

Initial Review Draft

REGULATORY IMPACT REVIEW

and

INITIAL REGULATORY FLEXIBILITY ANALYSIS

MODIFICATIONS TO COMMUNITY RIGHTS OF FIRST REFUSAL

For a proposed Regulatory Amendment to
Implement Amendment ____ to the Fishery Management Plan for
Bering Sea and Aleutian Islands King and Tanner Crabs

December 2010

EXECUTIVE SUMMARY

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the “program”). The program is unique in several ways, including the allocation of processing shares corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. Since implementation, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests. This amendment package considers actions intended to address the following three of the concerns:

- 1) the relatively short period of time allowed for exercising and performing under the right;
- 2) the lapse of the right after three consecutive years of use of the individual processing quota (IPQ) outside the community or if a community entity elects not to exercise the right on a transaction to which it applies; and
- 3) the requirement that the right apply to all assets involved in a transaction, which could include assets outside the community.

Purpose and Need Statement

The Council has adopted the following purpose and need statement for these actions:

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.

To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now holding between 20 percent and 50 percent of the PQS in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.

Alternatives

The Council has identified three actions for this amendment package. In all cases, the actions are defined by a single alternative that is compared to the status quo alternative, under which all aspects of the current right of first refusal structure would be maintained. Under Action 1, the time available for a community entity to exercise a right of first refusal would be extended from 60 days to 90 days, and the time for a community entity to perform under the contract would be extended from 120 days to 150 days. Under Action 2, a right of first refusal could be continued, or changed to benefit a different community, depending on the circumstances. Under one alternative, the right would continue to benefit the original community indefinitely (Alternative 2). Under another alternative, the right would shift to a different community, if the PQS is sold and used in that second community for a set period of time (Alternative 3). Under Action 3, a community entity’s right would be applied to either the subject PQS only (Alternative 2) or to the subject PQS and assets located in the community intended to benefit from the right of first

refusal (Alternative 3).

Effects of Action 1 – Increase the time for exercise and performance of the right of first refusal

In considering whether to exercise a right of first refusal, a community must examine the merits of the transaction and arrange its performance. These factors suggest that an extending the period to exercise a right and perform under the contract could be beneficial to entities making that decision. The extension is likely to be particularly beneficial for communities that adopted provisions for public notice and meetings to decide whether to exercise the right. Even this extended time period, however, is likely to pose a challenge, for large transactions that include a variety of assets other than the subject PQS. Although lengthening the time for exercise and performance under the right may benefit community entities, lengthening those time periods could complicate transactions for parties affected by the right. Under the terms of the right, a PQS holder and buyer can prevent a community entity from intervening in the transaction, if the buyer agrees to grant a right of first refusal to the community entity and to use a portion of the IPQ yielded by the PQS in the community for a period of years. Although these concessions may affect the value of the assets transferred (including the PQS), the parties to the transaction can effectively limit the ability of the community entity to disrupt the transaction by exercising the right. This ability may reduce the difficulty posed by the time period extensions to PQS holders. As a result, the proposed time period extensions are likely to have only minor effects on PQS holders, the parties with which they might transact, and community entities.

Effects of Action 2 – Extending the right indefinitely or transferring the right to a different community, if original right holder elects not to exercise the right

Under this action, rights of first refusal on PQS would either be extended indefinitely without lapse or rights would be transferred to a new holder, if the original holder elects not to exercise the right and a community develops a dependence on the PQS. Currently, the right lapses on use of the yielded IPQ outside the community for a period of three consecutive years or if the community entity fails to exercise the right when a transfer is made that is subject to the right. Making the right persist indefinitely would establish a perpetual contractual link between PQS and the community where processing occurred that led to the allocation of that PQS (but would not ensure use of the IPQ in the community). Under the first action alternative, this community/PQS association would be maintained regardless of whether the PQS holder used the yielded IPQ outside of the community for several years or transferred the PQS to another holder. Once triggered by a transfer, the right would supersede the interests of other parties, including communities where the yielded IPQ have been processed in the intervening years. The exercise of a right in this circumstance could disrupt the dependence on the processing activity that developed in the community that attracted the processing. At the extreme, this dependence be established through several years of processing activity. Community entities might also have multiple opportunities to acquire the PQS, since all transactions for use outside the community would trigger the right. So, a community entity that was unable or unwilling to intervene in a transaction for PQS will have the opportunity to intervene and acquire the shares in any future transaction subject to the right. These future opportunities may be important, if the circumstances and financing of the community entity change or the second transaction is on more appealing terms, which could occur if fewer PQS are included in the transaction or prices change.

Under the second action alternative, if a right holder failed to exercise the right and the IPQ was used in another community after a period of years (1, 3, or 5). The right would shift to the other community. This alternative would protect the interests of communities that develop a dependence on PQS, if the right holding community fails to exercise its right at the time of a transfer. **Full analysis of this alternative will require additional definition of the alternative by the Council.**

PQS holders are also affected by these extensions of the right. To the extent that rights of first refusal diminish the value of PQS, that diminution would be perpetuated by extending the right. Despite the

existence of the right, it remains likely that for most transactions PQS holders and buyers will avoid triggering the right by agreeing to use the IPQ in the right holding community to the extent required for avoiding triggering the right. In the long run, meeting this minimal requirement may be more difficult, particularly if processing activity is discontinued in some communities. To the extent that the right is intended to protect community interests, that protection may be lacking under the status quo, in part, because of its current lack of permanence. Yet, several other aspects of the right limit the effectiveness of the provision in protecting community interests. By its nature, the right only applies to transfers. Absent a transfer, shares may move freely among communities under other processing arrangements (including those internal to a company, as well as custom processing arrangements). This limitation on the right leaves a community entity unable to prevent the movement of processing from its community, as long as the PQS holder chooses not to transfer the shares. In addition, communities that become reliant on these allowed movements of processing activity are unprotected by the right in its current form.

Effects of Action 3 – Apply the right of first refusal to only subject processor shares or subject processor shares and assets in the community of the entity holding the right

Under this alternative, right of first refusal contracts are required to provide that the right shall apply to either 1) only the PQS or 2) the PQS and other assets physically present in the community of the entity holding the right of first refusal. In the event assets not subject to the right are included in the proposed sale, price of the assets subject to the right shall be determined by an appraisal process. In addition, under the alternative that applies the right to assets based in a community, an arbitration process could be applied to determine the assets subject to the right. Several administrative aspects of the process will need to be considered in whether to adopt either of the alternatives.

Under the second action alternative, the Council must define a standard for determining items that are subject to the right (i.e., assets that are “community-based”). Many assets are mobile and can be moved among communities. For example, a company that sells its PQS with its floating platform may be confronted by a community (or processor) claim that the floating platform is (or is not) a community based asset. If the Council wishes to proceed with this alternative, a standard would need to be defined for determining the assets based in a community to which the right would apply. The current motion suggests that an arbitrator or appraiser could be used to make this determination, but a specific process and timeline are not specified. Those aspects of the alternative require additional attention.

Assuming that assets to which the right will apply are well defined, the process for establishing a price for those assets (independent of other assets included in the transaction but excluded from the right) must be considered. As suggested in the motion, a jointly selected appraiser (or team of appraisers would be used). The time for selection of appraisers and its effect on the timeline for exercising a right and performing under the contract should be considered.

Notwithstanding the specific development of this action, PQS holders are likely to respond to the application of the right to only PQS (and possibly community based assets) in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement the PQS holder may need to provide something of value to the entity, which could be financial remuneration or a portion of the PQS. A community entity may have little leverage in this negotiation, if the PQS holder knows that the entity is without the wherewithal to exercise the right, but the community could receive some compensation for the security it provides in exchange for its agreement to allow the sale. CDQ groups that represent communities are likely to be better positioned to exercise the right than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests. Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the requisite period and extending the right to the entity in a second contract. This approach would maintain the community entity’s interest in the PQS under the

terms of the right with the new holder. A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.¹ To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. Lastly, a PQS holder that is undertaking a transaction might also subdivide the transaction. One transaction could be for the PQS and associated community based assets; the other transaction would be for any other assets. By subdividing the transaction in this manner, the PQS holder and the buyer can ensure that the price of PQS and the price of other assets in the transaction are set at an acceptable level, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS and community based assets carrying the bulk of the value of the transaction. Although the motion suggests a process that would allow a right holder to contest the price, the use of that process could be costly. Clearly, a variety of contractual arrangements might be made to ensure that the PQS holder receives reasonable value for assets (including the PQS), particularly in cases where the value of the assets is highly dependent on the accompanying PQS. Given the costliness of any administrative process associated with determining a price for assets subject to the right and the potential for PQS holders to avoid triggering the right, it is questionable whether the action alternatives would provide substantially greater protection of community interests than the existing right.

¹ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

Table of Contents

EXECUTIVE SUMMARYiii
 Purpose and Need Statementiii
 Alternativesiii
 Effects of Action 2 – Removal of right of first refusal lapse provisionsiv
 Effects of Action 3 – Apply the right of first refusal to only subject processor shares or subject processor shares and assets in the community of the entity holding the right v

1 INTRODUCTION 1

2 REGULATORY IMPACT REVIEW 1

 2.1 Purpose and Need Statement 2

 2.2 Description of Alternatives..... 2

 2.2.1 Alternatives considered, but not advanced for analysis..... 3

 2.3 Existing Conditions 6

 2.3.1 Management of the fisheries..... 6

 2.3.2 The processing sector 8

 2.3.3 Right of first refusal..... 12

 2.3.4 Communities..... 14

 2.3.5 Administration 17

 2.4 Analysis of alternatives 17

 2.4.1 Action 1 – Action to modify period to exercise right and perform under the contract.. 17

 2.4.2 Action 2 – Action to remove provisions under which the right would lapse 20

 2.4.3 Action 3 – Action to apply the right of first refusal to only PQS and assets in the community benefiting from the right..... 24

 2.4.4 Conclusion..... 31

 2.4.5 Net benefits to the Nation..... 31

3 REGULATORY FLEXIBILITY ANALYSIS 31

 3.1 Introduction 31

 3.1.1 Definition of a Small Entity..... 33

 3.2 A description of the reasons why action by the agency is being considered 34

 3.3 The objectives of, and the legal basis for, the proposed rule..... 34

 3.4 A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply 35

 3.5 A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule 35

 3.6 An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule..... 35

 3.7 A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities..... 35

4 NATIONAL STANDARDS & FISHERY IMPACT STATEMENT 35

 4.1 National Standards..... 35

 4.2 Section 303(a)(9) – Fisheries Impact Statement..... 37

5 REFERENCES 38

List of Tables & Figures

Table 1. Processing quota share holdings as a percent of the processing quota share pool.....	9
Table 2. PQS holdings subject to rights of first refusal (2009-2010).	9
Table 3 Processing by share type and community (2008-2009).....	10
Table 4 Number of active IPQ holder (buyer) accounts and IPQ processing plants by fishery (2005-2006 though 2008-2009).....	11
Table 5. Distribution of rights of first refusal by community on implementation.	12
Table 6. Percentage of PQS transferred to right of first refusal holder by fishery (as of 2009).	13
Table 7. Percentage of PQS on which right of first refusal lapse has been reported to NMFS by fishery (as of 2009).....	Error! Bookmark not defined.

1 INTRODUCTION

In August of 2005, fishing in the Bering Sea and Aleutian Island crab fisheries began under a new share-based management program (the “rationalization program”). The program is unique in several ways, including the allocation of processing shares² corresponding to a portion of the harvest share pool. These processor shares were allocated to processors based on their respective processing histories. To protect community interests, holders of most processor shares were required to enter agreements granting community designated entities a right of first refusal on certain transfers of those shares. Since implementation, community representatives and fishery participants have suggested that some aspects of the rights of first refusal may inhibit their effectiveness in protecting community interests. This amendment package considers measures intended to address the following three of the concerns:

- 1) the lapse of the right after three consecutive years of use of the individual processing quota (IPQ) outside the community or if a community entity elects not to exercise the right on a transaction to which it applies;
- 2) the relatively short period of time allowed for exercising and performing under the right; and
- 3) the requirement that the right apply to all assets involved in a transaction, which could include assets outside the community.

This document contains a Regulatory Impact Review (Section 2) and an Initial Regulatory Flexibility Analysis (Section 3) of the alternatives to modify rights of first refusal established under the program. Section 4 contains a discussion of the Magnuson Stevens Act National Standards and a fishery impact statement.³

This document relies on information contained in the Bering Sea/Aleutian Islands Crab Fisheries Final Environmental Impact Statement/Regulatory Impact Review/Initial Regulatory Flexibility Analysis/Social Impact Assessment (NMFS/NPFMC, 2004).

2 REGULATORY IMPACT REVIEW

This chapter provides an economic analysis of the action, addressing the requirements of Presidential Executive Order 12866 (E.O. 12866), which requires a cost and benefit analysis of federal regulatory actions.

