters, rather than an individual. If the "unique" element of the definition is carried over to the regional delivery relief action, it could effectively preclude relief under circumstances where a group of harvesters is affected by ice conditions or the loss of an essential facility. ICE believes this result would be fundamentally inconsistent with the intended purposes for this action.

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Second, ICE is concerned that the clause requiring that a circumstance be "unforeseen or reasonably unforeseeable" could be interpreted to preclude relief in connection with unsafe ice conditions, as they can be expected to occur from time to time. ICE believes this result would be inconsistent with the intended purposes for this action.

ICE believes that the emergency relief exemption should function as a *force majeure* clause does in a commercial contract. Such clauses recognize that a party's ability to perform may be frustrated by circumstances outside of that party's control, and when those circumstances exist, *force majeure* clauses relieve the affected party of the obligation to perform. Therefore, ICE has re-written the definition of conditions qualifying for regional delivery relief using typical *force majeure* clauses as a starting point, and modifying the definition to address the specific conditions that could be expected to affect the BSAI crab fisheries.

ICE has some reservations regarding the provision in the existing motion that permits parties to provide additional specificity to the exemption and its terms in the course of contract negotiations. While ICE appreciates that there may be a need to adapt the definition as circumstances in the BSAI crab fisheries change, ICE is also concerned that this provision could open the definition to renegotiation at the end of each contract term. As a general matter, ICE prefers that the core definition be established through the Council and regulatory process. However, ICE is withholding any further comments on this provision at this time, pending further discussions with processor and community representatives.

F. Mitigation. As an initial matter, ICE proposes this section be re-titled "Conditions to Be Satisfied to File Affidavit". From ICE's perspective, "mitigation" is an action that lessens the force or intensity of another action. In this context, ICE considers mitigation to be actions by harvesters and processors that moderates the effect of emergency relief that is granted and used. However, this section of the motion specifies conditions that must be satisfied to obtain relief in the first place, as opposed to actions taken to address the effect of relief that has already been granted.

ICE believes that the definition of the conditions warranting relief it proposes in

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the "Definition of Exemption" impose sufficient substantive restrictions on use of a regional delivery relief affidavit. Specifically, ICE believes the proposed definition of "Impracticable" requires that an affected harvester or processor be capable of showing that the conditions warranting relief are not capable of being overcome through reasonable efforts, and therefore proposes to delete the "all reasonable efforts" condition in the existing motion.

As a separate but related matter, ICE does not consider it appropriate to require that an IFQ holder be required to use all Class B, Class C IFQ and Class A IFQ for other regions as a condition to qualifying for regional delivery relief. While Class B, Class C and South region Class A IFQ can be (and have been) used to cover emergency relief landings taken out of their originally designated region, ICE does not believe it is appropriate to require that they be used for that purpose. Class B and C IFQ were not intended to cover emergency relief landings, and if they are required to be used for that purpose, then a substantially higher B share percentage will be necessary to facilitate new processor entry and provide competitive market opportunities for harvesters. Further, harvesters have no binding arbitration recourse for B or C share deliveries. Deliveries made outside of the intended region because of circumstances outside of the harvester's control are likely to be made under duress, and without the protection of binding arbitration, harvesters could be subjected to unfair pricing practices in connection with those deliveries.

As noted above, ICE continues to believe that the vast majority of landings intended for the North region but needing to be delivered outside of the North region because of circumstances outside of a harvester's or processor's control should be and will be covered using Class A South region IFQ and IPQ. However, as noted above, there may be times when Class A South region IFQ is nominally available for that purpose, but the complexities of restructuring share matches and delivery arrangements in the South make its use for that purpose impracticable. In those circumstances, an IFQ holder or an IPQ holder should not be precluded from regional delivery relief.

To promote good faith efforts to use Class A IFQ and IPQ as a resource of first



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resort to address regional delivery problems, ICE proposes that an affidavit be required to contain an accurate description of the Circumstances Outside of the Harvester's or Processor's Control that make it Impracticable to deliver the affected crab using regionally designated Class A IFQ for an alternate region. ICE believes that requiring this information will reduce the risk that affidavits will be used when Class A IFQ is a reasonable alternative, and will provide transparency that will enable contract parties to monitor affidavit use and propose changes to the conditions to filing an affidavit if they are warranted.

