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Bering Sea and Aleutian Islands crab fisheries
Council motion – December 2010
North Pacific Fishery Management Council

C-2(a) – Exemption from regional landing requirements

The Council selected the following as its preferred alternative for this action:

Alternative 2 – Regional Landing Exemption

This action would establish an emergency relief exemption for the regional delivery requirement under the BSAI crab program. The action 1) specifies the eligibility requirements for the exemption and the contracting parties, 2) establishes reserve pool certification and periodic reporting requirements 3) establishes how the emergency relief regulation is to be administered and 4) establishes a Council review process.

Regulatory components

Exemption and administration

Option 1: As a prerequisite to being eligible to apply for and receive an exemption from a regional landing requirement, the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the regional landing exemption is sought shall provide NMFS with an affidavit attesting to having entered into a non-binding framework agreement that addresses mitigation, a reasonable range of terms of compensation, and a reserve pool requirement to the satisfaction of the parties. The affidavit shall be delivered to NMFS:

Suboption 1: prior to the opening of the season.

Suboption 2: by a fixed date **(October 15 for all fisheries)**

To receive an exemption from a regional landing requirement the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the regional landing exemption is sought shall deliver to NMFS an affidavit attesting to having entered into an exemption contract that addresses mitigation, terms of compensation if appropriate, and a reserve pool requirement, to the satisfaction of the parties, prior to the day on which the exemption is sought. The exemption shall be granted upon timely submission of a framework agreement affidavit and subsequent filing of an exemption contract affidavit.

Parties to the framework agreement (and the affidavit attesting to that agreement) may include several IFQ holders, several IPQ holders, and several community/regional representatives, including representatives from multiple regions.

~~Option 2: To receive an exemption from a regional landing requirement the IFQ holders, the matched IPQ holders and the affected community entity or entities in the region for which the regional landing exemption is sought shall deliver to NMFS an affidavit attesting to having entered into an exemption contract prior to the day on which the exemption is sought.~~

Note: Any affidavit attesting to an exemption contract shall specifically identify the amount of IFQ/IPQ that are subject to the exemption.

Regional/community representatives

The entity that will represent communities shall be (options):

- (a) the entity holding or formerly holding the ROFR for the PQS,
- ~~(b) the entity identified by the community benefiting from (or formerly benefiting from) the ROFR,~~

~~Option: The entity or entities determined by the Council to be the community representatives in a region shall develop an allocation or management plan for any PQS issued without a ROFR in that region by a date certain established by the Council. (Note: This provision could be applied instead of (c), if (a) or (b) is selected as the primary means of determining regional representatives).~~

- ~~(c) a regional entity representing the communities benefiting from the ROFR or formerly benefiting from the ROFR.~~

Option: The entity or entities determined by the Council to be the community representatives in the North Region shall develop an allocation or management plan for North Region St Matthews Blue King Crab and North Region Opilio Crab PQS issued without a ROFR within 180 days of implementation of this regulation.

Effect on excessive share caps

The requirement that NMFS apply any IPQ used at a facility through a custom processing arrangement against the IPQ use cap of the owners of that facility shall be suspended for all Class A IFQ and matched IPQ included in the exemption.

Reporting requirements

Any IFQ holders who are party to a framework agreement shall provide an annual Regional Landing Exemption Report to the Council which will include the following:

- 1) a comprehensive explanation of the membership composition of the reserve pool and the measures in effect in the previous year,
- 2) the number of times a delivery relief exemption was requested and used, if applicable,
- 3) the mitigating measures employed before requesting the exemption, if applicable,
- 4) an evaluation of whether regional delivery exemptions were necessary, and their impacts on the affected participants, if applicable, and
- 5) a description of the consistency of the agreement with the Council's intent for this action.

At least two weeks prior to providing the annual Regional Landing Exemption Report to the Council, IFQ holders shall provide the annual Regional Landing Exemption Report to the communities and IPQ holders that are parties to framework agreements. Communities or IPQ holders may submit to the Council a Community Impact Report or IPQ holder report, respectively, that responds to the annual Regional Landing Exemption Report.

Statement of Council Intent

In developing the crab rationalization program, the Council included several measures to protect regional and community interests. Among those provisions, the Council developed regional designations on individual processing quota and a portion of the individual fishing quota that require associated catch to be delivered and processed in the designated region. A well-defined exemption from regional landing

and processing requirements of Class A IFQ and IPQ that includes requirements for those receiving the exemption to take efforts to avoid the need for and limit the extent of the exemption could mitigate safety risks and economic hardships that arise out of unforeseeable events that prevent compliance with those regional landing requirements.