The requirements of E.O. 12866 (58 FR 51735; October 4, 1993) are summarized in the following statement from the order:

In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nonetheless essential to consider. Further, in choosing among alternative regulatory approaches agencies should select those approaches that maximize net benefits (including potential

² Processor shares include both Processor Quota Shares (PQS), which are long term privileges to receive annual allocations of Individual Processor Quota (IPQ), and IPQ. Annual IPQ are a privilege to receive a specific poundage of crab landings in that year (which represent a share of the TAC).

³ The proposed action is a minor change to a previously analyzed and approved action and the proposed change has no effect individually or cumulatively on the human environment (as defined in NAO 216-6). The only effects of the action are the effects on the distribution of processor shares which will affect the crab harvests under the program. As such, it is categorically excluded from the need to prepare an Environmental Assessment.

economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

E.O. 12866 further requires that the Office of Management and Budget review proposed regulatory programs that are considered to be “significant”. A “significant regulatory action” is one that is likely to:

- Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, local or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.

2.1 Purpose and Need Statement

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

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.

To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now owning between 20 percent and 50 percent of the PQS in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.

2.2 Description of Alternatives

The Council has identified three actions for this amendment package. In all cases, the actions are defined by a single alternative that is compared to the status quo alternative, under which all aspects of the current right of first refusal structure would be maintained. Under Action 1, the time available for a community entity to exercise a right of first refusal would be extended from 60 days to 90 days, and the time for a community entity to perform under the contract would be extended from 120 days to 150 days. Under Action 2, a right of first refusal could be continued or changed to benefit a different community, depending on the circumstances. Under one alternative, the right would continue to benefit the original community indefinitely (Alternative 2). Under another alternative, the right would shift to a different community, if the PQS is sold and used in that second community for a set period of time (Alternative 3). Under Action 3, a community entity’s right would be applied to either the subject PQS only (Alternative 2) or to the subject PQS and assets located in the community intended to benefit from the right of first refusal (Alternative 3).

The specific elements and options identified by the Council are:

Action 1: Increase a right holding entity's time to exercise the right and perform as required.

Alternative 1 – status quo

- 1) Maintain current period for exercising the right of first refusal at 60 days from receipt of the contract.
- 2) Maintain current period for performing under the right of first refusal contract at 120 days from receipt of the contract.

Alternative 2: Increase an entity's time to exercise the right and perform.

- 1) Require parties to rights of first refusal contracts to extend the period for exercising the right of first refusal from 60 days from receipt of the contract to 90 days from receipt of the contract.
- 2) Require parties to rights of first refusal contracts to extend the period for performing under the contract after exercising the right from 120 days from receipt of the contract to 150 days from receipt of the contract.

Action 2: Increase community protections by removing the ROFR lapse provisions.

Alternative 1 – status quo

- 1) Maintain current provision under which the right lapses, if IPQ are used outside the community of the entity holding the right for three consecutive years.
- 2) Maintain current provision, which allows rights to lapse, if the PQS is sold in a sale subject to the right (and the entity holding the right fails to exercise the right).

Alternative 2 – Strengthen community protections under circumstances where ROFR may lapse.

- Option 1: Require parties to rights of first refusal contracts to remove the provision that rights lapse, if the IPQ are used outside the community for a period of three consecutive years
- Option 2: If any entity with a right of first refusal chooses not to exercise its right, and the PQS is sold and used in another community, then the right of first refusal as to the original entity lapses and is acquired by the community entity where the IPQ is currently being used:
- Suboption 1: immediately
 - Suboption 2: after 3 years
 - Suboption 3: after 5 years.
- Option 3: Require that any person holding PQS that met landing thresholds qualifying a community entity for a right of first refusal on program implementation to maintain a contract providing that right at all times

Note on the analysis – it is unclear whether the Council intended to create 3 mutually exclusive options or some other combination of the three options presented here. The analysis assumes that Options 1 and 3 create a single functional alternative. As option 3 cannot operate independently. In addition, by requiring a right of first refusal contract at all times, Option 3 is inconsistent with Option 2, under which periods will always exist during which no right holder can be identified. Instead, Option 2 creates an alternative approach to establishing a right of first refusal should a community choose not to exercise that right and the IPQ be used outside of the community holding the right. The analysis assumes that the Council is interested in applying Option 2 independently of the other two options (effectively creating two action alternatives). This analysis may assist the Council by bringing to light other interpretations or scenarios that it may wish to address with additional alternatives.

Action 3: Apply the right to only PQS or PQS and assets in the subject community.

Alternative 1 – status quo

The right of first refusal applies to all assets included in a sale of PQS subject to the right, with the price determined by the sale contract.

Alternative 2: Apply the right to only PQS.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS subject to the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price applies shall be determined by a) agreement of the parties or b) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal, or c) if the parties are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right of first refusal.

Alternative 3: Apply the right to only PQS and assets in the subject community.

Require parties to rights of first refusal contracts to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. In the event other assets are included in the proposed sale, the price of the PQS to which the price applies shall be determined by a) agreement of the parties or b) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right of first refusal, or c) if the parties are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right of first refusal.

In addition, the Council requested that staff include in the analysis a discussion of the following provisions:

Action 3, Alternative 2

The appraiser will be selected by:

- 1) mutual agreement of the parties or
- 2) the PQS holder and the community representative each selecting an appraiser and by those appraisers selecting a third appraiser. This panel of appraisers will then perform the duties of the appraiser.

For any transaction that includes only PQS, the community entity may request that an appraiser value the PQS. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser.

The appraiser shall establish a price that represents the fair market value of the PQS, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Within 10 days of receipt of a contract that is for PQS only, the community entity may request that an appraiser establish a price for the PQS. If the community entity fails to request an appraiser establish the price, the price in the contract will apply.

The parties shall select the appraiser (or each shall select an appraiser) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single appraiser is not selected by agreement of the parties, the two selected appraisers shall select a third appraiser within 30 days of the community representative receiving the contract.

The appraisers shall establish the price for the PQS within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the appraiser, within 120 days of receipt of the contract.

The cost of a mutually selected appraiser shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single appraiser, each party shall pay the costs of the appraiser it chooses, and the parties shall pay equally for the third appraiser.

Action 3, Alternative 3

The appraiser will be selected by:

- 3) mutual agreement of the parties or
- 4) the PQS holder and the community representative each selecting an appraiser and by those appraisers selecting a third appraiser. This panel of appraisers will then perform the duties of the appraiser.

The appraiser shall establish a price that represents the fair market value of the PQS and community based assets, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Within 10 days of receipt of a contract that includes PQS subject to the right, the community entity may request that an appraiser identify community based assets in the transaction and establish a price for the PQS and community based assets. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser. If the community entity fails to request that an appraiser establish the price, the price in the contract will apply and the right will apply to all assets in the transaction.

For any transaction that includes assets in addition to PQS, the appraiser shall determine which assets are community based.

If an appraiser is requested by the community entity, the parties shall select the appraiser (or each shall select an appraiser) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single appraiser is not selected by agreement of the parties, the two selected appraisers shall select a third appraiser within 30 days of the community representative receiving the contract.

The appraisers shall establish the price for the PQS and community based assets within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the appraiser, within 120 days of receipt of the contract.

The cost of a mutually selected appraiser shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single appraiser, each party shall pay the costs of the appraiser it chooses, and the parties shall pay equally for the third appraiser.

2.2.1 Alternatives considered, but not advanced for analysis

The Council and its crab advisory committee generally considered alternative time periods to those proposed in Action 1. No additional time periods were advanced for analysis, as the suggested time period extensions, when juxtaposed with the existing time periods, are believed to present a reasonable range of time periods for consideration. Any extension beyond that proposed by this action would be excessive by presenting an unacceptable delay to completion of contracts.

No alternatives to Action 2 were considered, as any action short of extending the right indefinitely is unlikely to achieve the lasting benefit intended by the Council for that action.

No additional alternatives to Action 3 were considered, as the two action alternatives are believed to be the only workable options to maintaining the status quo, which applies the right to all goods in the transaction.

2.3 Existing Conditions

This section describes the relevant existing conditions in the crab fisheries. The section begins with a brief description of the management of the fisheries under the rationalization program, followed by descriptions of the harvesting and processing sectors in the fisheries, including only information relevant to this action. A brief description of communities dependent on the crab fisheries is also included as background, concerning community effects of this action.

2.3.1 Management of the fisheries

The following nine crab fisheries are managed under the rationalization program:

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

Under the program, holders of License Limitation Program (LLP) licenses, endorsed for a fishery, were issued owner quota shares (QS), which are long term access privileges, based on the license's qualifying harvest histories in that fishery. Catcher processor license holders were allocated catcher processor vessel owner QS for their LLPs' histories as catcher processors; catcher vessel license holders were issued catcher vessel QS based on their LLPs' histories as a catcher vessel. These owner QS are approximately 97 percent of the QS pool. The remaining three percent of the initial allocation of QS was issued to eligible captains as crew QS or "C shares", based on the individual's harvest histories as permit holder on a crab vessel. QS annually yields individual fishing quota (IFQ), which represent privileges to harvest a

particular amount of crab (in pounds) in a given season (based on the TAC). The size of each annual IFQ allocation is based on the amount of QS held in relation to the QS pool in the fishery. So, a person holding 1 percent of the QS pool would receive IFQ to harvest 1 percent of the annual total allowable catch (TAC) in the fishery. Ninety percent of the “catcher vessel owner” IFQ are issued as “A shares”, or “Class A IFQ,” which must be delivered to a processor holding an equal amount of unused individual processor quota (IPQ).⁴ The remaining 10 percent of these annual IFQs are issued as “B shares”, or “Class B IFQ,” which may be delivered to any processor.⁵ Processor quota shares (PQS) are long term shares issued to processors. These PQS yield annual IPQ, which represent a privilege to receive a certain amount of crab harvested with Class A IFQ. IPQ are issued for 90 percent of the catcher vessel owner TAC, creating a one-to-one correspondence between Class A IFQ and IPQ.⁶

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

Bristol Bay red king crab – North/South division at 56°20’N latitude
Bering Sea *C. opilio* – North/South division at 56°20’N latitude
Eastern Bering Sea *C. bairdi* – none (or undesignated)
Western Bering Sea *C. bairdi* – none (or undesignated)
Pribilof red and blue king crab – North/South division at 56°20’ N latitude
St. Matthew Island blue king crab – North/South division at 56°20’N latitude
Western Aleutian Islands red king crab – South of 56°20’N latitude
Eastern Aleutian Islands golden king crab – South of 56°20’N latitude
Western Aleutian Islands golden king crab – undesignated and West of 174°W longitude

To further protect community interests, the Council included in the program a provision for community rights of first refusal on certain PQS and IPQ transfers. The representative entity of any community that supported in excess of 3 percent of the qualified processing in any fishery received the right on the PQS and derivative IPQ arising from processing in that community.⁷ In addition, entities representing qualified communities in the Gulf of Alaska north of 56°20’ N latitude received a right of first refusal on any PQS issued, based on processing in a community not qualifying for a right of first refusal in that same area of the Gulf. Four fisheries – the Eastern and Western *C. bairdi* and the Western Aleutian Islands red and golden king crab fisheries – are exempt from the rights of first refusal provisions, as allocations of PQS in those fisheries were based on historic processing in other fisheries.

In the case of CDQ communities, the representative entity holding the right is the local CDQ group. In all other communities, the right is held by an entity designated by the community. The right is established by

⁴ C shares issued to captains are an exception to this generalization. Those shares are not subject to IPQ and regional landing requirements.

⁵ The terms “A share” and “Class A IFQ” are used interchangeably in this paper, as are the terms “B share” and “Class B IFQ”.

⁶ Although 90 percent of IFQ issued each year are issued as A shares, individual allocations can vary from 90 percent. Holders of PQS and their affiliates receive their IFQ allocations as A shares only to the extent of their IPQ holdings. The rationale for issuing A shares to PQS holders and their affiliates to offset IPQ holdings is that these persons do not need the extra negotiating leverage derived from B shares for these offsetting shares. To maintain 10 percent of the catcher vessel owner IFQ pool as B shares requires that unaffiliated QS holders receive more than 10 percent of their allocation as B shares (and less than 90 percent A shares).

⁷ The community of Adak was excluded from the rights of first refusal, as that community received a direct allocation of 10 percent of the Western Aleutian Islands golden king crab fishery.

a contract between the community entity and the PQS holder. Under the contract, the right applies to any sale of PQS and sales of IPQ, if more than 20 percent of the PQS holder's community-based IPQ in the fishery were processed outside the community by another company in 3 of the preceding 5 years. As currently formulated, to exercise the right, the community entity must accept all terms and conditions of the underlying agreement.

Any intra-company transfers are exempt from the right of first refusal. To qualify for this exemption, the IPQ must be used by the same company.⁸ In addition, transfers of PQS for use in their home community are exempt from the right. To meet this exemption requirement, the purchaser must agree to use at least 80 percent of the annual IPQ in the community in 2 of the following 5 years and grant a right of first refusal on the received PQS. Under two circumstances, the right will lapse. First, if a company uses its IPQ outside of a community for three consecutive years, the right on the underlying PQS lapses. Second, if a community entity chooses not to exercise the right on the transfer of PQS, the right also lapses.