G. Compensation/Mitigation. ICE does not believe that requiring harvesters or processors to compensate communities in connection with deliveries made outside of the originally designated region is appropriate. ICE believes that the emergency relief exemption should function as a *force majeure* clause does in a commercial contract. Such clauses recognize that a party's ability to perform may be frustrated by circumstances outside of that party's control, and when those circumstances exist, *force majeure* clauses relieve the affected party of the obligation to perform, rather than imposing damages for the failure to do so. ICE believes that the emergency relief exemption should serve the same function.

Further, requiring harvesters to pay compensation to obtain emergency relief would create a disincentive to use the relief, and conversely, increase the incentive to attempt deliveries in the designated region under marginally safe or unsafe conditions. Harvesters believe that requiring compensation to be paid as a condition to obtaining emergency relief would be inconsistent with National Standard 10, which states that "Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea."

Finally, if compensation were to be paid in connection with landings taken out of a region under an emergency relief clause, it is not clear who should pay whom. Delivering crab outside of the intended region results in lost revenues for all parties. Harvesters recognize that deliveries outside of the region result in the direct loss of tax revenues to the affected community, and indirect losses within the community's fishing economy. However, harvesters ask that the communities recognize that harvesters

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incur additional fuel costs, suffer delivery schedule disruptions and risk additional deadloss when delivering outside of the intended region. If a community's losses are taken into account in connection with an emergency relief exemption, harvester's and processor's losses should be as well.

On the other hand, harvesters believe that it should be possible to have emergency relief from regional landing requirements, and, at least in connection with shorter term, occasional events such as problematic sea ice conditions, still meet or exceed the North region Opilio landing requirement on a multi-year average basis. Harvesters believe that this should be possible because the North region is a favored delivery location for non-regionally designated Opilio quotas such as CDQ, Class B and C IFQ and CPO IFQ, and that they are likely to be delivered in the North region in amounts that exceed the amounts of North region Class A Opilio IFQ that would be taken South under an emergency relief exemption. However, because harvesters do not have control over CDQ landings, and because Class B, Class C and CPO Opilio shares may be committed for deliveries outside of the North region, harvesters are asking that the emergency relief alternatives considered by the Council include options under which a reasonable amount of South region Class A IFQ could have its regional tag removed, and could be used to make landings in the North region. These de-regionalized IFQ would be subject to the share match and arbitration components of the crab rationalization program, and would be used to meet the North region minimum landing threshold if CDQ and Class B, C and CPO IFQ landings in the North were inadequate for that purpose.

ICE believes it may not be feasible to meet a regional minimum landing threshold, even on a multi-year average basis, if a catastrophic event makes it impracticable to deliver in the affected region for an extended period of time. ICE has not determined whether mitigation landings would be appropriate under such circumstances, nor has ICE attempted to develop terms under which such landings would be made. ICE looks forward to good faith discussions with other stakeholders concerning this issue.

H. Arbitration. As noted above, the level of coordination among fishermen and processors has not yet reached the point that deliveries intended for the North which must be taken South because of circumstances outside of a harvester's or processor's

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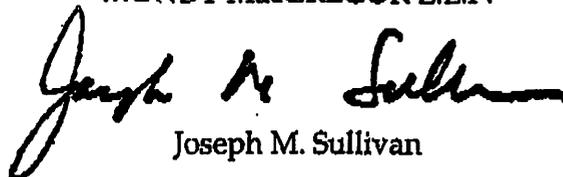
control can predictably be covered with South region Class A IFQ and IPQ. However, ICE believes that approach should be the preferred course of action for addressing North region delivery issues. ICE has considered using the crab rationalization binding arbitration system to resolve disputes regarding use of South Class A IFQ to cover landings from the North, but has been stymied by the fact that the system stipulates one substantive delivery term proceeding per processor, per fishery, per year. Because delivery disputes often take place early in the season, while the information necessary to set final process is not available until well after the season, ICE members have not been willing to use binding arbitration to address delivery disputes during the fishing season, as doing so would leave them without recourse to arbitration if they later find themselves in a dispute regarding final prices for the season. Until such time as the parties develop the requisite level of voluntary coordination, ICE proposes that the Council authorize an additional arbitration proceeding to address issues other than final price.

I. Contract Finalization Dates. ICE supports the options in the existing motion.

Thank you for the opportunity to submit the comments above on behalf of Inter-Cooperative Exchange.

Sincerely yours,

MUNDT MacGREGOR L.L.P.