The Council intends that exemptions will be developed by agreement of the holders of Class A IFQ, holders of IPQ, and regional/community representatives. **For emergency events of less than 2 million pounds in the aggregate, compensatory deliveries offer the opportunity to restore the landings to a region that are intended in current regulations; therefore no party should unreasonably withhold their agreement or unreasonably restrict the industry's ability to respond to those events.** A prerequisite to an exemption will be that the parties have entered a nonbinding framework agreement. It is the Council's intent that this framework agreement will define certain terms of the exemption, including mitigation requirements and a range of terms of compensation, and that the exemption contract describes the conditions under which the exemption is being or would be requested, including mitigation requirements and terms of compensation specific to the exemption being sought. Mitigation would be intended to mitigate the effects on parties that might suffer some loss because of the granting of an exemption. Compensation would be intended to compensate parties for losses arising from the exemption. All framework agreements are expected to contain provision for a reserve pool. A reserve pool would be intended to provide industry wide, civil contract based delivery relief without regulatory or administrative intervention. Specifically, a reserve pool would be an agreement among holders of IFQ to certain arrangements in the use of their IFQ to reduce the need for exemptions from the regional landing requirement. It is believed that an effective reserve pool must 1) commit each participant in the pool to be bound by its rules; and 2) include not less than (~~60%~~, ~~70%~~, ~~80%~~) of the "A" share IFQ held by:

- (a) unaffiliated cooperatives and unaffiliated IFQ holders not in a cooperative, in the aggregate; or
- (b) affiliated cooperatives and affiliated IFQ holders not in a cooperative, in the aggregate.

Allowing several IFQ holders, IPQ holders, and community/regional entities to be a party to the same framework agreement is intended to streamline negotiations, facilitate the use of reserve pools, and allow for the incorporation of compensatory deliveries (should the parties believe compensating deliveries are appropriate). If an exemption is needed for compensatory deliveries, the process for receiving that exemption shall be the same as the process of affidavits used to make any other exempt deliveries under this action.

Council Review

The Council will review the Regional Landing Exemption Program ~~within: (a) two years and (b) after the first season in which an exemption is granted.~~ **However, if compensatory deliveries occur, the review will happen the year after compensatory deliveries.**

Thereafter, the Council will review the Regional Landing Exemption Program as part of its programmatic review, and, based on the record, may amend or terminate the Regional Landing Exemption Program.

C-2(b) – Modifications to rights of first refusal

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; **therefore stronger measures must be considered.***

Alternatives

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~~

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 right 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.~~

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.

Timeline for assessment and performance (from the date of receipt of the sale contract by the community entity):

Within:

10 days: community may request an assessor

20 days: jointly selected assessor chosen, or if the parties do not agree on a single assessor, then each party chooses an assessor

40 days: if no single assessor is chosen, the two assessors will choose a third assessor

60 days after the assessor is chosen (by either method): assessor(s) establish a price

120 days after assessor is chosen: notification of community entity of intent to exercise ROFR

180 days after assessor is chosen: community representative must perform under the contract

The cost of the assessor will be paid equally by the PQS holder and the community entity. If a third assessor is chosen, the PQS holder and community entity will pay their chosen assessor and divide equally the cost of the third assessor.

~~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~~

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~~are unable to agree, an arbitrator jointly selected by the PQS holder and the entity holding the right of first refusal.~~

Action 4: Require community approval for IPQ subject to the right to be processed outside the subject community.

Alternative 1 – Status quo

Intra-company transfers of PQS and IPQ outside the subject community are permitted without requiring the PQS holder to notify the community entity that holds the right.

Alternative 2 – Require community consent to move IPQ outside the community

Require the PQS holder to obtain written approval from the community prior to processing IPQ subject to the right (or formerly subject to the right), at a facility outside the subject community.

C-2(b) – Receive report on the 5-year review of the rationalization program

The Council appreciates the work of the Council and NOAA Fisheries staff, as well as that of Mike Downs, AECOM, Inc., Commander Mike Woodley, USCG and Jennifer Lincoln, National Institute of Occupational Safety and Health, in preparing the five year review of the crab rationalization management program for Bering Sea and Aleutian Island crab fisheries. The five year review demonstrates that many aspects of the Bering Sea and Aleutian Islands crab rationalization management program seem to be working well for the stakeholders. For example, participants have adapted to the complications of the “three-pie” system, safety goals continue to be achieved and overcapitalization has been reduced. However, the review also indicates that there are some aspects of the program that may merit further consideration. Program stakeholders, as well as the Advisory Panel, have identified several problem areas, including issues of equitable crew compensation, quota lease rates and active participation, as related to program participation opportunities and next generation ownership, and certain aspects of the binding arbitration system. Nevertheless, it will take some additional time for Council members to more fully evaluate the five year review and assess oral and written public testimony to determine whether or not additional Council action is needed. In the meantime, the Council strongly encourages crab rationalization stakeholders to work together within the industry to craft solutions to the concerns identified. Stakeholder solutions will be considered by the Council should a formalized five year review amendment package be developed.

At this time, the Council will limit its action on the five year review package to the following single issue, and at a subsequent meeting, the Council will consider whether or not concerns associated with the five year review merit additional Council action.

Action to modify cooperative and IFQ and IPQ application deadline

The Council directs staff to prepare an analysis of an amendment that would move the application deadline for cooperatives and annual allocations of IFQ and IPQ from August 1st to June 15th.

Purpose and need statement

Under the crab rationalization program, QS holders and PQS holders must annually apply for allocations of IFQ and IPQ, respectively. In some instances, filing of these applications has been disputed creating

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uncertainties concerning the one-to-one relationship between Class A IFQ and IPQ, which is critical to parties use of those shares. Moving the application deadline to an earlier date for IFQ and IPQ could allow for additional time to resolve any disputes concerning the timeliness and adequacy of applications by NOAA Fisheries; and thereby, prevent some potential mismatches of the issued Class A IFQ pool and IPQ pools.

Alternative 1

Status quo

Retain the current August 1st deadline for cooperative and IFQ and IPQ applications.

Alternative 2

Move the cooperative and IFQ and IPQ application deadlines to June 15th.