To exercise the right, a community entity must provide the seller of PQS with notice of its intent to exercise the right and earnest money in the amount of 10 percent of the contract amount or \$500,000, whichever is less, within 60 days of notice of a sale and receipt of the contract defining the sale's terms. In addition, the entity must perform under the terms of the agreement within the longer of 120 days or the time specified by the contract.

2.3.2 The processing sector

Processing privileges are relatively concentrated with twenty or fewer PQS share holders in each of the fisheries subject to rights of first refusal requirements (see Table 1). Concentration of processing privileges varies across fisheries. The Eastern Aleutian Islands golden king crab fishery is the most concentrated. The Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, which have had the most participants historically, are the least concentrated. The regional distribution of shares differs with landing patterns that arose from the geographic distribution of fishing grounds and processing activities. In the St. Matthew Island blue king crab and the Pribilof red and blue king crab fisheries, most qualified processing occurred in the Pribilofs or offshore in the North region, resulting in over two-thirds of the processing allocations in those fisheries being designated for processing in the North region. The Bering Sea *C. opilio* fishery allocations are split almost evenly between the North and South regions; while less than 5 percent of the Bristol Bay red king crab PQS is designated for North processing. All qualifying processing in the Eastern Aleutian Island golden king crab fishery occurred in the South region, resulting in all processing shares in that fishery being designated for processing in the South region. The relatively low median share holdings in the large fisheries (the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries) suggest that a large portion of the historic processing was concentrated among fewer than 10 processors. In the smaller fisheries, fewer than 5 processors hold a large majority of the shares. The maximum holding in each fishery was in excess of twenty percent of the pool.

⁸ This provision does not apply to custom processing arrangements, as no share transfer occurs under those arrangements.

Table 1. Processing quota share holdings as a percent of the processing quota share pool.

pqs

Fishery	Share holdings by region					Across regions			
	Region	PQS holders	Mean holding	Median holding	Maximum holding	PQS holders	Mean holding	Median holding	Maximum holding
Bristol Bay red king crab	North	3	0.85	0.23	2.31	16	6.25	4.39	22.98
	South	16	6.09	4.39	20.68				
Bering Sea <i>C. opilio</i>	North	8	5.87	5.51	15.46	19	5.26	3.42	25.18
	South	17	3.12	0.38	9.72				
Eastern Aleutian Island golden king crab	South	10	10.00	5.24	45.36	10	10.00	5.24	45.36
St. Matthew Island blue king crab	North	6	13.06	8.92	29.94	10	10.00	6.87	32.67
	South	7	3.09	2.08	7.96				
Pribilof red and blue king crab	North	6	11.26	12.01	23.28	13	7.69	3.87	24.49
	South	10	3.25	1.09	13.85				

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2009-2010.
 Note: These share holdings data are publicly available and non-confidential.

Historically, holders of PQS have operated in multiple communities (in some cases onshore and in some cases on floating processors). While any specific PQS is subject only to a single community right of first refusal, many PQS holders have different portions of their share holdings subject to rights of first refusal by different communities. Maintaining share holdings that are subject to rights of first refusal of different communities could complicate exercise of the right, if the PQS holder attempts to include all of its share holdings in a single transaction. In this circumstance, two communities would hold a right of first refusal, yet no means of resolving a priority between the communities is established by the required contract provisions.

Table 2. PQS holdings subject to rights of first refusal (2009-2010).

Fishery	Total	PQS holders		
		with rights of first refusal benefiting		
		one community	two communities	three communities
Bristol Bay red king crab	16	5	5	1
Bering Sea <i>C. opilio</i>	19	11	3	1
Eastern Aleutian Island golden king crab	10	9	0	0
St. Matthew Island blue king crab	13	9	3	0
Pribilof red and blue king crab	10	6	2	0

Source: NMFS Restricted Access Management IFQ database, crab fishing year 2009-2010.

Under the rationalization program, a large portion of the processing (and raw crab purchasing) is vested in the holders of processing shares. These share holders have used their allocations to consolidate processing activities in the fisheries, with plant participation in each fishery dropping by approximately one-third. Since the rationalization program was implemented, the number of processing plants participating in the Bristol Bay red king crab fisheries declined to 12, and has remained constant at that level. The average processing by the top 3 plants in the fishery increased to approximately 20 percent, with the concentration of the different share types slightly higher (suggesting that the largest processors of the different share types differ). In the first three years of the program, between 10 and 12 plants have participated in the Bering Sea *C. opilio* fishery, a decline of almost 5 plants from prior to the program. Concentration of processing declined slightly in the most recent season. This decline likely resulted from the increase in the TAC, which resulted in substantial increases in the mean and median pounds processed, as well as the average pounds processed by the largest three plants. Ten or fewer plants participated in processing in the Bering Sea *C. bairdi* fisheries in the first three years of the program. Since these fisheries are directly prosecuted by few vessels and have relatively small TACs, the processing is slightly more concentrated than in the two largest fisheries. Five or fewer plants participated in the Eastern Aleutian Island golden king crab and Western Aleutian Island golden king crab fisheries in the first three years of the program, limiting the information that may be released concerning processing in those fisheries.

In the first two years of the program, a large portion of the IPQ pool was subject to the “cooling off” provision, which required processing to occur in the community of the processing history that led to the allocation of the underlying PQS. Consequently, few changes in the distribution of processing of Class A IFQ/IPQ landings occurred in the first two years of the program. Also, for most shares, entities representing the community of origin hold a right of first refusal on the transfer of the PQS and IPQ for use outside the community. This right is relatively weak, because intra-company transfers are exempt from the right, and, under the status quo, the right lapses if the IPQ are used outside of the community of origin for a period of three consecutive years. Despite the end of the cooling off period and the ease with which the right of first refusal may be avoided, in the third year of the program, most processing of IPQ landings have occurred in the community of origin. Discerning the degree of redistribution, however, is not fully possible, as landings on floating processors are often categorized as “at-sea”. In many cases, these floaters operated within community boundaries, at times docked in the community harbor. In the most recent year of the program, two years from the lapse of the ‘cooling off’ provision requirements, some redistribution of processing of Class A IFQ landings is suggested (see Table 3). Dutch Harbor and Akutan, collectively, have attracted slightly more Class A IFQ landings in the Bristol Bay red king crab fishery than under the cooling off period. These redirected landings reduced landings in King Cove and Kodiak, collectively. In the cooling off period, King Cove and Kodiak received substantially larger percentages of Class A IFQ landings than their rights of first refusals suggest. These likely occurred as landings from within borough boundaries were consolidated in King Cove and as King Cove and Kodiak attracted landings that were unconstrained by the cooling off requirements. Processing of A share IFQ in Akutan and Dutch Harbor in the Bering Sea *C. opilio* fishery dropped substantially (by almost 25 percent) in the fourth year of the program. Redistribution of these landings to other locations cannot be revealed, because of confidentiality restrictions. The movements of landings suggest that with the cooling off provision expiring, it is possible to see a significant redistribution of landings among communities.

Table 3 Processing by share type and community (2008-2009)

2008-2009

Fishery	Community	Class A IFQ			Class B IFQ			C share IFQ		
		Number of active plants	Pounds of share type processed	Percent of share type processed	Number of active plants	Pounds of IPQ landings processed	Percent of IPQ pool processed	Number of active plants	Pounds of IPQ landings processed	Percent of IPQ pool processed
Bristol Bay red king crab	Akutan	1	10,167,245	66.6	1	1,409,783	84.3	1	460,873	88.3
	Dutch Harbor	4			4					
	Floater	1	*	*	1	*	*	1	*	*
	King Cove	1	*	*	1	*	*	1	*	*
	Kodiak	2	*	*	2	*	*	1	*	*
	St. Paul	1	*	*	1	*	*	1	*	*
Bering Sea <i>C. opilio</i>	Akutan	1	12,650,952	30.4	1	3,995,669	86.3	1	1,341,384	90.2
	Dutch Harbor	3			4					
	Floater	2	*	*	2	*	*	2	*	*
	King Cove	1	*	*	1	*	*	1	*	*
	Kodiak	1	*	*	1	*	*	1	*	*
	St. Paul	1	*	*	1	*	*	1	*	*
E. Aleutian Islands golden king crab	Akutan	1	*	*						
	Dutch Harbor	4	*	*	4	*	*	2	*	*
W. Aleutian Islands golden king crab	Adak	1	*	*	1	*	*			
	Dutch Harbor	3	*	*	1	*	*	2	*	*
	Floater	1	*	*						
Western Bering Sea <i>C. bairdi</i>	Akutan							1	*	*
	Dutch Harbor	3	*	*	3	*	*	2	*	*
	Floater	2	*	*				1	*	*
	King Cove	1	*	*					*	*
	St. Paul				1	*	*	1	*	*
Eastern Bering Sea <i>C. bairdi</i>	Akutan	1	*	*				1	*	*
	Dutch Harbor	3	717,026	35.4	3	119,549	78.8	3	34,308	86.4
	Floater	2	*	*	2	*	*	1	*	*
	King Cove	1	*	*	1	*	*	1	*	*
	St. Paul							1	*	*

Source: RAM IFQ data and RCR permit file.

* withheld for confidentiality.

Note: For Class A IFQ shows percentage of IPQ pool.

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

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

Table 4 Number of active IPQ holder (buyer) accounts and IPQ processing plants by fishery (2005-2006 through 2008-2009).

Fishery	Community of Plant	2005 - 2006		2006 - 2007		2007 - 2008		2008 - 2009	
		Number of delivery accounts	Number of active plants	Number of delivery accounts	Number of active plants	Number of delivery accounts	Number of active plants	Number of delivery accounts	Number of active plants
Bristol Bay red king crab	Akutan	1	1	1	1	2	1	1	1
	Dutch Harbor	3	3	4	4	7	4	7	4
	Floater	3	2	2	2	3	1	4	1
	King Cove	1	1	3	1	1	1	1	1
	Kodiak	2	2	3	3	3	3	2	2
	Sitka	1	1						
	St. Paul	1	1	1	1	2	1	1	1
Bering Sea <i>C. opilio</i>	Akutan	1	1	1	1	1	1	1	1
	Dutch Harbor	6	4	8	4	6	4	4	4
	Floater	6	3	14	2	6	2	4	2
	King Cove	1	1	1	1	1	1	1	1
	Kodiak	2	2	2	2	4	3	2	2
	St. Paul	1	1	1	1	5	1	5	1
E. Aleutian Islands golden king crab	Akutan			1	1			1	1
	Dutch Harbor	3	3	4	4	4	4	4	4
	Floater	1	1						
W. Aleutian Islands golden king crab	Adak	2	1	2	1	1	1	2	1
	Dutch Harbor	2	2	2	2	2	2	4	3
	Floater	3	2					1	1
Eastern Bering Sea <i>C. bairdi</i>	Akutan			1	1	1	1	1	1
	Dutch Harbor			6	4	5	4	4	4
	Floater			1	1	2	2	5	2
	King Cove			1	1	1	1	1	1
Western Bering Sea <i>C. bairdi</i>	Akutan	1	1	1	1			1	1
	Dutch Harbor	4	4	5	3	3	2	4	4
	Floater	4	2	1	1	3	2	3	2
	King Cove	1	1	1	1	1	1	1	1
	Kodiak	1	1						
	St. Paul	1	1			3	1	1	1

Source: RAM IFQ data and RCR permit file.

2.3.3 Right of first refusal

Based on the qualifying criteria, 8 community entities received rights of first refusal in the different fisheries governed by the program (see Table 5).⁹ The distribution of rights differs across fisheries, with Akutan, Unalaska, King Cove, St. Paul, and St. George all starting the program with rights on approximately 10 percent or more of the PQS in at least one fishery.

Table 5. Distribution of rights of first refusal by community on implementation and at the end of the 2009-2010 season.