Joseph M. Sullivan

JMS:bgg

**NPFMC June 2009 Meeting****Agenda Item C-3(a)****ICE Comment Letter****Attachment A – Marked Motion****C-7(a) BSAI Crab Regional Delivery Relief****February 8, 2009**

The Council requests staff update the document for initial review in April with the following purpose and need statement and alternatives:

*In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require the associated catch to be delivered and processed in the designated region. In the first three years of the program, all of the crab IFQ was harvested and delivered. However, Congress's adoption of Section 122(e) of the Magnuson-Stevens Act, which grants custom processing use cap exemptions for Opilio IPQ holders on the condition that they process on shore or in the harbor of North region community, resulted in North region Opilio deliveries being concentrated in St. Paul harbor to a greater degree than prior to rationalization. Timing conditions in the Northern Region did create safety concerns, and delayed and in some cases prevented harvesters from entering harbors to deliver to shore-based and floating processors located in the regions, as required by the regional share designations. In addition, other unforeseeable events, events such as an earthquake or tsunami, or man-made disaster, could prevent deliveries or limit the available processing capacity in a region necessary for compliance with the regional designations on Class A IFQ and IPQ. A well-defined exemption from regional landing and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of*

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unforeseeable events that prevent compliance with those regional landing requirements.

**Alternatives**

The Council has adopted the following alternatives for analysis:

Alternative 1 – Status quo (no exemptions from regional landing requirements)

Alternative 2 – Contractually Defined Exemption

**Method of defining the exemption:**

The exemption shall be generally defined in regulation. To receive an exemption, however,

**Option 1:** an IFQ holder, the holder of matched IPQ, and the entity holding (or formerly holding) the right of first refusal for the IPQ, or

**Option 2:** an IFQ holder, the holder of the matched IPQ, and an entity identified by the community benefiting from (or formerly benefiting from) the right of first refusal for the IPQ, or in the event that the subject IPQ was never subject to a ROFR, any entity qualified to act as the regional representative with respect to any IPQ in that region and fishery may act as the regional representative for the subject IPQ.

**Option 3:** an IFQ holder, the holder of matched IPQ, and a regional entity agreed to by the communities benefiting from rights of first refusal (or formerly benefiting from rights of first refusal) in the designated region of the IFQ and IPQ, shall have entered a contract defining conditions under which an exemption will be granted and the terms of any compensation.

~~Deleted: Such an exemption should also provide a mechanism for reasonable compensation to communities and IPQ holders harmed by the granting of the exemption to ensure that the protections intended by the regional designations continue to be realized despite the exemption.~~

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**Administration of the exemption**

The exemption shall be administered through submission of an affidavit by the holder of the IFQ for which the exemption is applied. An affidavit attesting to the satisfaction of requisite conditions for the exemption (as agreed in the contract) shall constitute conclusive evidence of qualification for the exemption for NMFS purposes.

**Definition of the exemption**

An affidavit may only be filed if "Circumstances Outside of a Harvester's or Processor's Control" made it "Impracticable" for a harvester to deliver crab within the designated region to the processor(s) with whom the related Class A IFQ are matched or their designated agents, or make it "Impracticable" for a processor to process crab within the designated region.

~~Deleted: The following provision shall be included in the civil contract among the IFQ holder, the holder of matched IFQ and the entity representing community interests:~~

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"Circumstances Outside Of A Harvester's or Processor's Control" include ice, earthquake, volcanic eruption, silting, erosion, flooding, fire, explosion, mechanical breakdown, injury, disease, governmental agency action and comparable conditions that make it "Impracticable" for a harvester to deliver crab in the designated region to the processing facility designated by the IFQ holder with whom the related IFQ is matched, or make it Impracticable for a processor to process crab at such facility, during the applicable crab fishing season.

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"Impracticable" means that delivery or processing of crab (a) is prohibited by governmental authority, (b) appears to be impossible, (c) involves extreme and unreasonable delay, difficulty, or expense, (d) in the judgment of the master of the affected vessel, would result in a significant risk of injury to crew or damage to vessel, or (e) involves a significant risk of

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substantial loss of value to the crab (i.e., equal to or greater than five percent (5%) of the affected crab's fair market value).

Additional specificity of the exemption and its terms may be included in any contract between the IFQ holder, the holder of the matched IPQ and the entity representing region/community interests.

A contract executed by the three parties identified above shall provide conclusive evidence that a qualifying circumstance has been adequately described in satisfaction of this requirement.

~~Deleted: "Qualifying circumstance: An unavoidable circumstance that unreasonably delays or prevents the delivery or processing of crab in a region as required by regionally designated IFQ and matched IPQ will qualify for the exemption from regional landing requirements. To qualify for the exemption a circumstance must: a) be unavoidable, b) be unique to the IFQ and/or IPQ holder, c) be unforeseen or reasonably unforeseeable, and d) have actually occurred."~~

**Conditions to Be Satisfied to File Affidavit**

Additional conditions that must be satisfied to file an affidavit are:

1. If Circumstances Outside of a Harvester's or Processor's Control are affecting a fishing trip that is in progress, such circumstances must not have been reasonably foreseeable at the time the affected harvester began setting fishing gear;
2. Circumstances Outside of the Harvester's or Processor's Control must exist at the time that an IFQ holder or IPQ holder files an affidavit, and must continue to exist as of the date on which crab is transported out of the designated region under the related NMFS exemption;
3. An affidavit must contain an accurate description of the Circumstances Outside of the Harvester's or Processor's Control that make it impracticable to deliver the affected crab using regionally designated Class A IFQ for an alternate region; and
4. The affidavit shall only request re-designation of an amount of IFQ and IPQ equal to the estimated amount of crab that the affected harvester or processor reasonably projects that the harvester will be unable to deliver or that the processor will be unable to process as a result of Circumstances Outside of the Harvester's or Processor's Control.

~~Deleted: Mitigation requirements~~

~~Deleted: Requirement to attempt to mitigate:~~

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~~Deleted: The following provision shall be included in the civil contract among the IFQ holder, the holder of matched IPQ and the entity representing community interests:~~

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It would be a breach of the emergency relief contract for an IFQ holder or IPO holder to file an affidavit if any of the conditions specified above is not satisfied at the time that the affidavit is filed.

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**Mitigation**

To mitigate the effect of emergency relief on communities in the North region, harvesters and processors would have an obligation to insure that the percentage of Opilio crab delivered in the North region on a 3 year rolling average basis would equal or exceed the percentage of Opilio crab required to be delivered in that region during that period.

The 3 year rolling average requirement would apply only in connection with short term conditions that make North region landings impracticable, such as intermittent sea ice. The requirement would not apply in connection with circumstances that make it impracticable to deliver in the North region for an extended period, such as an extended harbor closure or loss of an essential processing facility.

Class B, Class C, Catcher-Processor Owner ("CPO") and CDQ landings in the North region would be counted toward the 3 year rolling average requirement. However, there would be no obligation to use Class B, Class C, CPO or CDQ to meet the 3 year rolling average requirement.

In the event that Class B, Class C CPO and CDQ landings in the North region are not sufficient to offset emergency relief landings taken out of the

~~Deleted: "To receive an exemption the IFQ holder and the holder of matched IPQ . shall have exerted all reasonable efforts to avoid the need for the . exemption, which may include attempting to arrange delivery to other . processing facilities in the designated region unaffected by the unavoidable . circumstance, attempting to arrange for the use of IFQ (and IPQ, if needed), . and CDQ not requiring delivery in the affected region, and delaying fishing."¶~~

~~Option An IFQ holder will not be granted an exemption, if the IFQ holder holds any unused Class B IFQ, C share IFQ, or Class A IFQ that may be delivered outside of the affected region.~~

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¶ Compensation shall be as agreed in the contract among the IFQ holder, the . holder of matched IPQ, and the entity representing regional/community . interests.~~

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region, harvesters and processors would need the ability to deliver South region Class A IFQ in the North region as necessary to meet the 3 year rolling average requirement.

Suboption: Remove the South region designation from an appropriate amount of Class A IFQ through an amendment to the crab rationalization program.

Suboption: Provide for a "mitigation affidavit" under the emergency relief contract, which, when filed, would compel NMFS to remove the South region designation from the amount of South region Class A IFQ specified in the affidavit, permitting it to be delivered in the North region.