Fishery	Region	Right of first refusal boundary	Percentage of initial PQS pool	Percentage of current PQS pool
Bristol Bay red king crab	North	None	0.0	0.0
		St. Paul	2.7	2.7
	South	Akutan	19.7	19.7
		False Pass	3.7	3.7
		King Cove	12.7	7.4
		Kodiak	3.6	0.2
		None	3.4	12.2
Port Moller	3.9	3.9		
Unalaska	20.7	20.7		
Bering Sea <i>C. opilio</i>	North	None	1.0	10.0
		St. George	0.7	0.0
		St. Paul	20.3	20.0
	South	Akutan	0.7	0.7
		King Cove	0.3	0.3
		Kodiak	0.1	0.0
None	1.0	2.0		
Unalaska	27.0	27.0		
Eastern Aleutian Island golden king crab	South	Akutan	1.0	1.0
		None	0.0	7.0
		Unalaska	66.1	61.2
Pribilof red and blue king crab	North	None	0.3	0.3
		St. George	2.9	0.0
		St. Paul	64.6	67.9
	South	Akutan	1.2	1.2
		King Cove	3.6	3.6
		Kodiak	2.0	2.0
Unalaska	24.0	24.0		
St. Matthew Island blue king crab	North	None	64.0	64.0
		St. Paul	13.6	13.6
	South	Akutan	2.7	2.7
		King Cove	1.3	1.3
		None	0.0	0.0
Unalaska	17.0	17.0		

Source: RAN PQS data, 2009-2010

In five cases, community entities holding the right have acquired PQS subject to the right. A variety of arrangements led to these transactions, but in no case was the right exercised directly. In one fishery, a portion of the PQS subject to the right was transferred to the community entity holding the right, while the right with respect to another portion of the PQS was allowed to lapse. In another fishery the PQS

⁹ Rights established on implementation are included, as even those which have lapsed could be resurrected under one of the alternatives.

represented a relatively small portion of the total PQS on which the entity held rights of first refusal and the PQS buyer was a different community entity. Rather than intervene in the transfer, the right holder elected to allow the transaction to proceed, lapsing the right of first refusal. In another instance, a PQS holder with a considerable harvest share holding transferred its PQS to the right holding community entity to avoid a potential harvester/processor affiliation that would have prevented participation in the arbitration program. In most cases, right holding community entities have been actively involved in PQS transactions involving shares subject to their rights. In some cases, those entities have acquired shares; in others, they have allowed transactions to proceed. This community involvement in transactions suggests that the right has affected community interests.

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

In addition to shares subject to the St. George right of first refusal, PQS allocated based on processing in the Aleutians East Borough communities (i.e., Akutan, False Pass, King Cove, and Port Moller) was permitted to be moved within the borough during the cooling off period. As a consequence, rights of first refusal for the benefit of those communities may also have lapsed from movement of processing. Also, certain IPQ have had the right removed as a consequence of other transfers that have occurred in the first few years of the program. In some cases, the PQS has been transferred to the right holder, while in others the right has lapsed because the right holder chose not to exercise the right at the time of a transfer (see Table 6). In one instance, a PQS holder divested of a portion of its PQS holdings to remain within permitted share use caps through a negotiated arrangement with the right holder.

Table 6. PQS no longer subject to rights of first refusal by fishery.

Fishery	Former beneficiary of the right	Percentage of PQS pool
Bristol Bay red king crab	King Cove*	5.3
	Kodiak*	3.5
Bering Sea <i>C. opilio</i>	St. George**	9.7
	St. Paul*	5.4
	Kodiak*	0.1
Eastern Aleutian Islands golden king crab	Unalaska***	6.9
Pribilof Island blue king crab	St. George**	2.5
St. Matthew Island blue king crab	Kodiak*	0.0
Source: RAM PQS data, 2009-2010		
* PQS held by former right holder.		
** Portion of the PQS held by former right holder, remainder released from right by agreement of the holder.		
*** PQS transfer occurred with consent of the former right holder.		

Assessing the extent to which rights have lapsed beyond those voluntarily reported to NOAA Fisheries is difficult because of the nature of available landings data. While some PQS holders have reported lapsing of rights voluntarily, regulations do not require PQS holders to report lapsing of a right.¹⁰ Although geographic landing requirements are applied in the program, records concerning location of landings are limited by record keeping protocols. Currently, most deliveries to floating processors are recorded as processed by a ‘at sea,’ without designation of a port. These ‘at sea’ deliveries may take place within community boundaries, and therefore may not be considered as being outside of the community that benefits from the right of first refusal. On the other hand, landing records will not fully reflect the geographic distribution of landings, which may result in several rights lapsing (because of use of IPQ outside of the community for three consecutive years). In addition, no system is in place for reporting and documenting the lapse of rights of first refusal. Given this shortcoming, it is possible that more community rights of first refusal may have lapsed than are reflected in the available data.

2.3.4 Communities

Eight communities have historically received substantial landings from the Bering Sea and Aleutian Islands crab fisheries in which the rights of first refusal apply: Unalaska, Akutan, King Cove, St. Paul, St. George, Kodiak, Port Moller, and False Pass. These communities vary in their geographic relation to the fishery; their historical relationship to the fishery; and the nature of their contemporary engagement with the fisheries through local harvesting, processing, and support sector activity or ownership. Each of these factors influences the direction and magnitude of potential social impacts associated with the proposed action (NPFMC, 2008).

Commercial fishing and seafood processing play a significant role in the economic success of Unalaska/Dutch Harbor. This community is home to the greatest concentration of processing and catcher vessel activity of any Alaska community (EDAW, 2005). Pollock accounted for nearly 70 percent of the total wholesale value processed in Dutch Harbor in 2005. The second largest contributor to total wholesale value processed in Dutch Harbor was crab, at nearly 20 percent. Of the crab species, red king

¹⁰ **If the Council does not adopt a remove the provisions under which rights lapse, the Council could consider an action that requires the PQS holder to report a lapse of the right to report to NOAA Fisheries. This reporting requirement would provide NOAA Fisheries of notice of the lapse, which might provide right holders with better information concerning the status of their rights.**

crab provided the largest contribution, at \$51 million in 2005, followed by snow crab at \$33 million. Dutch Harbor based processors received a substantial share of the PQS allocations in most crab fisheries, under the rationalization program. These shares are subject to rights of first refusal of the Dutch Harbor community entity. These shares are unlikely to migrate out of the community, because crab processing at most facilities plays an important part in an integrated operation that serves several fisheries. Under the right of first of refusal, Unalaska/Dutch Harbor is represented by Unalaska Crab, Inc., a community entity created explicitly for the purpose of holding rights of first refusal and crab shares under the program. The City Council is the board of directors for this company.

Once heavily dependent upon salmon, the community of King Cove is now more diversified, processing groundfish and crab from the GOA and BSAI. The community is home to several large crab vessels, and is also home to Peter Pan Seafoods,¹¹ the only shore based processor located in King Cove. The plant processes salmon, crab, halibut, and groundfish. Approximately 80 percent of King Cove's work force is employed full time in the commercial fishing industry (EDAW, 2005). This likely underestimates the dependency of the local economy on commercial fishing. For several years now, the amount and total value of crab processed in King Cove have been declining, while groundfish processing has increased. The decline in crab production was due primarily to a decline in quotas, related to reduced stocks. In addition, AFA sideboard limits on BSAI crab have also limited the amount of crab that could be processed in King Cove. Under the rationalization program, crab processing has remained an important component of the diversified processing undertaken at the shore plant in King Cove. Yet, rapid fleet contraction under the program, particularly in the Bristol Bay red king crab and Bering Sea *C. opilio* fisheries, has affected King Cove. Between 10 and 15 crew jobs are estimated to have been lost in each of these two fisheries. In the first year of the program, fleet contraction is also believed to have caused a drop in demand for harbor and moorage services, and goods and services from fishery support businesses in King Cove. Attribution of these effects to the change in crab management is difficult, since data isolating spending of crab vessels and fishery participants from spending associated with other fishery and non-fishery activities, are not available (see Lowe, et al., 2006). Subsequently, King Cove businesses are believed to have received increased demand for services, comparable to pre-rationalization levels, as vessels continuing to participate in the crab fishery are believed to have spent more time in the area during the longer seasons (NPFMC, 2008). Aleutia, Inc. is the community entity representing King Cove. Originally established as a salmon marketing company, the company also represents Sand Point and King Cove as their halibut and sablefish Community Quota Entity for purchases of quota in those fisheries.

The economy of Akutan is heavily dependent upon the groundfish and crab fisheries in the BSAI and GOA. The community is home to one of the largest shore based seafood processing plants in the area and is also home to a floating processor. The community also provides some limited support services to the fishing community. In addition, Akutan is a Community Development Quota (CDQ) community. The vast majority of catch landed in Akutan comes from vessels based outside of the community. Most of those vessels focus primarily on pollock, Pacific cod, and crab. The large shore plant is operated by Trident Seafoods. The shore processor is a multi-species plant, processing primarily pollock, Pacific cod, and crab. Given that the plant is an AFA-qualified plant with its own pollock co-op, pollock is the primary species in terms of labor requirements and economic value. However, the shore plant also accounts for a significant amount of the regional crab processing, representing a significant amount of the processing value at the plant (EDAW, 2005). As with plants in Dutch Harbor and King Cove, crab has remained an important part of a diverse operation at the shore plant in Akutan, since implementation of

¹¹ Peter Pan Seafoods is a wholly owned subsidiary of Nichiro-Maruha Corp., which also owns Westward Seafood operations in Dutch Harbor and a portion of Alyeska Seafoods.

the rationalization program. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of Akutan.

Although the economy of Kodiak is more diversified, compared to King Cove and Akutan, fishing is a significant contributor to the community economy. Excluding the USCG, four of the top ten employers in Kodiak, in 2003, were fish processors. Salmon and herring accounted for 42 percent of the total wholesale value during 2005. Halibut, sablefish, and other groundfish contributed 22 percent of the total wholesale value, while Tanner crab contributed less than 5 percent of the total wholesale value. Unlike Unalaska, King Cove, and Akutan, Kodiak is home to an extensive resident fishing fleet. The total number of vessels is fewer than 600, with fewer than 300 that actively fished in 2002. Total estimated gross revenue of Kodiak permit holders was \$111 million, for 2002. Kodiak is also home to numerous shore based processors, representing diversity in size, volume, and species processed. Species that typically contribute more than 10 percent of the total value are Pacific cod, pollock, and salmon. Rapid fleet contraction associated with the crab rationalization program is also thought to have affected Kodiak. Kodiak crew are estimated to have lost 125 positions in the Bristol Bay red king crab and approximately 60 positions in the Bering Sea snow crab fishery, in the first year of the program. A study of the effects of the rationalization program on Kodiak during the program's first year found anecdotal evidence suggesting declines in spending at some businesses, but evidence of a broad decline in total local spending could not be identified. The study cautioned that effects may lag, so these findings should be viewed as preliminary (Knapp, 2006). The City of Kodiak and the Borough of Kodiak are represented by Kodiak Fisheries Development Association, an entity formed for the sole purpose of holding rights of first refusal and crab quota on behalf of the city and borough.

Unlike King Cove, Akutan, Unalaska, or Kodiak, St. Paul is primarily dependent upon the processing of snow crab, harvested in the North Pacific. According to ownership data, all crab deliveries to the Pribilof Islands are made by non-resident vessels. Since 1992, the local shoreplant on St. Paul has been the primary processor for crab in the North region. St. Paul is a primary beneficiary of the North/South regional distribution of shares in the rationalization program. This limitation on landings should ensure that a substantial portion of the processing in the Bering Sea *C. opilio* fishery is undertaken in St. Paul. In the long run, it is possible that St. George could obtain a greater share of North landings, but most participants currently prefer St. Paul's harbor facilities to those available in St. George. Central Bering Sea Fishermen's Association, the St. Paul CDQ group, is the community entity holding rights of first refusal on behalf of St. Paul.

As with St. Paul, St. George has depended primarily on processing of crab from the Bering Sea *C. opilio* fishery. Processing of crab in St. George has been exclusively by floating processors. Since 2000, little or no crab processing has taken place in St. George. Prior to the rationalization program, the loss of processing activity was primarily attributable to the decline in crab stocks. Under the rationalization program, no processing has returned to St. George. Processing shares were subject to the 'cooling off' provision requiring the processing of landings with those shares to be undertaken in St. George. Yet, harbor breakwater damage caused by a storm prevented deliveries to the community during the first two years of the program and that activity has not returned. Whether the community can attract crab landings in the future depends, in large part, on its ability to provide a harbor perceived to be safe by participants and processing capacity for deliveries. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of St. George.

Limited processing of catch from the Bristol Bay red king crab fishery on floating processors occurred in the communities of False Pass and Port Moller in the processor qualifying years. This processing qualified both communities for rights of first refusal under the program. No processing is believed to have occurred in either community since implementation of the program. And, neither community currently

has a shore-based processing plant that supports crab processing. Port Moller has a salmon plant that is operated seasonally. Aleutian Pribilof Island Community Development Association, the local CDQ group in False Pass, is in the process of opening a processing plant in that community. At this stage, the plant does not support crab processing. The CDQ group Aleutian Pribilof Island Community Development Association holds rights of first refusal on behalf of False Pass. The right of first refusal for Port Moller is held by Aleutia.

2.3.5 Administration

Rights of first refusal are administered under the program through contractual requirements of affected parties. First, recipients of an initial allocation of PQS to which a right of first refusal could be applied must have entered a contract with an identified community representative prior to receiving that allocation. In addition, recipients of a transfer of PQS subject to the right but that does not trigger the right must enter a right of first refusal contract for that PQS prior to the transfer being processed. Once contracts are entered, the holder of the right and the PQS holder police the right through civil actions. This approach is intended to ensure that the right is established as required, while limiting the extent of agency involvement in any private dispute between the parties to the contract.

2.4 Analysis of alternatives

This amendment package considers three changes to the current right of first refusal intended to make the right more effective for protecting community interests. Although the changes all serve a related purpose they have limited interactive effects. To simplify the analysis, each action is analyzed independently, with interactive effects discussed after those analyses.

2.4.1 Action 1 – Action to modify period to exercise right and perform under the contract

Alternative 1 – status quo – maintain 60-day period to exercise right and 120-day period for performance.

Under the current right of first refusal contract requirements, a community entity has 60 days from receipt of a contract defining a transfer from a PQS holder to exercise the right of first refusal. Within that time period, the community entity must inform the PQS holder that it is exercising its right and provide earnest money of 10 percent of the transaction amount or \$500,000, whichever is less. The 60 day period in which to exercise the right is intended to provide community entities with the opportunity to assess the merits of intervening in the transaction. For some entities, such as CDQ groups, decisions of whether to enter simple, low value, transactions may be made expeditiously; however, larger more complex transactions, could involve a more extended decision making process for a community entity.

For any transaction, the community entity must assess the value of the various items included in the transaction. PQS alone could be very costly.¹² In addition, under the current provision, other items included in the transaction would be subject to the right, which could drive up the transaction price substantially. Depending on its plans for use of the PQS and assets acquired in the transaction, a community entity may need to assess the value of each of these items independently or as groups of items, along with their value as part of the transaction, as a whole. To make these determinations, an entity may need to consult experts or conduct its own appraisals. In addition to the other steps involved in the decision making process, the entity may need to arrange financing. Depending on the purchase, financing arrangements may require substantial due diligence on the part of any financing party.

¹² Since few transactions for PQS have taken place in the first few years of the program, price data cannot be released.

Independent assessments of the transaction, including valuations of possible collateral may be necessary. In some instances the entity may undertake a public meeting process or take formal board action to make a purchase. Notice requirements may be applied to any such meetings. Each of these various steps in the decision making process requires time.

Community entities may also need to undertake considerations beyond those confronted by entities acting as simple business entities. For example, an entity may only wish to exercise the right, if it is confident that the assets will bring some type or level of benefit to the community. Achieving these benefits may depend on relationships with other community-based operations and commitments of residents. These relationships and arrangements may be complex, and commitments may take time to attain.

In addition to having a limited period of time to exercise a right, community entities also have a limited period of time in which to perform under the right of first refusal. Under the current rule, an entity exercising its right has 120 days from receipt of the contract to fully perform under the contract. This added time for performance is intended to provide the entity with adequate time to finalize financing arrangements, including all necessary due diligence by lenders. This extended period may also allow for the entity to make additional arrangements, such as partnerships for use of assets or transactions for portions of the assets that it may not wish to maintain.

The current time periods for exercise and performance of a right of first refusal may be adequate for a community entity that has an opportunity to enter a relatively straightforward transaction for a small amount of PQS; however, these time periods may pose a great challenge for a community entity that faces an opportunity to enter a complex and costly transaction. The complexities of both determining whether it is appropriate to enter a transaction, as well as arranging financing, may prove insurmountable for a community entity that has 60 days in which to make a determination of whether to enter a transaction, and then have only an additional 60 days (or 120 days from notice) to perform.

To date, the existing timelines are not reported to have prevented any community exercise of a right of first refusal; however, the absence of the timeline constraining participants should not be interpreted as suggesting that the timeline provides communities adequate time for decision making and performance. The absence of a constraint has occurred largely because PQS holders have worked with community entities when transferring PQS, rather than risking the exercise of the right by an entity. In effect, the timeline has not applied, as PQS holders have avoided triggering the right. Some community entities, however, have suggested that, based on their experiences attempting to determine whether to pursue a transaction for PQS and arrange financing for the transaction, the existing timeline for exercising the right and performing under the contract may be inadequate, particularly for large transactions.

Since the time periods have not been affected by PQS sales, they have not directly affected PQS holders. The requirement of waiting 60 days to finalize a sale could affect a PQS holder that chooses to trigger the right, particularly, if timing of the transaction is important. In most cases, it may be expected that PQS holders will avoid triggering the right to prevent a transaction from being interfered with by the exercise of the right. This can be accomplished either by including the right holder in the transaction, or by agreeing to use 80 percent of the yielded IPQ in the community for 2 of the following 5 years. This approach by the PQS holder can also prevent possible delays in the transaction that could arise from the provision allowing the right holder 120 days from notice of the transaction to perform under the contract. Given the avenues available to a PQS holder to avoid triggering the right, the current timeline for exercise of the right and performance of the contract should pose little problem for a PQS holder wishing to transfer shares. Only in a situation where a PQS holder feels compelled to transfer shares quickly, and is negotiating with a buyer that refuses to use the yielded IPQ in the community are the time periods defined in the right of first refusal likely to be problematic for a PQS holder.

In general, the status quo time periods provide right holders with efficient decision making processes and existing financial arrangements with a reasonable opportunity to exercise and perform on a right of first refusal; however, entities that have a more public, time consuming decision making process or without well-established credit arrangements are likely to be challenged by the existing time frame. PQS holders, on the other hand, have their business planning disrupted under the current arrangements, as finalizing transactions is delayed up to 60 days by the right.

Alternative 2 – 30-day extension of the periods to exercise and perform under the right

Under alternative 2 (the action alternative), after notice of a transaction and receipt of the contract terms, a community entity would be given 90 days to determine whether to exercise its right of first refusal and 150 days to perform under the contract. This extension of the time periods would be intended to better accommodate community entities, while continuing to recognize that time may be of the essence under a contract.

In considering whether to exercise a right of first refusal, a community must examine the merits of the transaction and arrange its performance. These factors suggest that an extended period for making a decision of whether to exercise a right could be beneficial to entities confronted by that decision. In some circumstances, a 30 day extension to a 90-day period could be adequate for an entity to better evaluate a transaction, access earnest money, make preliminary financing arrangements, and make an appropriate decision concerning the exercise of its right. The extension is likely to be particularly beneficial for decisions that require public notice and meetings. Whether these requirements apply likely depends both on the entity's governing rules and the size of the transaction. Even this extended time period, however, is likely to pose a challenge, if the transaction is large and includes a variety of assets other than the subject PQS. If time to exercise is extended 30 days, concurrently extending the time to perform will maintain the existing 90 day window between the deadline for exercising the right and performing under the contract. Adding 30 days to the periods for exercising the right and performing under the applicable contract may make the right of first refusal more accessible to community entities wishing to enter a contract to protect a community's interests.

Although lengthening the time for exercise and performance under the right may benefit community entities, lengthening those time periods could complicate transactions for parties affected by the right. PQS holders and those wishing to acquire PQS may invest substantial efforts arranging transactions. Time may be of the essence in these transactions, because of the seasonality of fisheries. Allowing an extended period for a community entity to exercise a right of first refusal may impinge on operations, if the time period extends into the fishing season. The extent of this disruption will depend on the transaction and its timing. If the transaction includes assets other than PQS (such as processing equipment or groundfish fishery assets) the disruption could be of even greater significance. These factors all suggest that an extended time period for the decision of whether to exercise a right could be problematic for the parties to the transaction. Despite the potential benefits to community entities and the disruption for holders and buyers of PQS subject to the right by the proposed time period extensions, the structure of the right overall will limit any effect of the extensions.

Under the terms of the right, a PQS holder and buyer can prevent a community entity from intervening in the transaction, if the buyer agrees to grant a right of first refusal to the entity and to use 80 percent of the IPQ yielded by the transferred PQS in the community in two of the following five years. Although these concessions may affect the value of the assets transferred (including the PQS), the parties to the transaction can effectively limit the ability of the community entity to disrupt the transaction by exercising the right. This ability may limit both the difficulty posed by the time period extensions to PQS holders and the opportunity for community entities to acquire PQS under the right. As a result, the

proposed time period extensions are likely to have only minor effects on PQS holders, the parties they might transact with, and community entities.

Overall, this action would have little or no effect on net benefits. The effects of the action are primarily distributional affecting the interests of PQS holders and communities and their representative entities. Any benefits would be derived from the additional power of community entities (and the spillover effects on the communities they represent) that is derived from the additional time to decide whether to exercise the right and the additional time to perform. The costs would arise from the disruption to business and potential loss of business opportunities that could occur from the extended time period to exercise the right and perform.

2.4.2 Action 2 – Action to remove provisions under which the right would lapse

Alternative 1 – status quo – maintain current provisions under which the right lapses

Under the status quo, processors eligible for an initial allocation of PQS that met right of first refusal qualification requirements were required to establish a right of first refusal contract, prior to the issuance of that PQS. Once in place, the contract establishing the right maintains that right until the right holder acquires the PQS, the holder of the PQS uses the yielded IPQ outside of the community for three consecutive years, or the right holder elects not to exercise the right on a transaction on which the right applies.

The two provisions under which the right lapses are intended to sever the right, once the community's tie to PQS is lost. The first provision is based on the premise that a community's nexus to the PQS is lost, if the yielded IPQ are used by the PQS holder outside the community for three consecutive years.¹³ Removing this provision would establish a principle that the community's tie to the PQS should persist regardless of whether the IPQ are used outside the community for a continuous, extended period. The second provision is based on the premise that a community's nexus to the PQS is lost, if its representative elects not to exercise the right when it is triggered by a transfer to a buyer that intends to use the IPQ outside of the community.

Under this structure, the right of first refusal provides communities with a limited protection that is intended to survive only as long as the community maintains its connection to the processing shares. Depending on the circumstances, over time, connections to processing shares may be lost. The decline in rights will likely vary across communities and processors. A community with several active processors is more likely to maintain its rights, as movement of processing among processors may occur within the community. Communities with a single active processor, and particularly those that have had all processing on floating platforms, are more likely to see their rights dissipate. Regional landing requirements may also affect whether rights are lost, as those limits affect opportunities for relocation of processing. Rights may continue in St. Paul in particular, as few alternative locations are available for processing in the North region. In addition, PQS holders intent on removing rights from their shares can divert processing activity to remove the right. In time, the amount of PQS subject to rights of first refusal will decline. The distribution of the rights among communities and PQS holdings will depend both on the circumstances in the communities benefiting from the rights and the PQS holders' processing choices (including choices that could be made for the purpose of extinguishing the right).

¹³ Since custom processing occurs without a transfer of IPQ, those IPQ may be used by a PQS holder outside the community by simply having the crab custom processed in another location.

Alternative 2 – Options 1 and 3: remove all provisions under which the right lapses and require holders of applicable PQS to maintain a right of first refusal contract at all times

Under this alternative (including options 1 and 3), the provision under which the rights of first refusal on PQS lapse would be removed from the contracts establishing those rights and any rights that lapsed under the current rules would be required to be reestablished. In addition, the holders of any PQS to which the right applied on implementation of the program would be required to maintain right of first refusal contracts at all times. Together, these changes would create a lasting nexus between PQS and the community from which it originated.¹⁴ The tie would persist regardless of whether the yielded IPQ are used outside the community for extended periods and whether the community might have attracted other IPQ.

Making the right persist indefinitely would establish a perpetual link between PQS and the community where processing occurred that led to the allocation of that PQS. This community/PQS association would be maintained regardless of whether the PQS holder used the yielded IPQ outside of the community for several years. In addition, once triggered by a transfer, the right would supersede the interests of other parties, including communities where the yielded IPQ have been processed in the intervening years. The exercise of a right in this circumstance could disrupt the dependence on the processing activity that developed in the community that attracted the processing. At the extreme, this dependence could arise from several years of processing activity. Community entities might also have multiple opportunities to acquire the PQS, since all transactions for use outside the community would trigger the right. So, a community entity that was unable or unwilling to intervene in a transaction for PQS may have a second opportunity to intervene in a future transaction to acquire those shares. This second opportunity may be important, if the circumstances and financing of the community entity changes or the second transaction is on more appealing terms, which could occur if fewer PQS or different assets are included in the transaction or prices change.

PQS holders are also affected by making the right indefinite in term. PQS would never be free of the right (unless held by the right holder). To the extent that rights of first refusal diminish the value of these shares, that diminution would be perpetuated. Despite the existence of the right, it remains likely that for most transactions PQS holders and buyers will avoid triggering the right by agreeing to use the IPQ in the community to the extent required for avoiding triggering the right. In the long run, meeting this minimal requirement may be more difficult, particularly if processing activity is discontinued in some communities. In these circumstances, a community entity could gain significant leverage over the PQS holder and any potential buyer, who might need to add processing capacity to process landings in the community. In any circumstance, a buyer is likely to run some risk, if the right is triggered by a transaction. Even if the community entity is without the wherewithal to exercise the right and perform under the contract, it is possible that the entity could be backed by a competitor of the PQS holder or buyer who wishes to acquire the PQS. The potential for this intervention is likely to lead the parties to most transactions to deal directly with the community, unless they structure the transaction to avoid triggering the right.