**Arbitration**

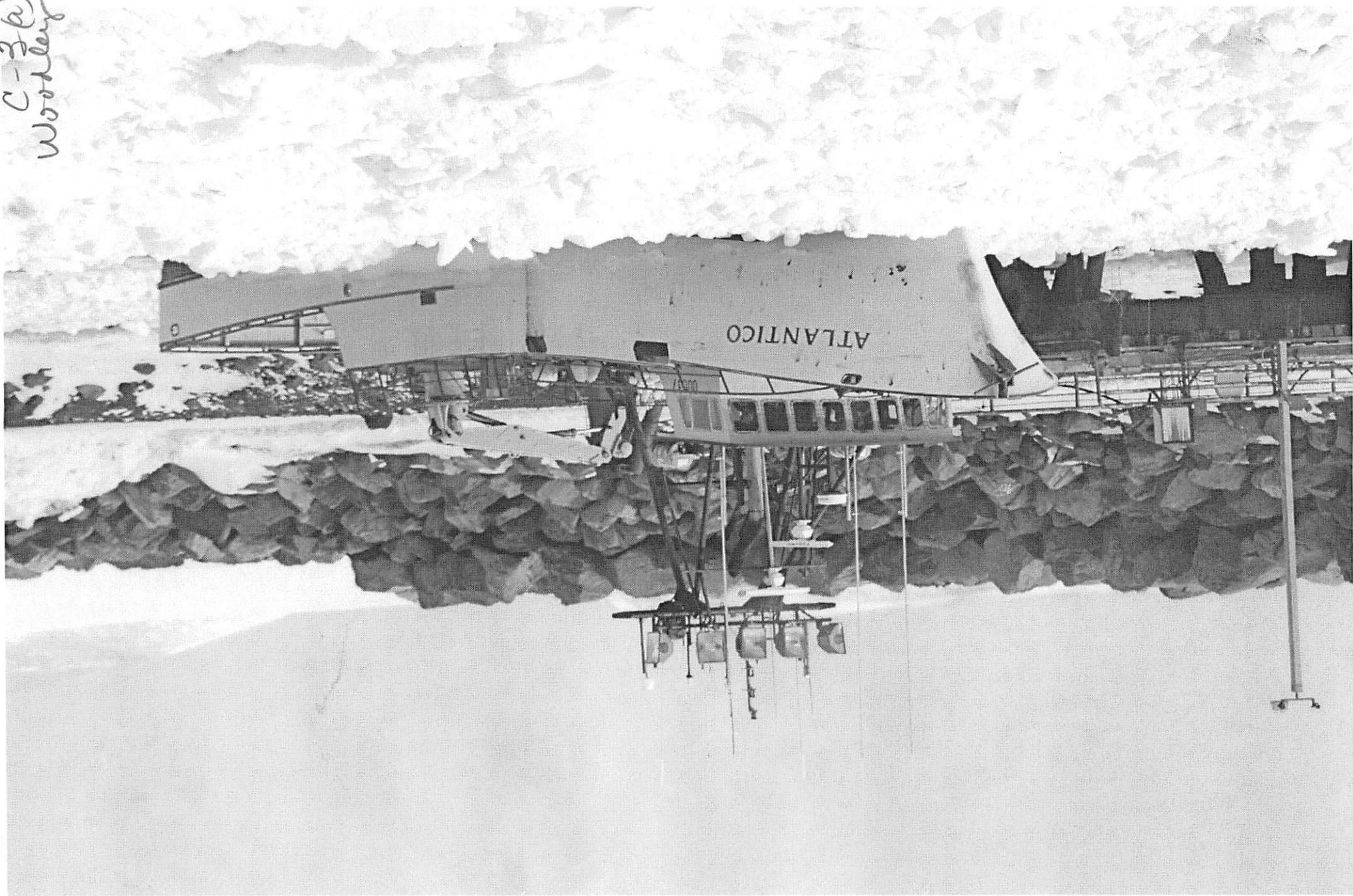
To facilitate use of Class A IFQ to address regional delivery relief, provide for one additional arbitration proceeding per processor per fishery per year.

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**Contract finalization dates:**

- Option 1: Fishery openings
- Option 2: January 1
- Option 3: Open, and can be finalized at any time.