To the extent that the right is intended to protect community interests, that protection may be lacking, in part, because of its current lack of permanence. Yet, several other aspects of the right limit the effectiveness of the provision in protecting community interests. By its nature, the right only applies to transfers. Absent a transfer, shares may move freely among communities under other processing arrangements (including those internal to a company, as well as custom processing arrangements). This

¹⁴ The only circumstance when a right would not apply would be if the representative community entity holds the PQS. If held by a right holder then transferred away, the right would be reinstated.

limitation on the right leaves a community entity unable to prevent the movement of processing from its community, as long as the PQS holder chooses not to transfer the shares. Establishing the right in perpetuity would prevent a PQS holder lapsing the right by moving shares outside of the community for three years prior to putting the PQS on the market. Lapsing of the right in this manner simplifies any transaction to sell the PQS (and other assets) by removing the encumbrance of the right. Extending the right indefinitely, as proposed, would require PQS holders to confront the community entity when transferring the PQS, either through triggering the right or through negotiations to avoid triggering the right. This modification will establish a permanent community interest in the PQS in community entities in the long run.

Administration of this action will require that PQS holders and right of first refusal holders report to NOAA Fisheries that contracts establishing the right of first refusal are maintained. Contracts could be required to be without expiration. No transfer would be approved until the person acquiring the PQS provides NOAA Fisheries with proof of the required contract. Using this means of administration should ensure that contracts are maintained as required, without excessive burden to the parties to the contract or the administrators.

The overall effect of this action on net benefits is also likely to be very minimal. Any benefit would accrue to entities holding the rights and the communities they represent. By maintaining the right in perpetuity, these entities and communities would maintain an interest in the PQS and associated processing. Communities that attract processing associated with PQS subject to a right intended to benefit another community could experience some loss, if a right holder intervenes in a sale of PQS. Between communities, these changes are likely to be simple distributive effects, with one community losing activity that is drawn to another community. PQS holders could experience some loss of value of their interests, as PQS remain subject to the right may lose some value. This loss will most likely occur with respect to PQS that are linked by the right to communities that have less efficient processing operations. Most often this will be communities with fewer processors and limited processing activity (where processing operational costs may be greater).

Alternative 3 – Option 2: If an entity with a right of first refusal chooses not to exercise its right, and the PQS is sold and used in another community, then the right of first refusal as to the original entity lapses and is acquired by the community entity where the IPQ is currently being used:

Suboption 1: immediately

Suboption 2: after 3 years

Suboption 3: after 5 years.

Under this alternative, a right of first refusal would be extinguished if the right holder failed to exercise the right on the sale of PQS for use outside of the community of origin. A subsequent right would emerge in favor of another community entity, in the event the IPQ yielded by the subject PQS was used in another community for a period of time. Three time periods are suggested by the motion. Under the first the right would emerge immediately on the use of the IPQ in another community. The second option suggests that the right arises after 3 years of use of the IPQ in another community. The third option would create a subsequent right, if the IPQ are used for 5 years in another community. **Several administrative clarifications will be needed to assess the effects of this alternative.**

First, a few clarifications are required to apply the options that would create a new right after the first lapsed. Under the any of the options, it is possible that the PQS could be used in the same community that benefited from the initial right. The Council should clarify whether the original community should be a potential beneficiary from the right after choosing not to exercise the right on an earlier transfer. In addition, the provisions for creating the right in the third and fifth year could be subject to a variety of

interpretations. The second and third options could be applied by creating the right in the community in which the IPQ are used in the third year (or fifth year) after the transfer ignoring the use of the IPQ in all previous years. Using this approach, it is possible that a PQS holder could strategically choose the community to hold the right. Factors such as the potential for the community to exercise the right or negotiate arrangements to avoid exercising the right could influence such a choice. In considering this potential, it is important to note that while custom processing arrangements in the fisheries are prevalent, the PQS holder would need to have the IPQ used in the target community to succeed in directing the right to that community. Depending on the circumstances (including the TAC in the year and the processing capacity in the target community) achieving that end could be difficult. In addition, it is possible that shares may not be processed within community boundaries in the designated year. In this case, the Council would need to specify an alternative process for designating the community for benefiting from the right, if it wishes to perpetuate the right. In these cases, the right could be established to benefit the community in which shares were most recently processed prior to the specified year. Another option could be to allow the right to benefit the first community in which processing takes place on or after the third (or fifth year).

Alternatively, the right could be created in the first community in which the IPQ are used for 3 years (or 5 years) or 3 years (or 5 years) consecutively. This interpretation would require a relatively substantial nexus between the PQS and the community for the right to be created. Alternatively, the motion could be interpreted to create the right in favor of the community in which the IPQ are first used 3 (or 5) times, creating the right as soon as the threshold is met in a community. This interpretation would delay creation of the right and would establish a more moderate nexus between the PQS and the community. If consecutive years of use are required, it is possible that several years could pass prior to the creation of a new right would emerge. The right would only be created after a relatively strong nexus between the PQS and the community is established.

Beyond defining criteria for a successor community, a few other administrative considerations arise under this alternative. **In short, to adopt an option creating a new right, the Council will need to develop a process and timeline for entering the agreement.** First, the extinguishment of a right of first refusal would need to be established as a starting point for determining the successor community. Currently, PQS holders have a 10 day waiting period for transfers of PQS for use outside a community.¹⁵ It is assumed that this period provides right holders with the ability to prevent a transfer that has not been noticed for purposes of triggering the right of first refusal. Although not firmly established by regulation or procedure, there is a presumption that the right lapses at the time of the subsequent transfer. The regulatory structure should be modified to firmly establish this lapsing of the right. At a future time, dependent on the year option selected, a new right will arise.

At the time the right arises, the PQS holder, community that is the beneficiary of the right, and the community representative (if one exists) would need to be notified of the right and provided a reasonable opportunity to complete the contract establishing the right. On receipt of that notice a period of time should be included for entering the contract and notifying NOAA Fisheries of the existence of the contract prior to the next allocation of IPQ. This process could be largely patterned after the existing regulation. In most cases, this process will be adequate for establishing rights (or providing community entities with adequate opportunity for establishing the right). In some instances, however, is it possible that a community that could benefit from the right may not have designated an entity for purposes of

¹⁵ Although this is intended to provide the right holder with the opportunity to intervene in the transaction should the PQS holder failed to notify the right holder of the transaction, no provision is made for informing the right holder of the transaction. The Council could consider development of a process for this notice.

holding rights of first refusal. In these instances, a time period for identification of a community entity will be needed. **These various factors should be considered by the Council, if it elects to develop this alternative.**

2.4.3 Action 3 – Action to apply the right of first refusal to only PQS and assets in the community benefiting from the right

Alternative 1 – status quo – the right applies to the PQS and all assets included in the transaction regardless of their location

Under the status quo, a community entity's right of first refusal applies to a transaction that includes the subject PQS. The provision requires that an entity exercising the right accept all terms and conditions of the proposed transaction. Transactions may include a variety of assets, including processing equipment and real estate. Some of these assets may have no connection to the crab fisheries or the represented community. In these instances, a community entity may be unable to effectively use its right for several reasons. Financing may be more difficult to obtain as the cost of these additional assets drive up the transaction price, reducing the feasibility for an entity to exercise the right. The entity may have no justifiable interest in assets unrelated to its host community. Acquiring these unrelated assets under the right may effectively require the entity to act as a broker for the assets to avoid maintaining those assets beyond its local interests. Entities without substantial capital (or that cannot access capital relatively quickly) may be unable to make the commitment necessary to exercise the right on large transactions.

Although application of the right to a transaction in its entirety may limit the effectiveness of the right for communities, it may also overcome difficulties that would arise were the right to apply only to a subset of the assets in the transaction, such as the PQS and assets in the community. If the right applies to a subset of the assets in the transaction, a valuation method must be adopted for determining the contract amount that must be paid on exercise of the right. The process for valuing the assets would be needed and the time allowed for the exercise of the right would likely need to be extended to accommodate that valuation. Applying the right to the transaction in its entirety also ensures that PQS holders will receive the expected compensation on the sale of the PQS and other assets, if the community entity elects to intervene in the transaction. While allowing a community entity to intervene in a transaction, the disruption of that intervention is limited, since the entity is required to perform under the contract as the buyer would have.

Alternative 2 - apply the right of first refusal to only PQS

Under this alternative, right of first refusal contracts are required to provide that the right shall apply only to PQS (excluding all other assets that might be included in the transaction). Any other assets included in the proposed sale would be excluded from the transaction. The motion also provides that if assets other than the subject PQS are included in a sale, the price of that PQS shall be determined by a) agreement of the parties, b) if the parties cannot agree on a price, by an appraiser jointly selected by the PQS holder and the entity holding the right, or c) if the parties are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right of first refusal. The layout of this provision again creates some ambiguity in interpretation. As set out, the motion suggests that these are three provisions, with a sequence of decision making by the parties to the right of first refusal agreement, but provisions b) and c) set out different means of addressing the same issue (i.e., the parties' inability to agree on a price). In adding c) the Council suggested that the determination of issues beyond price is an issue that an appraiser may not be equipped to address. In other words, an appraiser should only be called on to address price issues. In this alternative, it is unclear if issues other than the price of PQS could arise, as the PQS is easily identified. **If the Council sees a need for an arbitrator under this alternative (to decide issues other than the price of PQS) it should advise staff of the purpose of the arbitrator.**

Assuming that the arbitrator is not needed under this alternative, an appraiser could be selected in the event that the parties are unable to agree on a price for the PQS. The Council suggested that the following process could be used for selecting an appraiser and the appraiser identifying the price for the PQS:

The appraiser will be selected by:

- 1) mutual agreement of the parties or*
- 2) the PQS holder and the community representative each selecting an appraiser and by those appraisers selecting a third appraiser. This panel of appraisers will then perform the duties of the appraiser.*

For any transaction that includes only PQS, the community entity may request that an appraiser value the PQS. If the appraiser's valuation differs from that of the contract, the right of first refusal shall be at the price determined by the appraiser.

The appraiser shall establish a price that represents the fair market value of the PQS, but may adjust the price to address any diminishment in value of other assets included in the PQS transaction subject to the right.

Within 10 days of receipt of a contract that is for PQS only, the community entity may request that an appraiser establish a price for the PQS. If the community entity fails to request an appraiser establish the price, the price in the contract will apply.

The parties shall select the appraiser (or each shall select an appraiser) within 20 days of the community entity receiving the contract to which the right applies.

In the event that a single appraiser is not selected by agreement of the parties, the two selected appraisers shall select a third appraiser within 30 days of the community representative receiving the contract.

The appraisers shall establish the price for the PQS within 60 days of the community representative receiving the contract.

The community representative must notify the PQS holder of its intent to exercise the right within 90 days of receipt of the contract.

The community representative must perform, as required by the contract or the appraiser, within 120 days of receipt of the contract.

The cost of a mutually selected appraiser shall be paid equally by the PQS holder and the community representative. If the parties do not agree on a single appraiser, each party shall pay the costs of the appraiser it chooses, and the parties shall pay equally for the third appraiser.

The process outlined could be used to address a few issues. At its simplest level, the process identifies a price for PQS when the transaction involves assets other than PQS.

The first stage involves selection of an appraiser, which is either by mutual agreement or by both parties independently selecting an appraiser, who then jointly select a third appraiser. If three appraisers are selected, these appraisers would then jointly determine a price for the PQS. If the parties agree on an appraiser, the appraiser is required to be selected within 20 days of the community receiving the contract to which the right applies. If the parties do not agree, each is required to select an appraiser in that time

period. These two appraisers are given until the 30th day after the community representative received the contract to select the third appraiser. After the appraiser (or appraisers) is identified, they will have 60 days from the community receipt of the contract subject to the right to establish a price for the PQS. In other words, a single appraiser would have approximately 40 days, while a team of three appraisers would have 30 days to determine the price. **In considering this process, the Council should consider whether these two time periods are adequate.** It is possible that parties may have difficulty finding appraisers qualified for determining a price for PQS, as it is rarely traded and the terms of those trades are typically confidential. In addition, consideration of the effects of separating PQS from other assets will likely require visits to processing plants in remote locations and additional consultation with the seller and buyer, along with others in the industry. Whether an appraiser (or team of appraisers) could be identified and establish the price in this time period is uncertain. Longer time periods, however, will complicate any transaction that is subject to the right of first refusal.

The appraisers are directed to establish a price for the PQS that represents the fair market value of PQS, but are permitted (but not required) to reduce the price to reflect a loss of value of other items included in the original transaction with the PQS. For example, the appraisers may choose to increase the price for the PQS, if the original transaction included both PQS and a crab processing plant, and the value of the plant is greatly dependent on access to the PQS. Any attempt to quantify the effects of the separation of PQS from the remainder of the items in the transaction would also complicate the price determination. In a remote community with limited processing opportunities, valuation of these other items and the effects of severing PQS from the other assets will further complicate the task of the appraiser. Again, whether reasonable time is allotted for this type of assessment should be considered by the Council, as it develops this alternative.

Once the price is announced by the appraiser, the community representative would have a limited time to exercise its right and perform under the contract. The suggested times for these actions are as currently set out in regulation, but would not allow additional time for the period during which the assessment process takes place. So, the right holder would have 30 days from the date on which the appraiser's price is required to be announced to exercise the right and 60 days from that date to perform. The Council should consider whether this timeframe is appropriate.

While primarily motivated by a need to establish a price for PQS that are included in a transaction that also includes other assets, the suggested process allows the right holder to utilize an appraiser for establishing the price, even if the transaction includes only PQS. It is possible that a PQS holder may choose to sell the PQS separately from other assets, as a means of ensuring that it receives its expected return from a transaction. By subdividing the transaction, the PQS holder and the buyer can ensure that the price of PQS and the price of other assets are set at a level acceptable to both of those parties, should the right holder intervene in the transaction. At the extreme, assets not subject to the right could be offered at a nominal price, with the PQS carrying the bulk of the value of the transaction. In such a case, it may not be unreasonable for the right holder to demand an unbiased appraiser to determine an appropriate price for the PQS. To ensure that the right holder is not unfairly disadvantaged, the right holder may request that an appraiser establish a price for the PQS. As with the use of an appraiser generally, allowing an appraiser to establish a price in this manner would delay any transaction and may be costly to both the seller and buyer of the PQS.

The last provision in this process concerns the payment of appraiser costs. The parties would split the cost of a jointly selected appraiser. If unable to agree, the parties would each bear the cost of the appraiser it selects and would split the cost of the appraiser jointly selected by those two appraisers. In considering this provision, the Council should consider that some right holders may have little wherewithal to pay for an assessment. A PQS holder that perceives an inability of a right holder to pay for the assessment may

show little cooperation in the selection process, as a means to discourage the right holder from advancing with the assessment process. Even in the absence of any manipulation, the process could be costly to both parties. In considering those appraisers costs, the Council should consider that each party will also bear search costs of attempting to find a suitable appraiser and additional costs of providing information to the appraisers to ensure that its perspective is recognized by the appraiser. In some cases, this may include provision of extensive operational or financial information from community governments or plant operators. The need for these data and the time it may take an appraiser to determine their effect on the price of the PQS should also be accounted for in development of the timeline for the appraiser's price finding.

An appraiser is likely to use some combination of two approaches to value PQS. Under the first, an appraiser would look at comparable transactions for establishing a value. Few trades of PQS have occurred and little public information concerning those sales is likely to be available, as parties often limit access to this proprietary information. Given this dearth of information, appraisers may choose to resort to an alternative method for valuing assets. The second approach that could be used is to examine the net revenue generation potential of the PQS. Using this approach, an appraiser would consider the production using the PQS applying forecasted prices and costs in an attempt to develop a stream of net returns on the PQS, which should represent its market value. Given the prevalence of custom processing and the information concerning market prices for crab that are developed in the arbitration system, it is likely that at least some information will be available for making such a calculation. Whether reliable information concerning custom processing fees would be available is uncertain. Even with this information, the uncertainties of future markets, TACs, and costs will require that any appraiser make assumptions to develop a price. These uncertainties could be a great disincentive to PQS holders considering a sale that includes other assets to which the right of first refusal applies.

Notwithstanding the specific development of this action, PQS holders are likely to respond to the application of the right to only PQS in a few predictable ways. First, the PQS holder may attempt to negotiate an agreement with the community entity to allow the sale to proceed without the entity exercising the right. To secure an agreement, the PQS holder may need to provide something of value to the entity, which could be financial remuneration, a portion of the PQS, or an agreement to use the yielded IPQ in the community for a period of time. A community entity may have little leverage in this negotiation, if the PQS holder knows that the entity is without the wherewithal to exercise the right, but could receive some compensation for the security it provides by indicating its intent to allow the sale. CDQ groups that represent communities are likely to be better positioned than other community entities, but this could change over time if the other entities develop portfolios of fishing privileges and other interests.

Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the requisite period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder (regardless of whether the Council decides to adopt an amendment that extends the right under Action 2). This approach would apply, only if the person acquiring the PQS is willing to use 80 percent of the yielded IPQ in the community for two of the following five years. After meeting that requirement, the IPQ may be used outside the community.

A third way to avoid community entity intervention in a transaction is for the PQS holder, prior to the transfer, to use the IPQ outside of the community for three consecutive years causing the right to lapse.¹⁶

¹⁶ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

To use this approach, the PQS holder would only need to move the IPQ from the community ahead of the transaction to ensure the right lapsed; however, this approach provides the PQS holder with the greatest flexibility at the time of the PQS sale. In addition, this tactic may be ruled out, if the Council decides to extend the rights indefinitely under Action 2.

A variety of contractual arrangements can be made to ensure that the PQS holder receives reasonable value for the PQS, particularly in cases where the value of the assets is highly dependent on the accompanying PQS. The extent to which these different arrangements might circumvent the Council purpose for applying the right to the PQS exclusively depends on the Council's goal for this change and the specific terms of the right defined by the Council in this action. If the Council allows PQS holders to separate the PQS from other assets in a transaction without allowing the right holder to compel a review of the price of the PQS, it is possible that PQS holders will inflate price of PQS in a transaction to protect their interests in not only the PQS, but other assets in the transaction.

The right will continue to be a consideration for PQS holders looking to dispose of their PQS interest. Currently, PQS holders considering a transfer of their PQS are reported to typically contact the right holding entity. In some instances, these communications have resulted in the acquisition of the PQS by the entity; in others, the PQS transfers have been accommodated by the right holder. In some instances, the PQS transfers have been structured to avoid triggering the right, signaling that the use of the PQS is intended to be continued in the community. The involvement of right holding entities in these transactions is likely to continue in the same manner with any change in the scope of the right.

The administrative burden arising from this alternative cannot be determined until the alternative is fully specified. Most importantly, the process for the determination of the value of assets covered by the right will have a great effect on costs (primarily to the parties). This process is largely intended to operate independent of agency administration. Yet, it is possible that right holders or PQS holders may ask that the agency intervene, if one believes that the other party or an appraiser is not complying with the requirements. These types of appeals could be very time consuming and challenging, as they may require the agency to establish a value (or at least review an assigned value) for PQS, or review other aspects of a privately conducted process. In either case, the review of the case by the agency would delay the completion of a transaction, which could be problematic for the parties to the transaction. **It is unlikely that NOAA Fisheries could adequately oversee the administration of the provision.**

Overall, this alternative is likely to minimally strengthen the position of right holders by limiting the size of any transaction on which they hold rights of first refusal. Limiting the scope of the right to PQS could also be argued to be more consistent with the rationale for the right, as the community's interest in PQS and associated processing arising from historic processing is the interest that is intended to be protected by the right. Limiting the scope of the right in this manner may be more disruptive to business operations of PQS holders and buyers. By applying the right to only PQS, the ability of these parties to finalize business transactions could be jeopardized. The benefit to any community is likely to be minimal, in comparison to the existing rule, as PQS holders will still be able to avoid the right by agreeing to use the yielded IPQ in the community for a period of years. In addition, the administrative costs (both private and public) of the process for determining the value of the PQS is likely to undercut any benefit, particularly for communities with the fewest resources. The development of a fair and affordable structure for pricing PQS is important to this alternative, but may not be achievable.

Alternative 3 – apply the right of first refusal to PQS and assets in the benefiting community

Under this alternative, right of first refusal contracts are required to provide that the right shall apply only to the PQS and other assets physically present in the community benefiting from the right of first refusal. In the event other assets from outside the community are included in the proposed sale, the price of the

PQS and community based assets to which the right applies shall be determined by 1) agreement of the PQS holder and the entity holding the right, 2) if the parties are unable to agree, an appraiser jointly selected by the PQS holder and the entity holding the right; or 3) if the parties are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right. As noted in the discussion of the previous alternative, the motion suggests a sequence of decision making, with the parties first attempting to agree to a price. If unable to come to an agreement, the parties would then resort to an appraiser under 2) or an arbitrator under 3). The rationale advanced for including the third provision is that the appraiser may be required to not only set a value for assets, but also determine which assets are based in a community. It was suggested that an arbitrator may be better equipped to make such a determination. The motion as written suggests that the arbitrator would be used strictly for pricing the assets. The Council should clarify whether an arbitrator would be first used to determine the community-based assets, after which an appraiser would determine the price for those assets and the subject PQS or whether a single arbitrator would be called on to make both of those determinations. In considering this aspect of the structure, the Council should consider whether one person would be well equipped for making both decisions or if the decision making requires two different types of expertise. Regardless of whether one or two authorities are created, it is likely that a two-stage process would be required, with an announced finding of community based assets, followed by a period during which the parties would attempt to agree to a price for those assets. If a price cannot be negotiated, the parties could then request that the appraiser or arbitrator to set a price. Regardless of the decision making authority, **the Council should develop a timeline and specific process for this two-stage decision making.**

As with the previous alternative, several administrative aspects of the process will need to be considered to implement this provision. Since many of these issues apply to both alternatives, the analysis of this alternative relies largely on the analysis of the preceding alternative.

As noted, this alternative will require that a process be developed for identifying items that are based in a community, which would be included in the sale under the right. Many assets are mobile and can be moved among communities. For example, a company that sells its PQS with its floating platform may be confronted by a community (or processor) claim that the floating platform is (or is not) a community based asset. To develop an amendment, the Council must consider a process for resolving which assets are subject to the right. In any case, it is likely that disputes will arise in the case of assets that are not fixtures (or equipment that could be removed from the community). The Council should consider developing a **standard for determining if an asset is based in a community.** For example, the Council could provide that an asset that is in a community for more than 185 of the preceding 365 days would be considered to be community based. Alternatively, the Council could define community based in a more operational manner, linking the right application to assets that were used for processing in the community in the preceding season. It should be noted that under either of these provisions, the rule might be applied to a floating processor used in the community, despite the extensive use of the floater in other locations at other times in the year. If the Council intends assets such as floaters to be excluded from the right, it should define “community-based” in a manner that excludes these assets. To avoid the inclusion of these mobile assets, the Council could adopt a definition of community based that includes only real property (including buildings and other fixtures); however, this definition may be problematic, as mobile items on which an operation depends (e.g., fork lifts) would be excluded from the transaction. To ensure that the right satisfies its intended purpose, the Council should carefully define assets to which the right applies. Despite these efforts, it is possible that the parties could dispute the scope of any items subject to the right.

Assuming that assets to which the right will apply are well defined, values must be established for those assets independent of other assets (from outside the community) that might be included in the transaction. The establishment of the price could use the same process defined for the previous alternative. Under that

structure, the parties either agree on a price, select a single appraiser, or each select an appraiser who jointly select a third appraiser. Whether it favors this process or another, **the Council should fully specify the process and timeline for establishing the price for transactions** under this alternative, including **assigning costs of any appraiser to the parties**. Under this alternative, the timeline should accommodate the time period for selecting the arbitrator(s) and/or appraiser(s). These time periods should be followed by time periods for exercise of the right and performance.

As under the previous alternative, PQS holders are likely to attempt to limit the disruption of their business by the right. Negotiated agreements with the right holding community entities are likely to be used to prevent intervention in transactions. These agreements are likely to include some concession of the PQS holder, such as financial remuneration, a portion of the PQS, or a commitment by the buyer to use the PQS in the community. These concessions are likely to vary with the negotiating leverage of the right holders. For example, CDQ groups that hold rights are likely to be in a significantly better position to extract concessions than other right holders with fewer assets.

Alternatively, the person receiving the PQS could avoid the right being triggered by agreeing to use the requisite amount of IPQ in the community for the requisite period and extending the right to the entity in a second contract. This approach would maintain the community entity's interest in the PQS under the terms of the right with the new holder. If the buyer is not willing to use 80 percent of the yielded IPQ in the community for two of the following five years, this method could not be used to limit application of the right.

Depending on the Council's action with respect to the tenure of rights, it could be possible for a PQS holder to eliminate the right by using the PQS outside the community for 3 consecutive years prior to the transfer, causing the right to lapse.¹⁷ Eliminating the right would provide a PQS holder with the greatest flexibility to sell the PQS (provided the Council does not eliminate the provision under which rights lapse).

PQS holders might also subdivide the transaction, selling the PQS and community based assets separately from other assets. Under the structure suggested for using an appraiser for setting the price, the right holder could challenge a determination of the price (if only PQS and community based assets are included in the transaction). The Council should consider whether the right holder can also challenge the finding of which assets are community based. If so, it is likely that a contract to sell PQS and community based assets would in all cases have the potential to be subject to two additional delays. The first period would be used to determine community based assets; the second would be used for determining a price for the assets to which the right applies.

The ability to use various transaction structures to protect a transaction from the right will depend on the Council's choices for defining assets that are subject to the right and pricing. If pricing is reviewed by an independent appraiser, PQS holders may be less inclined to manipulate contract structures prevent exercise of the right. Whether contracts are structured to include or exclude certain assets will depend on the circumstances of the parties, as well as the nature and condition of the assets. In some instances, it is possible that items (including those based in the community under any definition) could carry liabilities that the right holder may wish to avoid, creating a disincentive for exercise of the right. In any case, the potential for a PQS holder and buyer to structure a transaction to discourage exercise of the right should be considered. The less ability of the right holder to challenge the transaction, the more likely the parties are to resort to these tactics. Despite this potential, in fashioning an provisions allowing right holders to

¹⁷ This choice may be unavailable, if the Council elects to extend the right in perpetuity.

challenge the structure of a transaction, the Council should consider that right holders may use challenges to exert leverage on PQS holders. Delaying a transaction may be used to extract concessions from the PQS holder and buyer. The appropriateness of this practice depends on the purpose for establishing the right.