C-2(a)  
Woodley



TRIDENT SEAFOODS CORP. - ST. PAUL  
CRAB DELIVERY LOG - MASTER FILE  
JANUARY 2009

Joe Plesha  
C-3(a)

Del #	LOT#	DATE	DEL NO.	VESSEL BALANCE FWD (FISCAL YR 2009)	TICKET	SHARE
1	0001	01/19/09		Kiska Sea	E09072665	A
	0001	01/19/09		Kiska Sea	E09072666	B
	0002	01/20/09		Kiska Sea	E09072721	A
2	0003	01/20/09		Arctic Hunter	E09072816	A
3	0004	01/21/09		Katie K	E09072810	A
4	0004	01/21/09		Arctic Sea	E09072859	A
	0005	01/22/09		Arcitic Sea	E09072923	A
5	0005	01/22/09		Nuka Island	E09072938	A
6	0006	01/23/09		Early Dawn (CBSFA)	E09073056	CDQ
7	0007	01/23/09		North Sea	E09073055	A
9	0008	01/24/09		Bering Sea	E09073187	A
8	0009	01/24/09		Sandra Five	E09073171	A
10	0010	01/25/09		North American	E09073223	A
11	0011	01/25/09		Time Bandit	E09073251	A
12	0012	01/25/09		Alaska Spirit	E09073267	A
13	0012	01/25/09		Billikin	E09073268	A
14	0013	01/26/09		Mystery Bay	E09073411	A
	0014	01/26/09		Billikin	E09073372	A
15	0014	01/26/09		Kiska Sea	E09073415	A
	0015	01/27/09		Kiska Sea	E09073574	A
	0015	01/27/09		Kiska Sea (YDFDA)	E09073578	CDQ
16	0015	01/27/09		Valiant	E09073601	A
	0016	01/27/09		Valiant	E09073603	A
17	0017	01/28/09		Lady Aleutian	E09073674	A
18	0018	01/28/09		Island Mist	E09073706	A
	0019	01/29/09		Island Mist	E09073796	A
20	0019	01/29/09		Bering Hunter	E09073812	A
19	0020	01/29/09		Nuka Island	E09073794	A
21	0021	01/30/09		Arctic Hunter	E09073801	A
22	0022	01/30/09		Fierce Allegiance	E09073970	CDQ
23	0023	01/31/09		Fierce Allegiance	E09074032	CDQ
24	0024	01/31/09		Time Bandit	E09074052	A
26	0025	01/31/09		North Sea	E09074058	A
25	0025	01/31/09		North Sea	E09074057	A
27	0025	01/31/09		Paragon	E09074059	A

MONTH TO DATE  
FISCAL YEAR TO DATE

CRAB DELIVERY LOG - MASTER FILE  
FEBRUARY 2009

LOT#	DATE	VESSEL	OWNER	
<u>BALANCE FWD (FISCAL YR 2009)</u>				
1	0027	02/01/09	Paragon	TSC
2	0027	02/01/09	Billikin	TSC
3	0027	02/01/09	North Sea (CVRF)	TSC
	0027	02/01/09	Paragon	TSC
	0027	02/01/09	North Sea	TSC
5	0028	02/02/09	Sandra 5	PPSF
4	0029	02/02/09	Billikin	TSC
6	0029	02/02/09	Pinnacle	TSC
	0029	02/02/09	Billikin	TSC
	0030	02/03/09	Pinnacle	TSC
7	0031	02/04/09	Arctic Hunter	AJV
	0031	02/04/09	Arctic Hunter	AJV
8	0032	02/04/09	Comelia Marie	57° NORTH
9	0033	02/05/09	Lady Aleutian	57° NORTH
10	0034	02/08/09	Northwestern	PPSF
11	0035	02/09/09	Southernwind	TSC
12	0035	02/09/09	Billikin	TSC
	0035	02/09/09	Northwestern	TSC
13	0036	02/10/09	Trailblazer	PPSF
14	0036	02/10/09	Island Mist	PPSF
15	0037	02/11/09	Alaska Spirit	TSC
	0037	02/11/09	Trailblazer	TSC
16	0038	02/13/09	Pinnacle	TSC
18	0039	02/14/09	Early Dawn	CBSFA
17	0039	02/14/09	Sandra 5	TSC
	0039	02/14/09	Pinnacle	TSC
	0040	02/15/09	Early Dawn	CBSFA
19	0040	02/15/09	Farwest Leader	TSC
	0040	02/15/09	Constellation	TSC
	0040	02/15/09	Early Dawn	TSC
22	0041	02/16/09	Karin Lynn	TSC
	0041	02/16/09	Constellation	TSC
21	0042	02/16/09	Lady Aleutian	57° NORTH
	0043	02/17/09	Karin Lynn	TSC
23	0044	02/17/09	Tempo Sea	PPSF
24	0045	02/18/09	Northwestern	TSC
25	0045	02/18/09	Ocean Fury	TSC
	0046	02/19/09	Ocean Fury	TSC
26	0047	02/20/09	Barbara J	TSC
	0047	02/20/09	Barbara J	TSC
	0047	02/20/09	Barbara J	TSC
27	0048	02/21/09	Farwest Leader	TSC
28	0048	02/21/09	Kiska Sea	TSC
	0048	02/21/09	Kiska Sea	TSC
29	0049	02/21/09	Bering Hunter	PPSF
30	0050	02/22/09	Fierce Allegiance	CBSFA
	0050	02/22/09	Kiska Sea	TSC
	0051	02/23/09	Fierce Allegiance	57° NORTH
	0052	02/23/09	Fierce Allegiance	CBSFA
31	0052	02/23/09	Handler	TSC
32	0052	02/23/09	North Sea	TSC
	0052	02/23/09	Fierce Allegiance	TSC
33	0053	02/24/09	Early Dawn	CBSFA
	0053	02/24/09	North Sea	TSC
	0053	02/24/09	North Sea	TSC
	0054	02/26/09	Handler	AJV
	0054	02/26/09	Bering Star	AJV
	0055	02/26/09	Aleutian No 1 (Norton)	TSC
	0056	02/27/09	Aleutian No 1 (Norton)	TSC
	0056	02/27/09	Alaska Spirit	TSC
	0056	02/27/09	Karin Lynn	TSC
	0057	02/27/09	Cascade Marinier	AJV
	0058	02/28/09	Karin Lynn	TSC
	0058	02/28/09	Karin Lynn	TSC
	0059	02/28/09	Nuka Island	57° NORTH
	0059	02/28/09	Katie K	57° NORTH
	0060	02/28/09	Bering Hunter	PPSF