The administrative burden arising from this alternative cannot be determined until the alternative is fully specified. Processes for determining assets covered by the right and prices must be defined. As with the previous alternative, these aspects of the right may require agency oversight, if a party believes that the system is not being adhered to. This oversight could be very time consuming and costly to both the agency and parties, particularly PQS holders who might be unable to complete a transaction because of the delay.¹⁸

Depending on its definition, this alternative should create an opportunity for a community entity to exercise a right of first refusal solely on assets that are of interest to the community that it represents (i.e., the community based assets and PQS). The effects of the action will depend, in large part, on the specific definition of the right. While right holders will benefit from the changes brought on by the action, PQS holders may see some diminution in the value of PQS subject to the right, as transactions that include PQS will be subject to a right that could facilitate greater community entity intervention. The benefit to communities, however, may be minimal, as methods of avoiding the right and its application to a transaction will remain available. In addition, the administrative costs associated with this alternative could be substantial in some cases. The private and public costs are likely to overshadow any potential benefit, particularly in light of the ability of PQS holders to avoid application of the right to transactions.

2.4.4 Conclusion

In its current form, the right of first refusal provides a community entity with some leverage in the event a PQS holder wishes to transfer PQS. Yet, a PQS holder may take several measures to limit the effectiveness of the right. The measures proposed in this amendment package will strengthen the position of the community entity slightly; however, these measures are unlikely to substantially change the negotiating position of a right holder, particularly if the PQS holder is determined to undermine that negotiating position. More realistically, the right (either in its current form or as modified by the proposed action) will very slightly increase the community entities' (and the communities that they represent) negotiating leverage and political leverage, in the event that a PQS holder wishes (or attempts) to move IPQ use from a community to the detrimental of the community. In addition, the second and third actions could increase administrative costs disproportionately to any benefit.

2.4.5 Net benefits to the Nation

The actions proposed in this amendment package are largely intended to assist communities in maintaining historic processing interests in the crab fisheries. The overall effect will be a slight strengthening of the right held by community entities. This change could impose slight efficiency losses on PQS holders and buyers and could impose administrative costs that exceed any community benefit. Overall, the effect on net benefits to the Nation is expected to be minimal.

3 REGULATORY FLEXIBILITY ANALYSIS

3.1 Introduction

¹⁸ It should be noted that the delay could prevent a transaction that is based largely on assets unrelated to the crab fishery that are brought into the transaction because they are based in the applicable community.

The Regulatory Flexibility Act (RFA), first enacted in 1980, and codified at 5 U.S.C. 600-611, was designed to place the burden on the government to review all regulations to ensure that, while accomplishing their intended purposes, they do not unduly inhibit the ability of small entities to compete. The RFA recognizes that the size of a business, unit of government, or nonprofit organization frequently has a bearing on its ability to comply with a Federal regulation. Major goals of the RFA are: 1) to increase agency awareness and understanding of the impact of their regulations on small business; 2) to require that agencies communicate and explain their findings to the public; and 3) to encourage agencies to use flexibility and to provide regulatory relief to small entities.

The RFA emphasizes predicting significant adverse impacts on small entities as a group distinct from other entities and on the consideration of alternatives that may minimize the impacts, while still achieving the stated objective of the action. When an agency publishes a proposed rule, it must either, (1) “certify” that the action will not have a significant adverse effect on a substantial number of small entities, and support such a certification declaration with a “factual basis”, demonstrating this outcome, or, (2) if such a certification cannot be supported by a factual basis, prepare and make available for public review an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact of the proposed rule on small entities.

Based upon a preliminary evaluation of the proposed pilot program alternatives, it appears that “certification” would not be appropriate. Therefore, this IRFA has been prepared. Analytical requirements for the IRFA are described below in more detail.

The IRFA must contain:

1. A description of the reasons why action by the agency is being considered;
2. A succinct statement of the objectives of, and the legal basis for, the proposed rule;
3. A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply (including a profile of the industry divided into industry segments, if appropriate);
4. A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
5. An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule;
6. A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives, such as:
 - a. The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
 - b. The clarification, consolidation or simplification of compliance and reporting requirements under the rule for such small entities;
 - c. The use of performance rather than design standards;
 - d. An exemption from coverage of the rule, or any part thereof, for such small entities.

The “universe” of entities to be considered in an IRFA generally includes only those small entities that can reasonably be expected to be directly regulated by the proposed action. If the effects of the rule fall primarily on a distinct segment of the industry, or portion thereof (e.g., user group, gear type, geographic area), that segment would be considered the universe for purposes of this analysis.

In preparing an IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule (and alternatives to the proposed rule), or more general descriptive statements if quantification is not practicable or reliable.

3.1.1 Definition of a Small Entity

The RFA recognizes and defines three kinds of small entities: (1) small businesses; (2) small non-profit organizations; and (3) and small government jurisdictions.

Small businesses: Section 601(3) of the RFA defines a “small business” as having the same meaning as a “small business concern,” which is defined under Section 3 of the Small Business Act. A “small business” or “small business concern” includes any firm that is independently owned and operated and not dominate in its field of operation. The U.S. Small Business Administration (SBA) has further defined a “small business concern” as one “organized for profit, with a place of business located in the United States, and which operates primarily within the United States, or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials, or labor. A small business concern may be in the legal form of an individual proprietorship, partnership, limited liability company, corporation, joint venture, association, trust, or cooperative, except that where the form is a joint venture there can be no more than 49 percent participation by foreign business entities in the joint venture.”

The SBA has established size criteria for all major industry sectors in the U.S., including fish harvesting and fish processing businesses. A business “involved in fish harvesting” is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates), and if it has combined annual receipts not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation (including its affiliates) and employs 500 or fewer persons, on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide.

The SBA has established “principles of affiliation” to determine whether a business concern is “independently owned and operated.” In general, business concerns are affiliates of each other when one concern controls or has the power to control the other or a third party controls or has the power to control both. The SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists. Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships, are treated as one party, with such interests aggregated when measuring the size of the concern in question. The SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern’s size. However, business concerns owned and controlled by Indian Tribes, Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601), Native Hawaiian Organizations, or Community Development Corporations authorized by 42 U.S.C. 9805 are not considered affiliates of such entities, or with other concerns owned by these entities, solely because of their common ownership.

Affiliation may be based on stock ownership when: (1) A person is an affiliate of a concern if the person owns or controls, or has the power to control 50% or more of its voting stock, or a block of stock which

affords control because it is large compared to other outstanding blocks of stock, or (2) If two or more persons each owns, controls or have the power to control less than 50% of the voting stock of a concern, with minority holdings that are equal or approximately equal in size, but the aggregate of these minority holdings is large as compared with any other stock holding, each such person is presumed to be an affiliate of the concern.

Affiliation may be based on common management or joint venture arrangements. Affiliation arises where one or more officers, directors, or general partners control the board of directors and/or the management of another concern. Parties to a joint venture also may be affiliates. A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Small organizations: The RFA defines “small organizations” as any nonprofit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions: The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000.

3.2 A description of the reasons why action by the agency is being considered

The Council developed the following purpose and need statement defining its rationale for considering this action:

The Bering Sea/Aleutian Islands crab rationalization program recognizes the unique relationship between specific crab-dependent communities and their shore-based processors, and has addressed that codependence by establishing community “right of first refusal” agreements as a significant feature of the program. These right of first refusal agreements apply to the Processor Quota Shares initially issued within each community, and are entered into and held by Eligible Crab Community Organizations on behalf of each respective community.

To date, there have been several significant Processor Quota Share transactions, resulting in Eligible Crab Community Organizations now owning between 20 percent and 50 percent of the PQS in each rationalized fishery. However, the ability of the right of first refusal to lapse may diminish the intent to protect community interests. Also, limiting the time period to exercise the right may conflict with the ability to exercise and perform under the right of first refusal. In addition, some communities, when exercising the right of first refusal may have no interest in purchasing assets located in another community and feel the right of first refusal contract should exclude any such requirement.

3.3 The objectives of, and the legal basis for, the proposed rule

Under the current regulatory structure, Bering Sea/Aleutian Islands crab resources are managed by NOAA Fisheries and the State of Alaska, under an FMP. The objective of this action is to clarify and strengthen the opportunity of entities holding rights of first refusals on transactions that include PQS to more effectively exercise those rights. The authority for this action and the FMP are contained in the Magnuson-Stevens Act, as amended by the Consolidated Appropriations Act of 2004.

3.4 A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply

This action directly regulates holders of PQS and community entities holding the rights of first refusal.

Estimates of small entities holding PQS are based on the number of employees of PQS holding entities. Currently, 21 entities hold PQS subject to rights of first refusal. Estimates of large entities were made, based on available records of employment (see Department of Labor and Workforce Development, 2008) and analysts' knowledge of foreign ownership of processing companies. Of these 21 entities, 10 are estimated to be large entities, leaving 11 judged to be small entities.

Five community entities hold rights of first refusal on behalf of eight communities

3.5 A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule

The reporting, record keeping, and other compliance requirements will be increased under the proposed rule. Under Action 1, no change in recording keeping will arise, as the action only changes the time periods for exercise of the right of first refusal and performance under the contract. Under Action 2, reporting, record keeping, and compliance requirements will be increased, as PQS holders will be required to maintain additional contracts establishing a rights of first refusal at all times.

The effects of Action 3 on reporting, recordkeeping, and other compliance requirements cannot be determined at this time.

3.6 An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule

The analysis uncovered no Federal rules that would conflict with, overlap, or be duplicated by the alternatives.

3.7 A description of any significant alternatives to the proposed rule that accomplish the stated objectives of the Magnuson-Stevens Act and any other applicable statutes, and that would minimize any significant adverse economic impact of the proposed rule on small entities

[To be added]

4 NATIONAL STANDARDS & FISHERY IMPACT STATEMENT

4.1 National Standards

Below are the ten National Standards as contained in the Magnuson-Stevens Act, and a brief discussion of the consistency of the proposed alternatives with each of those National Standards, as applicable.

National Standard 1

Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

Nothing in the proposed alternatives would undermine the current management system designed to prevent overfishing while achieving optimum yield.

National Standard 2

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

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

National Standard 3

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

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

National Standard 4

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

The proposed alternatives would treat all participants the same, regardless of their state of residence. The proposed change would be implemented without discrimination among participants and is intended to contribute to the fairness and equity of the program by ensuring that community interests are adequately protected by the rights of first refusal. The action will not contribute to an entity acquiring an excessive share of privileges.

National Standard 5

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

This action considers efficiency in utilization of the resource balancing that efficiency against community interests in establishing the rights of first refusal. The action is intended to ensure that community social and cultural interests are adequately protected.

National Standard 6

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

None of the alternatives would be expected to affect changes in the availability of Bering Sea and Aleutian Island crab resources each year. Any such changes would be addressed through the annual allocation process, which is not affected by the alternatives.

National Standard 7

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

This action does not duplicate any other measure and could reduce costs of enforcement actions in the fisheries.

National Standard 8

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

This action is intended to minimize potential adverse effects on communities and ensure sustained community participation in the fisheries by ensuring that historically dependent communities are adequately protected by the rights of first refusal.

National Standard 9

Conservation and management measures shall, to the extent practicable, (A) minimize bycatch, and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.

This action has no effect on bycatch or discard mortality.

National Standard 10

Conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.

The alternatives considered under this action do not affect safety of human life at sea.

4.2 Section 303(a)(9) – Fisheries Impact Statement

Section 303(a)(9) of the Magnuson-Stevens Act requires that any management measure submitted by the Council take into account potential impacts on the participants in the fisheries, as well as participants in adjacent fisheries. The impacts of the alternatives on participants in the fisheries have been discussed in previous sections of this document. This action will have no effect on participants in other fisheries.

5 REFERENCES

EDAW (2005) Comprehensive Baseline Commercial Fishing Community Profiles: Unalaska, Akutan, King Cove, and Kodiak, Alaska, EDAW, San Diego, California.

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

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

North Pacific Fishery Management Council/EDAW (November 2008) Three-Year Review of the Crab Rationalization Management Program for Bering Sea and Aleutian Islands Crab Fisheries.

North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004a) Environmental Impact Statement, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries.

North Pacific Fishery Management Council/National Marine Fisheries Service (August 2004b) Regulatory Impact Review/Initial Regulatory Flexibility Analysis, Voluntary Three-Pie Cooperative Program for the Bering Sea and Aleutian Islands Crab Fisheries.

Prepared by

Mark Fina, Ph.D.

Jeannie Heltzel

Lewis Queirolo, Ph.D.

Persons Consulted

Jessica Gharrett

Sam Cotten

Frank Kelty

Steve Minor

John Iani

Tamara Bledsoe

Glenn Merrill