CRAB DELIVERY LOG - MASTER FILE  
MARCH 2009

LOT#	DATE	VESSEL BALANCE FWD (FISCAL YR 2009)	TICKET	SHARE	OWNER	
1	0061	03/01/09	Comelia Marie	E09 077046	A	57° NORTH
2	0062	03/01/09	Tempo Sea	E09 077047	A	TSC
	0063	03/02/09	Tempo Sea	E09 077190	A	PPSF
	0064	03/02/09	Tempo Sea	E09 077268	A	TSC
3	0064	03/02/09	North Sea	E09 077169	CDQ	TSC
4	0065	03/03/09	Early Dawn	E09077264	CDQ	CBSFA
	0065	03/03/09	North Sea	E09 077251	CDQ	TSC
5	0065	03/03/09	Katie K	E09 077286	A	TSC
6	0065	03/03/09	Wizard	E09 077283	A	TSC
	0068	03/04/09	Wizard	E09 077478	A	AJV
	0068	03/04/09	Bulldog	E09 077457	A	AJV
	0068	03/04/09	Bulldog	E09 077457	C	AJV
8	0068	03/04/09	Cascade Mariner	E09 077530	A	AJV
	0066/0067	03/04/09	Wizard	E09 077465	A	TSC
	0066/0067	03/04/09	Wizard	E09 077466	A	TSC
	0066/0067	03/04/09	Wizard	E09 077466	B	TSC
7	0066/0067	03/04/09	Bulldog	E09 077463	CPO	TSC
	0069	03/05/09	Cascade Mariner	E09 077582	A	AJV
9	0069	03/05/09	Handler	E09 077641	A	AJV
	0069	03/05/09	Handler	E09 077641	B	AJV
10	0070	03/06/09	Provider	E09 077770	A	TSC
	0071	03/07/09	Provider	E09 077849	A	TSC
11	0071	03/07/09	Cape Caution	E09 077858	A	TSC
12	0071	03/07/09	North Sea	E09 077876	CDQ	TSC
13	0071	03/07/09	Maverick	E09 077877	A	TSC
14	0072	03/08/09	Silver Dolphin	E09 077941	A	TSC
15	0072	03/08/09	Tempo Sea	E09 077951	A	TSC
16	0073	03/08/09	Sultan	E09 077952	A	AJV
	0074	03/09/09	Sultan	E09 077990	A	AJV
17	0075	03/09/09	Cornelia Marie	E09 078031	A	57° NORTH
18	0076	03/09/09	Keta	E09 077996	A	PPSF
	0077	03/10/09	Keta	E09 078122	A	PPSF
	0078	03/10/09	Destination	E09 078182	A	TSC
	0078	03/10/09	Farwest Leader	E09 078184	CDQ	TSC
	0079	03/11/09	Farwest Leader	E09 078289	CDQ	TSC
21	0080	03/11/09	Alaska Spirit	E09 078339	A	57° NORTH
22	0081	03/12/09	Maverick	E09 078444	A	TSC
23	0082	03/12/09	Cascade Mariner	E09 078464	A	AJV
24	0083	03/12/09	Keta	E09 078465	A	PPSF
	0083	03/12/09	Keta	E09 078465	B	PPSF
25	0084	03/13/09	Early Dawn	E09 078591	CDQ	CBSFA
26	0085	03/13/09	Silver Spray	E09 078589	A	AJV
27	0086	03/14/09	Farwest Leader	E09 078688	CDQ	TSC
	0086	03/14/09	Farwest Leader	E09 078688	A	TSC
	0086	03/14/09	Farwest Leader	E09 078688	CPO	TSC
	0086	03/14/09	Farwest Leader	E09 078688	B	TSC
28	0086	03/14/09	Constellation	E09 078717	A	TSC
29	0086	03/14/09	Ocean Fury	E09 078718	A	TSC
30	0087	03/15/09	Aleutian Lady	E09 078824	A	TSC
	0087	03/15/09	Aleutian Lady	E09 078826	A	TSC
31	0088	03/16/09	Provider	E09 078908	A	PPSF
	0089	03/16/09	Provider	E09 078909	A	TSC
32	0090	03/17/09	Destination	E09 079023	A	TSC
33	0091	03/17/09	Atlantico	E09 079013	A	AJV
34	0091	03/17/09	Maverick	E09 079025	A	AJV
35	0092/0093	03/18/09	Pacific Mariner	E09 079068	A	AJV
	0092/0093	03/18/09	Pacific Mariner	E09 079068	B	AJV
36	0092/0093	03/18/09	Alaska Spirit	E09 079078	A	AJV
37	0094	03/19/09	Big Blue	E09 079163	A	57 NORTH
38	0095	03/19/09	Silver Dolphin	E09 079177	A	TSC
	0095	03/19/09	Silver Dolphin	E09 079177	C	TSC
	0096	03/19/09	Silver Dolphin	E09 079178	A	AJV
39	0097	03/20/09	Atlantico	E09 079233	A	TSC
40	0097	03/20/09	Constellation	E09 079248	A	TSC
41	0097	03/20/09	Aleutian Lady	E09 079259	A	TSC
	0097	03/20/09	Aleutian Lady	E09 079259	B	TSC
42	0098	03/21/09	Silver Spray	E09 079343	A	57 NORTH
	0099	03/22/09	Comelia Marie	E09 079408	A	57 NORTH
	0100	03/23/09	Comelia Marie	E09 079431	A	57 NORTH
44	0101	03/23/09	Bering Hunter	E09 079522	A	TSC
	0102	03/24/09	Bering Hunter	E09 079579	A	TSC
	0103	03/26/09	Silver Spray	E09 079863	A	57 NORTH
45	0104	03/26/09	Silver Spray	E09 079864	A	TSC
	0104	03/26/09	Silver Spray	E09 079864	B	TSC
46	0105	03/27/09	Comelia Marie	E09 079912	A	57 NORTH

**CRAB DELIVERY LOG - MASTER FILE  
APRIL 2009**

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<b>LOT#</b>	<b>DATE</b>	<b>VESSEL</b>	<b>TICKET</b>	<b>SHARE</b>	<b>OWNER</b>
		<b>BALANCE FWD (FISCAL YR 2009)</b>			
0106	04/09/09	Atlantico	E09 081148	A	AJV
0107	04/09/09	Atlantico	E09 081150	A	TSC
2 0108	04/17/09	Atlantico	E09 081736	A	TSC
3 0109	04/22/09	Atlantico	E09 081977	A	TSC

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MONTH TO DATE  
FISCAL YEAR TO DATE

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**CRAB DELIVERY LOG - MASTER FILE  
MAY 2009**

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<b>LOT#</b>	<b>DATE</b>	<b>VESSEL</b>	<b>TICKET</b>	<b>SHARE</b>	<b>OWNER</b>
		<b>BALANCE FWD (FISCAL YR 2009)</b>			
	110	5/2/09	Atlantico	E09 082852	A TSC
	110	5/2/09	Atlantico	E09 082852	B TSC
2	111	5/5/09	Big Blue	E09 083079	A 57 NORTH
3					

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MONTH TO DATE  
FISCAL YEAR TO DATE

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